Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

Location: WebEx Meeting

Date: January 9, 2024

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

Action: Welcome and approve November 14, 2023 Minutes	Tab 1	Chris Hogle
Update: URE 506 proposed amendments went back to SC 11/15/23; republished for public comment 11/16/23; no comments received		Chris Hogle
Discussion: draft memo re in-person vs remote appearances; URE 1101 redline	Tab 2	David Billings
Discussion: draft memo re proposed amendment to URE 106	Tab 3	Chris Hogle

Committee Web Page

Meeting Schedule:
January 9, 2024
February 13, 2024
April 9, 2024
June 11, 2024
October 8, 2024
November 12, 2024

Rule Status:

URE 1101, 106 – In draft

URE 404 - Awaiting advice from Supreme Court

URE 506 – Back from public comment

URE 507.1 - Awaiting DoH guidelines

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
November 14th, 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	Tenielle Brown		
David Billings	Benjamin Miller		
Adam Alba	Melinda Bowen		
Dallas Young	Hon. Vernice Trease		
Hon. Linda Jones			
Rachel Sykes			
Hon. Richard McKelvie			
Matthew Hansen			
Hon. David Williams			
Ryan McBride			
Tony Graf			
Hon. Michael Leavitt			
Ed Havas			

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1. WELCOME AND APPROVAL OF MINUTES

Chris Hogle welcomed everyone to the meeting. After a minor change to the minutes from last meeting, Sarah Carlquist moved to approve the October minutes. Judge McKelvie seconded. The motion carried.

2. URE 101, 412, 615, and 1101 proposed amendments given final approval by SC, effective 11/1/23

Mr. Hogle gave update that the amendments to URE 101, 412, 615, and 1101 were all approved by the Supreme Court and became effective November 1, 2023.

3. URE 506 proposed amendments going back to SC 11/15/23

Mr. Hogle, Ms. Carlquist, and Nicole Salazar-Hall will meet with Supreme Court regarding URE 506 tomorrow.

4. Proposed amendments Re: In-person vs Remote Appearances (URE 104, 201, 603, 612, 615, 804)

Mr. Hogle thanked the subcommittee consisting of Rachel Sykes, Adam Alba, and David Billings, who agreed to work on this. Mr. Billings gave an update. The subcommittee made proposed redline edits to various rules regarding remote hearings.

Mr. Alba was also on the subcommittee and added that these changes may not be necessary. Mr. Alba added that the rules of evidence have a section in Rule 101 with definitions, and that if there is a need to define a "hearing" or a "trial", we may be able to add a definition in there to state that it includes those hearings or trials that are conducted remotely. Alternatively, Judge Leavitt suggested that changes could be made to Rule 1101's provisions to specify that the rules apply regardless of whether hearings are held remotely or in-person.

In addressing the work that the subcommittee did on this, Mr. Billings stated that he skimmed through the entire rules of evidence to see if there were areas where the language regarding remote hearings/trials made sense. Ms. Sykes confirmed that she did the same. The subcommittee looked at other jurisdictions for any similar changes but did not find anything.

The group then had a lively discussion on whether or not such changes were necessary, or if no action was needed. Mr. Hogle called for a vote and 7 members (majority) were in favor of the no action approach.

In the event that the Supreme Court wants this committee to take some action, the majority voted in favor of clarifying applicability of the rules under Rule 1101.

Mr. Hogle then asked the subcommittee to prepare a report to the Supreme Court stating that most of the committee members are in favor of doing nothing, but if something needs to be done, then the committee is agreeable to amending Rule 1101. Mr. Hogle motioned to approve. Ms. Salazar-Hall seconded. The motion carried.

5. Rule 106

The last time we considered Rule 106 was back in 2021. We even modified a rule and sent it up to the Supreme Court. The Federal Rules have since been amended in a similar manner to our previously proposed amendments.

The group considered whether the Utah rule should follow the new Federal rule. The group voted on whether to suggest a modification to the Supreme Court, which would modify Rule 106 to align with the new Federal rule. Ms. Salazar- Hall moved to do so. Mr. Billings seconded. No naysayers. Motion passed. Jace Willard agreed to put something together to send to the Supreme Court.

6. 2024 Committee meeting schedule

We typically meet six times during the year: once in January, February, April, June, October, and

November. Mr. Hogle proposed the following schedule: February 13th; April 9th; June 11th; October 8th; and November 12th. We already have a meeting on the calendar for January 9th. No objections to the proposed schedule. Mr. Willard will send out calendar invites.

Ms. Salazar-Hall added that we want to be aware of the next legislative session. Ms. Salazar-Hall and Mr. Young are on the rapid response team.

ADJOURN:

Ms. Carlquist moved to adjourn. Mr. Alba seconded.

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be January 9th, at 5:15 pm, via Webex video conferencing.

TAB 2

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
CHRISTOPHER HOGLE
CHAIR

January 9, 2024

Hon. Matthew B. Durrant
Chief Justice, Utah Supreme Court
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Re: Response to Supreme Court Memorandum Concerning Remote vs. In-Person Hearings

Dear Chief Justice Durrant:

In its memorandum to the Advisory Committees, the Court requested that we provide recommendations regarding the following questions as they relate to our committee:

1. Should there be a rule of procedure that allows participants to request their hearing be held opposite the decision of the judicial officer?

2. Should there be a rule of procedure that provides a presumption regarding certain hearing types? (Example: non-evidentiary, status hearings, etc.)

