



## Utah Supreme Court Rules of Evidence Committee

### Meeting Agenda

*Chris Hogle, Chair*

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

Date: January 10th, 2023

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

<b>Action:</b> Welcome and approve December 13 <sup>th</sup> , 2022 Minutes	Tab 1	Chris Hogle
<b>Discussion:</b> Update on Rule 506	Tab 2	Sarah Carlquist
<b>Discussion:</b> Juvenile Amendments, Rules 101, 1101, 412, and 615	Tab 3	Judge Leavitt

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

### **Meeting Schedule:**

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**

**December 13th, 2022**

**5:15 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 Ed Havas Nicole Salazar-Hall Tony Graf Adam Alba Dallas Young Hon. Michael Leavitt Hon. David Williams Deborah Bulkeley Ryan McBride Matthew Hansen Melinda Bowen	Minhvan Brimhall Hon. Teresa Welch Teneille Brown Adam Crayk Sam Knight Hon. Richard McKelvie Jennifer Parrish Hon. Vernice Trease Hon. Linda Jones Jacqueline Carlton		Bryson King Angelica Juarez

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**1. WELCOME AND APPROVAL OF MINUTES**

Due to the partial absence of Chris Hogle, Nicole Salazar-Hall chaired the meeting and welcomed everyone. After one change to the November minutes, Adam Alba moved to approve the minutes. Tony Graf seconded. The motion carried.

**2. UPDATE ON RULE 506**

Sarah Carlquist updated the committee on Rule 506. The Appellate Rules Committee does not want to do anything until the Supreme Court requests action. The Supreme Court will potentially address this issue, on the merits, in an upcoming case. The question is whether this committee wants to continue to hold 506 pending the Appellate Rules Committee or if this committee should send it up to the Supreme Court.

The administrative rules of judicial procedure have been amended making express that if records are sealed at the trial court level, they remain sealed at the appellate court level, but the appeals court can unseal them upon a proper motion.

Ms. Salazar-Hall suggested sending the Rule 506 draft with a note that says we held off sending this pending the outcome of the potentially applicable Supreme Court case. Judge Michael Leavitt agreed that the Rule and memorandum should be sent to the Supreme Court. Debora Bulkeley expressed her agreement. Mr. Graf also agreed.

Ms. Carlquist suggested flagging the potential issues with Rule 11 and the potential issues on appeal.

Ms. Bulkeley motioned to send Rule 506 to the Supreme Court with a quick memorandum on its interplay with Rule 11. Judge Leavitt seconded. The motion carried.

### **3. PRESUMPTION OF ADMISSIBILITY OF GOOGLE EARTH PHOTOS – FLORIDA STATUTE 90.2035**

Ed Havas discussed a court of appeals decision overturned based on google earth photos.

It is commonplace to rely upon google earth and other similar web-based imagery and it allows the court to take judicial notice as long as it is from a recognized and accepted source and the date from the image is shown. In Florida, a rule permitting courts to take judicial notice of this evidence passed with unanimous bipartisan support. Mr. Havas stated that this seems like a good thing to add to our rules to avoid confusion on the introduction of such evidence in Utah. Mr. Havas suggested creating a stand-alone rule.

Several members of the group raised concerns regarding the scope of this potential rule. Ms. Carlquist added that Rule 201 may already speak to this issue. Mr. Alba suggested gauging the interest of the Court. Judge David Williams volunteered to raise it with the Board of District Court Judges. Judge Leavitt similarly volunteered to raise it with the Juvenile Rules Committee.

Ms. Salazar-Hall suggested taking a poll from this committee to determine if this committee should further explore this potential rule. A vote was taken, and the results were as follows: six members were in favor of exploring this at least on a cursory level and polling the Judges to see if this might be necessary. Three members were in favor of not moving. Three members abstained from voting.

Judge Leavitt made a motion for Judge Williams and Judge Leavitt to raise the matter with their respective boards of judges and report back. Ms. Bulkeley seconded. The motion carried. Judges Leavitt and Williams will report back during the committee's February 21, 2023 meeting.

### **4. JUVENILE AMENDMENTS TO RULES**

Judge Leavitt led this discussion.

This committee recommended and the Supreme Court adopted an amendment to Rule 412. This created some confusion as to rules that don't mention juvenile proceedings. Judge Leavitt prepared proposed amendments (Tab 3 to the agenda) and met with the Rules of Juvenile Procedure Committee. Judge Leavitt suggested punting the remaining issues to the Rules of

Juvenile Procedure Committee.

Chris Hogle suggested that this committee review Tab 3 and come prepared with questions at the next meeting.

Mr. Hogle moved to table agenda item No. 4 until the January 10th, 2023, meeting. Dallas Young Seconded. The motion carried.

**ADJOURN:**

With no further items to discuss, Ms. Salazar-Hall adjourned the meeting. The next meeting will be January 10, 2023, at 5:15 pm, via Webex video conferencing.

