Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

Location: WebEx Meeting:

Date: November 14, 2023

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

Action: Welcome and approve October 10, 2023 Minutes	Tab 1	Chris Hogle
Update: URE 101, 412, 615, and 1101 proposed amendments given final approval by SC, effective 11/1/23		Chris Hogle
Update: URE 506 proposed amendments going back to SC 11/15/23		Chris Hogle
Discussion: proposed amendments re in-person vs remote appearances (URE 104, 201, 603, 612, 615, 804)	Tab 2	David Billings
Discussion: 2024 Committee meeting schedule		Chris Hogle

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

Meeting Schedule:
January 9, 2024

Rule Status:
URE 104, 201, 603, 612, 615, 804 – In draft
URE 106 - Under consideration by Supreme Court

URE 404 - Awaiting advice from Supreme Court
URE 506 – Going back to SC for approval to publish for public comment
URE 507.1 - Awaiting DoH guidelines

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
October 10th, 2023
5:15 p.m.-7:00 p.m.
Via Webex

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Chris Hogle	Deborah Bulkeley	Jacqueline Carlton	Jace Willard
Nicole Salazar-Hall	Jennifer Parrish		Angelica Juarez
Sarah Carlquist	Ed Havas		
David Billings	Tenielle Brown		
Adam Alba			
Benjamin Miller			
Dallas Young			
Hon. Michael Leavitt			
Hon. Linda Jones			
Rachel Sykes			
Hon. Richard McKelvie			
Matthew Hansen			
Hon. David Williams			
Melinda Bowen			
Ryan McBride			
Tony Graf			
Hon. Vernice Trease			

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1. WELCOME AND APPROVAL OF MINUTES

Chris Hogle welcomed everyone to the meeting. Nicole Salazar-Hall moved to approve the April minutes. Sarah Carlquist seconded. The motion carried.

2. WELCOME NEW COMMITTEE MEMBERS

Mr. Hogle welcomed the three new members: David Billings, Benjamin Miller, and Rachel Sykes. The new members introduced themselves to the committee, and the preexisting members introduced themselves to the new members. Mr. Hogle explained the process in which the committee considers suggestions for new or amended evidence rules.

3. UPDATE URE 101, 412, 615, AND 1101 PROPOSED AMENDMENTS APPROVED BY SC FOR PUBLIC COMMENT ON 5/17/23; WENT OUT AND NO COMMENTS RECEIVED.

All the rules were approved, and no comments were received. The next step is to report to the Supreme Court. November 1st is when new rules become effective. Mr. Willard said we can seek the Supreme Court's approval to make this final.

4. PUBLIC COMMENTS TO URE 506 PROPOSED AMENDMENTS

Ms. Carlquist gave some background on Rule 506. In a footnote in *State v. Bell*, the Supreme Court called upon the committee review the Rule, which relates to the patient/doctor privilege. Ms. Carlquist explained the approaches and drafts up to the most recent draft attached to the agenda.

Ms. Carlquist ask for input on using the term "matter" rather than "case" as it relates to the new sections. Judge Jones said that use of the term "matter" was intended to indicate that the rule applied in criminal matters arising before a criminal case, such as in situations in which search warrants were issued for patients' medical records.

The group had a lively discussion regarding the use of the word "matter" or "case." Ultimately, Judge Leavitt moved to add the language "criminal case or matter" to the rule. That motion was voted on by the group, and the motion carried.

Ms. Carlquist moved to send the updated language to the Supreme Court for adoption. Judge Leavitt seconded. The motion carried.

Mr. Young moved to send the rules that had previously gone for public comment (Rules 101, 412, 615, and 1101) up to the Supreme Court to be made final. Mr. Alba seconded. The motion carried.

5. SUPREME COURT LETTER RE IN-PERSON VS REMOTE APPEARANCES (URE 615)

Mr. Hogle suggested following typical procedure and forming a subcommittee to look at Rules 615, and maybe 611 and 612, to determine if any amendments might be appropriate considering the modern approach to remote hearings.

David Billings volunteered to take the lead on this subcommittee. Rachel Sykes and Adam Alba will also join subcommittee. The subcommittee will report during November 14th meeting.

ADJOURN:

Mr. Young moved to adjourn. Ryan McBride seconded. The motion carried.

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be November 14th, at 5:15 pm, via Webex video conferencing.

TAB 2

Rule 104. Preliminary Questions.

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any remote or in-person hearing on a preliminary question so that the jury cannot hear it if:

(c)(1) the hearing involves the admissibility of a confession;

(c)(2) a defendant in a criminal case is a witness and so requests; or

(c)(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

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. This rule is the federal rule, verbatim.

Original Advisory Committee Note. This provision is the federal rule, verbatim, and is comparable to Rule 8, Utah Rules of Evidence (1971). Rule 104(c) recognizes that hearings on motions to suppress confessions should be conducted out of the hearing of the jury where there is a contested issue. State v. Allen, 29 Utah 2d 88, 505 P.2d 302 (1973). See also Jackson v. Denno, 378 U.S. 368 (1964). Cf. Pinto v. Pierce, 389 U.S. 31, 88 S. Ct. 192, 19 L. Ed. 2d 31 (1967).

Rule 201. Judicial Notice of Adjudicative Facts.

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(b)(1) is generally known within the trial court's territorial jurisdiction; or

(b)(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(c)(1) may take judicial notice on its own; or

(c)(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard via remote means on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

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. This rule is the federal rule, verbatim.

