



Utah Supreme Court Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

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

Date: February 21, 2023

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

Action: Welcome and approve January 10, 2023 Minutes	Tab 1	Chris Hogle
Discussion: Continued Discussion on Rule 506	Tab 2	Ryan McBride and Sarah Carlquist
Discussion: Continued Discussion on Juvenile Amendments, Rules 101, 1101, 412, and 615	Tab 3	Judge Leavitt

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

Meeting Schedule:

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

January 10th, 2023

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

1. WELCOME AND APPROVAL OF MINUTES

Chris Hogle welcomed everyone to the meeting. After making one change to the December minutes, reflecting that Judge Linda Jones was present at the December meeting, Sarah Carlquist moved to approve the minutes. Ryan McBride seconded. The motion carried.

2. UPDATE ON RULE 506

Ms. Carlquist provided the update. The Court liked the changes this committee made for the most part.

In response to comments from Justices Peterson and Pearce, Subsection f(2) was changed to make clear that whatever communications get released under the exceptions can still be protected via protective order. Justice Pohlman had some minor edits ~~about being consistent with certain wording.~~ Justices Hagan and Petersen ~~felt expressed concern~~ that the constitutional catch-all in section d(4) was too broad. ~~Subsection f(2) was changed to make clear that whatever communications get released under the exceptions can still be protected~~

~~via protective order. Courts are free to enter protective orders about dissemination of information released.~~

Justices Petersen and Hagan suggested narrowing d(2) to say something to the effect of “is necessary to provide impeachment or exculpatory evidence.” The Court did not say whether the ~~rule-draft~~ should be changed before ~~issuance for going to~~ public comment. However, Mr. Hogle asked the group whether this committee should narrow the language in d(2)(d) and then ~~put it up~~ issue it for public comment after the change, or if the group should ~~put it up~~ issue it for public comment as is.

There was a lively discussion on this issue, including a conversation about whether d(2)(d), was even necessary at all. Mr. ~~Mcbride~~ McBride raised strong concerns about the current language being overbroad. Mr. ~~Mcbride~~ McBride volunteered to draft new, narrower language and present his draft to the group at the next meeting.

Dallas Young moved to send the rule out for comment with d(2)(d) as is. Melinda Bowen seconded.

Matthew Hansen counter-~~motioned~~ moved to allow Mr. McBride to draft changes to the rule and present his draft at the next meeting. Mr. Young withdrew his motion. Judge ~~Michael~~ Leavitt seconded Mr. Hansen’s countermotion. There were no objections to Mr. Hansen’s countermotion, and the- M motion carried.

3. JUVENILE AMENDMENTS, RULES 101, 1101, 412, AND 615

Judge Leavitt led the discussion.

Rule 412 was amended to include juvenile court proceedings. At the December meeting, ~~this~~ the committee decided to take a closer look at the above-referenced rules.

The group discussed what the next steps should be with regard to these rules and to what degree the rules of evidence apply in the Juvenile context.

Judge Leavitt stressed that the Juvenile Rules Committee is likely in a better position to address some of these issues.

Ms. Carlquist motioned to send this group’s current findings to the Supreme Court. Nicole Salazar-Hall seconded the motion. Hearing no objections, the motion carried.

The Juvenile Rules Subcommittee (Judge Leavitt) will put together a memo to the Supreme Court laying out the issues at play and their implications.

ADJOURN:

Mr. Hogle noted that we are entering the legislative session.

Mr. Young moved to adjourn. Teneille Brown seconded.

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be February 21, 2023, at 5:15 pm, via Webex video conferencing.

Tab 2

1 **Rule 506. Physician and Mental Health Therapist-Patient. [Version 2]**

2
3 **(a) Definitions.**

4 **(a)(1)** "Patient" means a person who consults or is examined or interviewed by a physician or
5 mental health therapist.

6 **(a)(2)** "Physician" means a person licensed, or reasonably believed by the patient to be licensed,
7 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 any state as a
10 physician, psychologist, clinical or certified social worker, marriage and family therapist,
11 advanced practice registered nurse designated as a registered psychiatric mental health nurse
12 specialist, or professional counselor; and

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

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

19 **(b)(1)** diagnoses made, treatment provided, or advice given by a physician or mental health
20 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 therapist, and other
23 persons who are participating in the diagnosis or treatment under the direction of the physician or
24 mental health therapist. Such other persons include guardians or members of the patient's family
25 who are present to further the interest of the patient because they are reasonably necessary for the
26 transmission of the communications, or participation in the diagnosis and treatment under the
27 direction of the physician or mental health therapist.

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

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

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

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

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

38 **(d)(2) Necessary to a Criminal Case.** If a party in a criminal case shows by the preponderance
39 of the evidence that the communication is necessary to a fair determination of guilt or innocence
40 and the communication:

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

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

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

45 (d)(2)(D) is exculpatory.
46

(d)(23) 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; and

(d)(34) 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 Case. The following provisions apply only in criminal cases and only if a party is claiming an exception under paragraphs (d)(1) or (d)(2).

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

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.

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

94 (1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it being the
95 opinion of the Committee that full disclosure of information by a patient in those settings is as
96 critical as and as much to be encouraged as in the "physician" patient setting. The Utah Supreme
97 Court requested that Rule 506 further apply to licensed clinical social workers. To meet this
98 request, the Committee included such individuals within the definition of psychotherapists.
99 Under Utah Code § 58-35-2(5), the practice of clinical social work "means the application of an
100 established body of knowledge and professional skills in the practice of psychotherapy. . . ."
101 Section 58-35-6 provides that "[n]o person may engage in the practice of clinical social work
102 unless that person: (1) is licensed under this chapter as a certified social worker," has the
103 requisite experience, and has passed an examination. Section 58-35-8(4) refers to licenses and
104 certificates for "clinical social worker[s]." As a result of including clinical social workers, Rule
105 506 is intended to supplant Utah Code § 58-35-10 in total for all social workers.

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

109 (3) In the Committee's original recommendation to the Utah Supreme Court, the proposed Rule
110 506 granted protection only to confidential communications, but did not extend the privilege to
111 observations made, diagnosis or treatment by the physician/psychotherapist. The Committee was
112 of the opinion that while the traditional protection of the privilege should extend to confidential
113 communications, as is the case in other traditional privileges, the interests of society in
114 discovering the truth during the trial process outweigh any countervailing interests in extending
115 the protection to observations made, diagnosis or treatment. However, the Supreme Court
116 requested that the scope of the privilege be broadened to include information obtained by the
117 physician or psychotherapist in the course of diagnosis or treatment, whether obtained verbally
118 from the patient or through the physician's or psychotherapist's observation or examination of the
119 patient. The Court further requested that the privilege extend to diagnosis, treatment, and advice.
120 To meet these requests, the Committee relied in part on language from the California evidentiary
121 privileges involving physicians and psychotherapists. See Cal. Evid. Code §§ 992 and 1012.
122 These features of the rule appear in subparagraphs (a)(4) and (b). The Committee also relied on
123 language from Uniform Rule of Evidence 503.

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

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

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

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

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

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

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

144 The 1994 amendment to Rule 506 was primarily in response to legislation enacted during the
145 1994 Legislative General Session that changed the licensure requirements for certain mental
146 health professionals. The rule now covers communications with additional licensed professionals
147 who are engaged in treatment and diagnosis of mental or emotional conditions, specifically
148 certified social workers, marriage and family therapists, specially designated advanced practice
149 registered nurses and professional counselors.

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

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

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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.

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(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:

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181 simplicity this rule uses only "patient."

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183 general rule section, but no particular substantive change was intended by the
184 reorganization.

185

Tab 3

Re: Recommendation to Approve Amendments to URE 101, 412, 615, and 1101

The Supreme Court’s Advisory Committee on the Rules of Evidence (Committee) recommends that the Utah Supreme Court approve the attached revisions to Rules 101, 412, 615, and 1101 of the Utah Rules of Evidence and authorize that notice of the proposed changes be posted for public comment.

The purpose of these amendments is to add clarity regarding how the rules of evidence apply in juvenile court proceedings.

BACKGROUND

By default, the Utah Rules of Evidence apply to all Utah juvenile court proceedings. According to Rule 1101, “[t]hese 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.” UTAH R. EVID. 1101(a). Subsections (c) and (d) contain no exceptions for juvenile cases.

The Utah Rules of Juvenile Procedure add clarity: “Except as set forth herein or as otherwise provided by law, the juvenile court shall adhere to the Utah Rules of Evidence.” UTAH R. JUV. P. 43(a).

Our appellate courts have applied the rules of evidence to juvenile court proceedings. *See generally In re W.A.*, 2002 UT 127, ¶¶ 33-39, 63 P.3d 607 (analyzing Rules 410 and 803 as applied in juvenile court proceedings); *In re A.M.D.*, 2006 UT App 457, ¶¶ 19-24, 153 P.3d 724 (analyzing Rules 403, 615, 702 and 704 as applied in juvenile court proceedings); *In re J.C. v. Cruz*, 808 P.2d 1131, 1135 (Utah Ct. App. 1991) (“Evidence to prove abandonment must be admissible under basic rules of evidence.”); *In re R.D.S.*, 777 P.2d 532, 535 (Utah Ct. App. 1989) (“The rules of evidence apply to recall proceedings in juvenile court.”).¹

Early in 2022, the Committee received a request by some juvenile court practitioners to amend Rule 412 to specify that, where it references “criminal proceedings,” it also include “juvenile court delinquency” proceedings. There were concerns that this rule regarding the admissibility of

¹ Prior to the enactment of Rule 43 of the Utah Rules of Juvenile Procedure, the application of the rules of evidence in juvenile proceedings was less exact. In a parental rights termination proceeding, the court held: “[J]uvenile court proceedings are highly equitable in nature, designed to inquire into the welfare of children, are not adversarial in the usual sense, and may be conducted in an informal manner.” *In re S.J.*, 576 P.2d 1280, 1283 (Utah 1978). The court added: “Basic rules of evidence should be adhered to in a proceeding of this sort although application of such rules is within the court’s sound discretion.” *Id.*; *see also In re. L.D.S.*, 797 P.2d 1133, 1137 (Utah Ct. App. 1990). These statements, though not directly overruled by subsequent case law, have likely been overruled by the language of Rule 43(a) of the Utah Rules of Juvenile Procedure.

a victim's sexual behavior or predisposition in a criminal case was not being applied in juvenile delinquency cases. The Committee agreed with the proposed change and sent it to the Supreme Court for approval. After public comment, the proposal was finally approved. Rule 412 now includes a reference to juvenile delinquency proceedings.

Only one other rule of evidence specifically references "juvenile delinquency proceedings," namely Rule 615 dealing with a victim's right not to be excluded from a juvenile court hearing or trial.

Otherwise, the rules of evidence contain no other references specifically to juvenile courts.

ISSUE

The inclusion of these references to juvenile courts in two select provisions of the rules, but not elsewhere, results in a lack of clarity. Despite the general applicability provision in Rule 1101, one might interpret that only Rules 412 and 615 apply to juvenile court proceedings, but other rules, where the juvenile court is not specifically referenced, may not. As a rule of statutory construction, the inclusion of a term in one statute and the exclusion of the same term from another is evidence that the term was intentionally omitted. *See, generally, State Farm Mut. Auto Ins. Co. v. Clyde*, 920 P.2d 1183, 1187 (Utah 1996); *State v. Hobbs*, 2003 UT App 27, ¶ 21, 64 P.3d 1218, *In re A.B.*, 936 P.2d 1091, 1098 (Utah Ct. App. 1997). "Rules of evidence are interpreted according to the general rules of statutory construction." *Butler v. Naylor*, 1999 UT 85, ¶ 9, 987 P.2d 41.

And though the language of Rule 43(a) of the rules of juvenile procedure seems clear and may make the added language in Rules 412 and 615 seem superfluous, neither the rules of evidence nor the rules of juvenile procedure clarify whether rules of evidence that refer to criminal proceedings always apply in juvenile delinquency proceedings. This is particularly problematic because a delinquency proceeding "is a civil proceeding with the juvenile court exercising equitable powers." UTAH CODE § 80-6-501 (1).

In most cases, juvenile court judges apply rules of evidence related to criminal proceedings to delinquency proceedings, but there is some disagreement even among the juvenile bench regarding whether they should in all instances and whether there should be exceptions.

PROPOSED RULE CHANGES

Because of this potential confusion, the Committee recommends adoption of the attached amendments. In doing so, it hopes to accomplish two objectives to (1) ensure clarity regarding the applicability of the rules of evidence in juvenile court proceedings while remaining mindful of the concerns raised by practitioners that prompted the most recent amendment to Rule 412 and the existing language in Rule 615 and (2) reaffirm the responsibility of the Supreme Court's Advisory Committee on the Rules of Juvenile Procedure (Juvenile Rules Committee) to allow for exceptions or modifications to the rules of evidence in juvenile proceedings as already

authorized by Rule 43(a) of the Utah Rules of Juvenile Procedure. That committee is comprised solely of judges and practitioners who work in juvenile court and who are aware of the nuances that evidentiary issues in those cases present. They are better equipped to manage specific evidentiary determinations for juvenile court cases.

Rule 101

This rule regarding defined terms in the rules of evidence would be amended to include references to juvenile court and to clarify that, as a default rule, evidentiary rules related to criminal cases for adults apply to juvenile court delinquency cases generally. This should accommodate the concerns raised by including a reference to juvenile courts in Rules 412 and 615. The Juvenile Rules Committee may determine that some of them should not and may propose amendments to the rules of juvenile procedure to note those exceptions.

Rule 1101

This amendment simply adds juvenile court matters to the list of the types of cases and proceedings intended to be included under the catch-all umbrella of “all actions and proceedings in the courts of this state,” while still recognizing the authority of the Juvenile Rules Committee to modify their applicability in juvenile proceedings.

Rule 412

With the proposed changes to Rule 101 and 1101, we address the concerns regarding whether a victim’s rights in an adult criminal case would apply in a delinquency case, making the recent amendment to Rule 412 unnecessary. We propose that it be changed back to its previous form.

Rule 615

Although this reference to juvenile courts is not new, it poses the same concern that the amendment to Rule 412 presented. By eliminating it, the language of the rules remains consistent. With the additional proposed language in Rules 101 and 1101, the same rights of a victim to remain in the courtroom when the exclusionary rule is invoked during a criminal proceeding would still apply in juvenile delinquency cases.

CONCLUSION

Based upon the foregoing, the Committee recommends that the Utah Supreme Court adopt these proposed amendments.