Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

Location: WebEx Meeting

Date: February 13, 2024

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

Action: Welcome and approve January 9, 2024 Minutes	Tab 1	Chris Hogle
Update: URE 106 proposed amendments out for public comment; URE 506 amendments given final approval (effective 5/1/24); URE 1101 per Committee's recommendation, not adopted		Chris Hogle
Discussion: URE 702 redline	Tab 2	Teneille Brown
Discussion: URE 615 redline	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 106 – Out for public comment
URE 404 - Awaiting advice from Supreme Court
URE 507.1 - Awaiting DoH guidelines
URE 615 – In draft
URE 702 – In draft

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
January 9th, 2024
5:15 p.m.-7:00 p.m.
Via Webex

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

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1. WELCOME AND APPROVAL OF MINUTES

Chris Hogle welcomed everyone to the meeting.

Once quorum was achieved, Mr. Hogle moved for approval of the November meeting minutes with a slight modification. David Billings seconded. The motion carried.

2. URE 506 PROPOSED AMENDMENTS WENT BACK TO SC 11/15/23; REPUBLISHED FOR PUBLIC COMMENT 11/16/23; NO COMMENTS RECEIVED.

No comments received back on Rule 506. Mr. Hogle moved to resend the proposed amendments to Rule 506 up to the Supreme Court for final approval. Sarah Carlquist Seconded. Motion carried.

3. DRAFT MEMO RE IN-PERSON VS. REMOTE APPEARANCES; URE 1101 REDLINE

David Billings and subcommittee worked on this.

Ed Havas raised a question regarding line ten stating “any proceedings” in the original rule. Mr.

Havas suggested changing the language to “any” or “the.” Mr. Hogle agreed with “the.” Judge David Williams agreed.

Dallas Young suggested that “proceedings” should be changed from plural to singular. After more input from the group, Mr. Hogle suggested changing to “the proceeding is.” Judge Michael Leavitt added the importance of keeping in mind the next paragraph for consistency purposes. Teneille Brown suggested keeping the language as “proceedings are.” Mr. Young insisted on his position which “proceedings is.” Ms. Carlquist agreed with remaining consistent and keeping “proceedings are.”

After a lively discussion, the group agreed leave the language as is.

Judge Leavitt moved to approve the memo and draft of proposed rule. Mr. Billings seconded. No opposition. Motion carried.

4. DRAFT MEMO RE PROPOSED AMENDMENT TO URE 106

No edits or suggestions at this time. Mr. Hogle added it is very well written and succinct.

Ms. Carlquist moved to approve the memo, and Mr. Billings seconded. Motion Carried.

OTHER COMMENTS: We may want to think about revising our UT rules to conform to the Federal version of Rule 702. Jace Willard will include this in the agenda for the next meeting. The federal rules have changed somewhat, and Professor Brown agreed to lead a discussion on Rule 702 at the next meeting.

ADJOURN:

Mr. Hogle moved to adjourn.

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be February 13th, at 5:15 pm, via Webex video conferencing.

TAB 2

Showing differences between versions effective [See Text Amendments] to November 30, 2023 and December 1, 2023 [current]
Key: ~~deleted text~~ **added text**
1 deletion · **4** additions

Federal Rules of Evidence Rule 702, 28 U.S.C.A.

Rule 702. Testimony by Expert Witnesses [Rule Text & Notes of Decisions subdivisions I, II]

<Notes of Decisions for 28 USCA Federal Rules of Evidence Rule 702 are displayed in multiple documents.>

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **the proponent demonstrates to the court that it is more likely than not that** :

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the ~~expert has reliably applied~~ **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.

Credits
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011 **; Apr. 24, 2023, eff. Dec. 1, 2023.**)

Fed. Rules Evid. Rule 702, 28 U.S.C.A., FRE Rule 702

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Fed. R. Evid. 702

ADVISORY COMMITTEE NOTES

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2023 Amendments

Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *Huddleston v. United States*, 485 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule. Nor does the amendment require that the court make a finding of reliability in the absence of objection.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000--requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact

that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit. "[P]roponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable... The evidentiary requirement of reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to Rule 702, quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994).

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty--or to a reasonable degree of scientific certainty--if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of

the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

Rule 702. Testimony by Experts.

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(b)(1) are reliable,

(b)(2) are based upon sufficient facts or data, and

(b)(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

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. Apart from its introductory clause, part (a) of the amended Rule recites verbatim Federal Rule 702 as it appeared before it was amended in 2000 to respond to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The 2007 amendment to the Rule added that introductory clause, along with parts (b) and (c).

Unlike its predecessor, the amended rule does not incorporate the text of the Federal Rule. Although Utah law foreshadowed in many respects the developments in federal law that commenced with Daubert, the 2007 amendment preserves and clarifies differences between the Utah and federal approaches to expert testimony.

The amended rule embodies several general considerations. First, the rule is intended to be applied to all expert testimony. In this respect, the rule follows federal law as announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its federal counterpart, Utah's rule assigns to trial judges a "gatekeeper" responsibility to screen out unreliable expert testimony. In performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. This degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability. The rational skeptic is receptive to any plausible evidence that may bear on reliability. She is mindful that several principles, methods or techniques may be suitably reliable to merit admission into evidence for consideration by the trier of fact. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Finally, the gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support. The Daubert court characterized this task as focusing on the "work at hand". The practitioner should equally take care that the proffered expert testimony reliably addresses the "work at hand", and that the foundation of reliability presented for it reflects that consideration.

Section (c) retains limited features of the traditional Frye test for expert testimony. Generally accepted principles and methods may be admitted based on judicial notice. The nature of the "work at hand" is especially important here. It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes

that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

Section (b) adopts the three general categories of inquiry for expert testimony contained in the federal rule. Unlike the federal rule, however, the Utah rule notes that the proponent of the testimony is required to make only a "threshold" showing. That "threshold" requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile - or choose between - the different opinions. As such, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and it is not contemplated that evidentiary hearings will be routinely required in order for the trial judge to fulfill his role as a rationally skeptical gatekeeper. In the typical case, admissibility under the rule may be

determined based on affidavits, expert reports prepared pursuant to Utah R.Civ.P. 26, deposition testimony and memoranda of counsel.

TAB 3

Showing differences between versions effective [See Text Amendments] to November 30, 2023 and December 1, 2023 [current]
Key: ~~deleted text~~ **added text**
7 deletions · **13** additions

Federal Rules of Evidence Rule 615, 28 U.S.C.A.

Rule 615. Excluding Witnesses **From the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony**

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded **from the courtroom** 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~~ **1)** a party who is a natural person;

(~~b~~ **2)** ~~an~~ **one** officer or employee of a party that is not a natural person~~, after being~~ **if that officer or employee has been** designated as the party's representative by its attorney;

(~~c~~ **3)** ~~a~~ **any** person whose presence a party shows to be essential to presenting the party's claim or defense; or

(~~d~~ **4)** a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

Credits
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Pub.L. 100-690, Nov. 18, 1988, Title VII, § 7075(a), 102 Stat. 4405; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011 **; Apr. 24, 2023, eff. Dec. 1, 2023** .)

Fed. Rules Evid. Rule 615, 28 U.S.C.A., FRE Rule 615

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Fed. R. Evid. 615

ADVISORY COMMITTEE NOTES

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2023 Amendments

Rule 615 has been amended for two purposes:

(1) Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial--and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit those subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule's policy of preventing tailoring of testimony

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions

of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis.

(2) Second, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated representative per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-representative is exempt at any one time. If an entity seeks to have more than one witness-representative protected from exclusion, it needs to show under subdivision (a)(3) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3).

Rule 615. Excluding Witnesses From the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony.

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom 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~~1) a party who is a natural person;

(~~b~~2) ~~an~~ one officer or employee of a party that is not a natural person, ~~after being~~if that officer or employee has been designated as the party's representative by its attorney;

(~~c~~3) ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense;

(~~d~~4) a victim in a criminal proceeding where the prosecutor agrees with the victim's presence;

(~~e~~5) 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~~6) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial 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.