3. Should there be a rule of procedure that provides an appeal process for challenging the decision of a judicial officer as it relates to remote vs. in-person hearings, and if so, who should consider the appeal? (Example: presiding judge)

The Advisory Committee on the Utah Rules of Evidence has carefully considered these questions and at our November 2023 meeting, we debated the merits of various potential amendments to the Utah Rules of Evidence. After voting, our conclusions are as follows:

a. A majority of the Committee are of the view that no changes to the Utah Rules of Evidence are necessary to account for remote proceedings. Further, a majority also believe that since the Supreme Court's questions 1-3 involve

procedure, such matters are better answered and addressed by the Advisory Committees on the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and Utah Rules of Juvenile Procedure.

b. However, the Committee is mindful of the Court's charge and interest in this topic. We agree that if the Court is of the view that there should be a change to the Utah Rules of Evidence to address virtual meeting technology and remote/hybrid proceedings,[1] that such change should be made to Utah R. Evid. 1101(a) & (b) to make clear that the term "proceedings" includes all actions and proceedings in Utah State Courts, regardless of whether they are conducted in person, conducted remotely, or a mix of the two (e.g., a hybrid proceeding). Proposed revisions in that event are included in Exhibit A.

The Committee looks forward to the Justices' input on the above recommendations.

Sincerely,

/s/ Christopher Hogle

[1] As used herein, a "hybrid proceeding" describes a court proceeding where some individuals are physically present in court, while others participate and/or attend via virtual meeting technology.

EXHIBIT A

Rule 1101. Applicability of Rules.

(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), regardless of whether any proceedings are conducted in person, via virtual meeting technology, or a combination of the two. 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, regardless of whether any proceedings are conducted in person, via virtual meeting technology, or a combination of the two.

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

(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.

(2) Grand Jury. Proceedings before grand juries.

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

(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.

2022 Advisory Committee Note: Regarding subsection (c)(4): In *State v. Weeks*, 2002 UT 98, 61 P.3d 1000, the Utah Supreme Court explained the "wisdom" of not applying the evidence rules to sentencing and restitution hearings. *Id*. at ¶ 17. The breadth of information available at such hearings has always been wide. *See Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). Granting flexibility allows trial courts to fashion just sentences—including court-ordered restitution—based on the facts of a given case. It benefits defendants because one form of punishment (restitution) may allow them to avoid a greater fine, incarceration, or both. Finally, it benefits victims by ensuring that they don't endure a "mini-trial" on restitution, and fines that might have gone to the State may instead go to the victim in the form of restitution. *Weeks*, 2002 UT 98, ¶¶ 17-19.

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 style 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.

TAB 3

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
CHRISTOPHER HOGLE
CHAIR

November 15, 2023

Hon. Matthew B. Durrant
Chief Justice, Utah Supreme Court
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Re: URE Amendments to Rule 106 (approval for public comment)

Dear Chief Justice Durrant:

The Rules of Evidence Advisory Committee is requesting that certain proposed amendments to Rule 106 be published for public comment.

Rule 106 *– Remainder of or Related Writings or Recorded Statements.*

Rule 106 provides as follows: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." This rule is modeled after the identical Federal Rule of Evidence 106 (attached as Exhibit A), which has recently been amended, effective December 1, 2023, to omit both instances of "writing or recorded," and to add the following sentence: "The adverse party may do so over a hearsay objection."

The Committee proposes that the same changes be made to Utah's Rule 106. The redline draft is attached as Exhibit B. The proposed change would broaden the rule by removing the requirement that a statement be written or recorded in order to fall within the rule. This expansion

is advisable because the same reasons of fairness that would justify permitting an adverse party to introduce any other part of a previously admitted written or recorded statement would likewise support permitting the adverse party to do so as to unwritten or unrecorded statements. The same is true of admitting related statements. In each instance, another portion of the statement, or a related statement, could lend context to the previously admitted statement or expose "cherry-picking" by the other side. A concern for fairness also supports the principle that if any part of a statement has previously been introduced, a hearsay objection should not be permitted to prevent another part of the same statement, or a related statement, from being admitted. Keeping Rule 106 in harmony with the amended federal rule would have the added benefit of making it easy for Utah courts to continue to draw on the larger body of precedent and other authoritative interpretations related to the federal rule.

The Committee seeks approval to publish the above proposed changes for public comment, and looks forward to the Justices' input on the above recommendations.

Sincerely,
/s/ Christopher Hogle

EXHIBIT A

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article I. General Provisions (Refs & Annos)

Federal Rules of Evidence Rule 106, 28 U.S.C.A.

Rule 106. Remainder of or Related Writings or Recorded Statements

Currentness

<[Text of rule effective until December 1, 2023, absent contrary Congressional action.]>

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

<[Text of rule effective December 1, 2023, absent contrary Congressional action.]>

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part--or any other statement--that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 24, 2023, eff. Dec. 1, 2023, absent contrary Congressional action.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

1987 Amendments

The amendments are technical. No substantive change is intended.

2011 Amendments

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style 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.

<[Effective December 1, 2023, absent contrary Congressional action.]>

2023 Amendments

Rule 106 has been amended in two respects:

(1) First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime--when that is not what he said. In this example the prosecution, which has created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its non-hearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will depend on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

(2) Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial--where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, covers these questions under one rule. The rule is expanded to now cover all statements, in any form--including statements made through conduct or sign language.

The original committee note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163,

at 7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not--because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an unrecorded statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value--in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g., Phoenix Assocs. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The intent of the amendment is to displace the common-law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988), the Court in dictum referred to Rule 106 as a partial codification of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent--especially when the rule is one, like the rule of completeness, that arises most often during the trial.

The amendment does not give a green light of admissibility to all excised portions of statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So, for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019).

Notes of Decisions (110)

Fed. Rules Evid. Rule 106, 28 U.S.C.A., FRE Rule 106
Including Amendments Received Through 11-1-23

End of Document

EXHIBIT B

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements.

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or recorded~~ statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

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. Utah Rules of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice.