Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

Location: WebEx Meeting

Date: June 11, 2024

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

Action: Welcome and approve April 9, 2024 Minutes	Tab 1	Chris Hogle
Update: URE 106 proposed amendments going back to Supreme Court after public comment		Chris Hogle
Discussion: URE 615 redlines	Tab 2	Sarah Carlquist
Discussion: URE 702 updated memo	Tab 3	Teneille Brown
Discussion: H.J.R. 13 and URE 1102 committee note (with past example from URE 409)		Chris Hogle
Discussion: Acknowledgment and send off to Adam Alba, Matt Hansen, Ed Havas, Chris Hogle, Angelica Juarez, and Judge Trease		Nicole Salazar-Hall

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 – Going back to Supreme Court after public comment
URE 404 - Awaiting advice from Supreme Court
URE 507.1 - Awaiting DoH guidelines
URE 615 – In draft
URE 702 – In draft
URE 1102 – Committee Note in draft

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

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

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Chris Hogle	Hon. David Williams		Jace Willard
Nicole Salazar-Hall	Sarah Carlquist		
Tony Graf	Ed Havas		
Matthew Hansen	Hon. Linda Jones		
Adam Alba			
Benjamin Miller			
Rachel Sykes			
David Billings			
Dallas Young			
Prof. Teneille Brown			
Hon. Michael Leavitt			
Ryan McBride			
Hon. Richard McKelvie			
Hon. Vernice Trease			

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1. WELCOME AND APPROVAL OF MINUTES

Chris Hogle welcomed everyone to the meeting. After waiting for quorum to begin the meeting, the minutes from the last meeting were amended to move Rachel Sykes from the excused to the present column. Professor Teneille Brown moved for approval of the November meeting minutes. Judge Richard McKelvie seconded. The motion carried.

2. URE Rule 615 Redlines

David Billings filled in for Sarah Carlquist and discussed Rule 615. The subcommittee drafted three redline versions for the group's review and feedback.

The group had a discussion about potential sanctions under this rule and the observed extent of rule violations in Utah.

Some members advocated for the third option of the rule drafted by the subcommittee, which is the version that most closely resembles the federal version, while others advocated for the second option. No one urged adoption of the first option.

Mr. Hogle suggested creating a hybrid between the second and third options, where we start with the language of the second option and add the language "other than counsel or a pro se party" to replace the "in the case language" in line 5.

The decision was made to turn it back over to the subcommittee to create a draft that incorporates the consensus items.

3. URE Rule 106 Public Comments

We received some public comments back on Rule 106. The group discussed one particular comment which came from the AG's office. The group discussed whether the proposed changes to the rule already address the concerns raised in the public comments.

Mr. Hogle asked the group if, based on the public comment received, we should revisit the proposed changes to the rule. Matthew Hansen, Tony Graf, Ryan McBride, and Judge Leavitt said that the proposed changes should be revisited. Mr. Billings stated that he was not in favor of altering any of the proposed language but brought up that their concerns could be addressed in an advisory committee note. Specfifically, Mr. Billings said that the Federal Advisory committee note would be sufficient to address the concerns.

Mr. Billings moved to strike the current proposed advisory committee note and replace it with the Federal advisory committee note. However, this motion was not seconded, so no vote was taken.

Mr. Hogle then suggested that we send this back up to the Supreme Court justices saying we've considered the public comments, but we've addressed the points satisfactorily and we think nothing ought to change in the rule. Dallas Young motioned for the above course of action and Ms. Sykes seconded. Mr. Hansen, Mr. Graf, and Mr. McBride voted nay on the motion. Judge Vernice Trease abstained from the vote. Judge Leavitt decided to support the motion. The motion carried with a majority of the group in favor.

4. URE 702

Professor Brown briefed the group on the developments relating to URE 702. The Rule 702 subcommittee was asked to look at the change to Federal Rule 702 and report on whether we should recommend making conforming changes to Utah Rule 702.

Professor Brown presented a memo from the Rule 702 subcommittee recommending that the rule not be amended to follow amendments made to FRE 702. The Committee agreed and voted to present the substance of the memo to the Supreme Court in support of making no changes to Rule 702. Professor Brown will present an amended memo with supporting citations at the June meeting.

5. HJR013

Jace Willard told the group about a new legislative amendment. Mr. Willard informed the group

that, under HJR013, the legislature has amended Rule 1102 of the Utah Rules of Evidence. This legislative amendment was made without consulting the Rules of Evidence Committee. There has been no direction given from the Supreme Court about what they would like this committee to do with this.

The group discussed the implications of the legislative amendment and whether this committee should, on its own accord, suggest any changes.

Specifically, the group discussed whether this committee should add an advisory committee note that says that "this amendment was passed by joint resolution of the legislature." Mr. Willard will research whether such statements have been included in advisory committee notes to other rules modified by the Legislature.

For the time being, this discussion was tabled for the next meeting.

ADJOURN:

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be June 11, at 5:15 pm, via Webex video conferencing.

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TAB 2

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.

~~***Effective: 11/1/2023***~~

At a party's request, or on its own motion, the court must order witnesses excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel or a pro se party~~in the case. 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) one~~an~~ 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) 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.

2024 Advisory Committee Note. The language of this rule has been amended to clarify from where witnesses are excluded when the exclusionary rule is invoked, and that the court may prohibit an excluded witness from learning about the testimony of other witnesses through any means. The amendments do not affect the inherent powers of the court to enforce orders made under this rule, nor do the amendments intend to limit counsel's or a pro se party's lawful and ethical ability to prepare witnesses.

Rule 615. Excluding Witnesses.

~~*Effective: 11/1/2023*~~

(A) At a party's request, the court must order witnesses excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. ~~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 officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

~~(c)~~**(3)** a 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) An order under (A) operates only to exclude witnesses from the courtroom or from a place where they can see or hear the proceedings. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom or from a place where they can see or hear the proceedings; ~~and~~

(2) prohibit excluded witnesses from accessing trial testimony; ~~and~~

~~**(3)** enforce any violations of any order under (A)~~

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.

2024 Advisory Committee Note. The language of this rule has been amended to clarify from where witnesses are excluded when the exclusionary rule is invoked, and that the court may prohibit an excluded witness from learning about the testimony of other witnesses through any means. The amendments do not affect the inherent powers of the court to enforce orders made under this rule, nor do the amendments intend to limit counsel's or a pro se party's lawful and ethical ability to prepare witnesses.

TAB 3

S.J. QUINNEY COLLEGE OF LAW
THE UNIVERSITY OF UTAH

TENEILLE R. BROWN
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Memorandum to the Members of the Utah Supreme Court
From the Utah Rules of Evidence Subcommittee on URE 702

Re: *Recommendation on Conforming Utah Rule of Evidence 702 to Recent Amendments to Federal Rule of Evidence 702*

Executive Summary:

The URE Subcommittee on URE 702, consisting of Ryan McBride, Edward Havas, Dallas Young, and Teneille Brown, met on March 14, 2024 to discuss whether Utah should adopt changes to Utah Rule of Evidence 702 corresponding to the recent amendments to Federal Rule of Evidence 702. After careful consideration, the subcommittee recommends that Utah not update its Rule 702 to conform to the amended Federal Rule. In this memo, we lay out our reasons for this recommendation.

The 2023 Revisions to Federal Rule of Evidence 702 and their Justifications:

1. FRE 702 was amended effective December 1, 2023, to address perceived "widespread" misapplication by courts, as many commenting on the proposed revisions felt some district courts resisted the judiciary's gatekeeping role and applied more lenient standards than the Rule demands.

2. The amendment clarifies that the *proponent* of expert testimony has the burden of demonstrating to the court "that it is more likely than not" (preponderance of the evidence standard) that the rule's three admissibility requirements (Rule 702(b)-(d)) are met.

3. The amendment also attempted to address concerns raised by scientific advisory groups that unreliable forensic testimony was being admitted. Rule 702(d) now states that the expert's opinion must reflect "a reliable application" of their principles and methods, requiring courts to strike testimony if an expert overstates an opinion at trial, or does not stay within the bounds of what can be concluded based on the application to these facts.

4. Courts must perform a Rule 702 analysis before admitting expert testimony and make explicit findings on the record as to the challenged preconditions to admissibility.

Utah Intentionally Deviated from FRE 702:

Utah courts have acknowledged similarities between the Utah and Federal *Daubert* standard [2] for admitting expert testimony, as outlined in cases such as State v. Rimmasch,[3] and Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.[4] However, there are notable differences:

1. Utah Rule 702 provides a more detailed and rigorous outline for admissibility determinations compared to the flexible approach in Daubert.[5]

2. Utah's Rule 702(b) and (c) require only that the proponent establish a "threshold showing" of reliability, which is a less stringent standard than the federal rule.[6]

3. Utah courts may consider federal case law when interpreting Rule 702, but they must be mindful of the differences between the Utah and Federal rules.[7]

Rationale for Not Conforming Utah's 702 with the FRE:

1. Given that Utah Rule 702 was intentionally drafted to differ from Federal Rule 702, absent compelling reasons, Utah's rule should be allowed to develop independently.

2. Utah's current Rule 702 is preferable in some ways, as it avoids lengthy and expensive *Daubert* hearings, is generally workable, and is adequately interpreted by existing Utah case law.

3. It is already clear from Utah case law that the proponent carries the burden of demonstrating that the 702 criteria are met.

4. Adopting a "preponderance of the evidence" standard would increase the required threshold for proof, and would therefore increase costs and potentially bar valid claims. Because Utah's rule does not appear to be causing problems for practitioners, increasing the burden of proof would require soliciting broader input from a diverse set of practitioners and considering the impacts on plaintiff's access to the courts.

5. The subcommittee felt that Utah's Rule 702 effectively balances the judge's gatekeeping role with the admission of reliable expert testimony, without being overly restrictive.[1]

6. Finally, the subcommittee thinks that Utah Rule 702(b)(3) adequately addresses the Federal Rule amendment clarifying the application of principles and methods to the facts of the case.

Conclusion:

The subcommittee therefore does not recommend conforming changes to Utah Rule of Evidence 702. If the application of Utah's rule becomes more unwieldy than it currently is, a comprehensive survey of affected attorneys and stakeholders should be conducted to inform any potential amendments.

Respectfully submitted,

Teneille R. Brown

On behalf of the URE Subcommittee on FRE 702

[1] Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr., 2010 UT 59, ¶ 12, 242 P.3d 762, 766.
[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[3] State v. Rimmasch, 775 P.2d 388 (Utah 1989).
[4] Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr., 2010 UT 59, 242 P.3d 762.
[5] State v. Crosby, 927 P.2d 638, 641–42 (Utah 1996).
[6] Eskelson, 2010 UT 59, ¶ 11, 242 P.3d at 766.
[7] Gunn Hill Dairy Properties, LLC v. Los Angeles Dep't of Water & Power, 2012 UT App 20, ¶¶ 26-29, 269 P.3d 980, 989–90.