Original Advisory Committee Note. This rule is the federal rule, verbatim, and consolidates the law of judicial notice formerly contained in Rules 9 through 12, Utah Rules of Evidence (1971) and in Utah Code § 78-25-1 (1953) into one broadly defined rule. The Utah Supreme Court has stated the rule with reference to judicial notice in Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 267, 289 Pac. 116 (1930) where the court stated: "In short, a court is presumed to know what every man of ordinary intelligence must know about such things." See also DeFusion Co. v. Utah Liquor Control Comm'n, 613 P.2d 1120 (Utah 1980).

Subdivision (a) "governs only judicial notice of adjudicative facts," and does not deal with instances in which a court may notice legislative facts, which is left to the sound discretion of trial and appellate courts. Compare Rule 12, Utah Rules of Evidence (1971). Since legislative facts are matters that go to the policy of a rule of law as distinct from the true facts that are used in the adjudication of a controversy they are not appropriate for a rule of evidence and best left to the law-making considerations by appellate and trial courts.

Subdivision (b) is in accord with the Little Cottonwood Water Co. case, supra, and the substance of Rule 9(1) and (2), Utah Rules of Evidence (1971). Utah law presumes that the law of another jurisdiction is the same as that of the State of Utah and judicial notice has been taken from the law of other states and foreign countries. Lamberth v. Lamberth, 550 P.2d 200 (Utah 1976); Maple v. Maple, 566 P.2d 1229 (Utah 1977). The Utah court has taken judicial notice under Rule 9(2), Utah Rules of Evidence (1971) of the rules and regulations of the Tax Commission. Nelson v. State Tax Comm'n, 29 Utah 2d 162, 506 P.2d 437 (1973). The broad language of subdivision (b) is identical to Rule 201 of the Uniform Rules of Evidence (1974). Judicial notice of foreign law is permissible under this rule. Provisions of this rule supersede Utah Code § 78-25-1 (1953), since the statute is merely illustrative of items encompassed within the broad framework of this rule. The foreign law of some jurisdictions might best be left to proof through witnesses if the resort to sources available in the State of Utah is questionable.

Subdivision (c) is discretionary, but subdivision (d) requires the court to take judicial notice if requested by a party and if supplied with the necessary information to make a determination of whether to take judicial notice. Compare Rules 9(2) and 10(3), Utah Rules of Evidence (1971). The committee believes that Rule 201(d) simplifies the process of taking judicial notice of adjudicative facts by making it mandatory when a party makes a request therefor and supplies the court with the necessary information.

Rule 603. Oath or Affirmation to Testify Truthfully.

Before testifying, whether in-person or via remote means, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

A witness testifying via remote means must also give an oath or affirmation that the witness will not communicate with anyone during their testimony.

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. This rule is the federal rule, verbatim.

Original Advisory Committee Note. This rule is the federal rule, verbatim. The oath or affirmation need not be in any special form but only such as to awaken the conscience of the witness and impress the witness with the duty to testify truthfully. The rule is a modified version of Rule 18, Utah Rules of Evidence (1971).

Rule 612. Writing Used to Refresh a Witness's Memory.

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(a)(1) while testifying; or

(a)(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing produced at the hearing (whether in-person or remote), to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

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. This rule generally comports with current Utah practice.

Rule 615. Excluding Witnesses.

At a party's request, the court must order witnesses excluded, including from any remotely-conducted hearing or trial, 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 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

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

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.

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant is Unavailable as a Witness.

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(a)(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(a)(2) refuses to testify about the subject matter despite a court order to do so;

(a)(3) testifies to not remembering the subject matter;

(a)(4) cannot be remotely present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(a)(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(b)(1) Former Testimony. Testimony that:

(b)(1)(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one (and whether made in-person or via remote means); and

(b)(1)(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(b)(2) Statement Under the Belief of Imminent Death. In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

(b)(3) Statement Against Interest. A statement that:

(b)(3)(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(b)(3)(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(b)(4) Statement of Personal or Family History. A statement about:

(b)(4)(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(b)(4)(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

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. Subdivision (a) is comparable to Rule 63(7), Utah Rules of Evidence (1971). Rule 62(7)[(e)], Utah Rules of Evidence (1971), seems to be encompassed in Rule 804(a)(5). Subdivision (a)(5) is a modification of the federal rule which permits judicial discretion to be applied in determining unavailability of a witness.

Subdivision (b)(1) is comparable to Rule 63(3), Utah Rules of Evidence (1971), but the former rule is broader to the extent that it did not limit the admission of the testimony to a situation where the party to the action had the interest and opportunity to develop the testimony. Condas v. Condas, 618 P.2d 491 (Utah 1980); State v. Brooks, 638 P.2d 537 (Utah 1981).

Subdivision (b)(2) is comparable to Rule 63(5), Utah Rules of Evidence (1971), but the former rule was not limited to declarations concerning the cause or circumstances of the impending death nor did it limit dying declarations in criminal prosecutions to homicide cases. The rule has been modified by making it applicable to any civil or criminal proceeding, subject to the qualification that the judge finds the statement to have been made in good faith.

Subdivision (b)(3) is comparable to Rule 63(10), Utah Rules of Evidence (1971), though it does not extend merely to social interests.

Subdivision (b)(4) is similar to Rule 63(24), Utah Rules of Evidence (1971).

Subdivision (b)(5) had no counterpart in Utah Rules of Evidence (1971).