## Tab 2

**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 communication~~s~~, 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 a communication~~s~~ relevant 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 a party in a criminal case shows by the  
42 preponderance of the evidence that the communication is necessary to a fair  
43 determination of guilt or innocence and the communication:

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44 \_\_\_\_\_  
45 **(d)(2)(A)** contains a recantation or material inconsistency;

46 \_\_\_\_\_  
47 **(d)(2)(B)** shows that the accusation was the product of suggestion  
48 or undue influence;

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49 \_\_\_\_\_  
50 **(d)(2)(C)** relates to the reliability of the method or means by which the  
51 communication was disclosed; or

52 \_\_\_\_\_  
53 **(d)(2)(D)** is necessary to protect a criminal defendant's constitutional  
54 rights.

55  
56 **(d)(2)(3) Hospitalization for Mental Illness.** For a communications relevant to an  
57 issue in proceedings to hospitalize the patient for mental illness, if the mental health  
58 therapist in the course of diagnosis or treatment has determined that the patient is  
59 in need of hospitalization; and

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

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

67 \_\_\_\_\_  
68 **(e)(1)** If the party claiming any exception makes the required showing, the  
69 court shall conduct an in-camera review of the communications and shall  
70 release to the parties any communication to which the exception applies,  
71 subject to any protective orders entered by the court.

(e)(2) If 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 the applicability of an exception and to release any additional communication to which the exception applies.

(e)(3) Any communications submitted to the court for in-camera review and that are not otherwise released under an exception shall be sealed and made part of the record.

**(f) Reasonable Protective Orders and Procedures.** The court may make reasonable orders regarding the confidentiality protections and 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 Court noted "that Mr. Bell raise[d] important constitutional and policy concerns regarding a criminal defendant's access to records that may contain exculpatory evidence[.]" and referred the rule to its advisory committee for review. *Id.* ¶ 1. Specifically, the court directed the committee "to consider the importance of": (1) "maintaining a strong privilege rule"; (2) "more clearly defining what is required to qualify for exceptions to the privilege"; and (3) "respecting a criminal defendant's constitutional rights." *Id.* The amendments contained in subsections (d)(2) and (e) are intended to address the court's directive. Further, the amendment in subsection (d)(2) is not intended to change the longstanding requirement that "some type of extrinsic indication" is necessary to show the exception applies. See *State v. Worthen*, 2009 UT 79, ¶ 38. 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.

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**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 class and terminology consistent throughout the rules. These changes

109 are intended to be stylistic only. There is no intent to change any result in any ruling  
110 on evidence admissibility.

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

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

116 (1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it  
117 being the opinion of the Committee that full disclosure of information by a patient in  
118 those settings is as critical as and as much to be encouraged as in the "physician"  
119 patient setting. The Utah Supreme Court requested that Rule 506 further apply to  
120 licensed clinical social workers. To meet this request, the Committee included such  
121 individuals within the definition of psychotherapists. Under Utah Code § 58-35-2(5),  
122 the practice of clinical social work "means the application of an established body of  
123 knowledge and professional skills in the practice of psychotherapy. . . ." Section 58-  
124 35-6 provides that "[n]o person may engage in the practice of clinical social work  
125 unless that person: (1) is licensed under this chapter as a certified social worker,"  
126 has the requisite experience, and has passed an examination. Section 58-35-8(4)  
127 refers to licenses and certificates for "clinical social worker[s]." As a result of  
128 including clinical social workers, Rule 506 is intended to supplant Utah Code § 58-  
129 35-10 in total for all social workers.

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

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

149 (a)(4) and (b). The Committee also relied on language from Uniform Rule of  
150 Evidence 503.

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

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

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

159 The patient is entitled not only to refuse to disclose the confidential communication,  
160 but also to prevent disclosure by the physician or psychotherapist or others who  
161 were properly involved or others who overheard, without the knowledge of the  
162 patient, the confidential communication. Problems of waiver are dealt with by Rule  
163 507.

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

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

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

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

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

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

185

## **Tab 3**

## Rule 101. Scope; Definitions.

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

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

**(b)(1)** “civil case” means a civil action or proceeding, including all juvenile court cases or proceedings that are not delinquency proceedings non-delinquency proceedings;

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

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

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

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

**(b)(6)** “defendant” includes a minor in a juvenile delinquency case or proceeding accused of committing an act that would be a crime if committed by an adult;

**(b)(7)** “conviction” includes an adjudication in a juvenile delinquency case or proceeding.

(c) To the extent the above definitions and the Utah Rules of Juvenile Procedure conflict, the provisions of the Utah Rules of Juvenile Procedure shall govern.

## Rule 1101. Applicability of Rules.

***Effective: 5/1/2022***

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

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

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

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

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

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

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

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

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

*Effective: 5/1/2017*

**(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.

## **Rule 615. Excluding Witnesses.**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

**(a)** a party who is a natural person;

**(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

**(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense;

**(d)** a victim in a criminal~~-or juvenile delinquency~~ proceeding where the prosecutor agrees with the victim's presence;



(e) a victim counselor while the victim is present unless the defendant establishes that the counselor is a material witness in that criminal proceeding ~~or juvenile delinquency proceeding~~; or

(f) a person authorized by statute to be present.