Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Nicole Salazar-Hall, Chair

Location: WebEx Meeting

Date: October 8, 2024

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

Action: Welcome and approve June 11, 2024 Minutes	Tab 1	Nicole Salazar-Hall
Change of Leadership and Introductions for New Committee Members (Clint Heiner, Scott Lythgoe, and Andy Morelli)		Nicole Salazar-Hall
Update: URE 106 (back from Supreme Court for additional work)	Tab 2	Nicole Salazar-Hall
Review Public Comments: URE 615	Tab 3	Sarah Carlquist
Update: URE 702 (Supreme Court agreed with recommendation to take no action)		Nicole Salazar-Hall
Update: H.J.R. 13 and URE 1102 committee note (with past example from URE 417)	Tab 4	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 – Back from Supreme Court
URE 404 - Awaiting advice from Supreme Court
URE 507.1 - Awaiting DoH guidelines
URE 615 – Back from public comment
URE 702 – No action
URE 1102 – Committee Note in draft

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
June 11th, 2024
5:15 p.m.-7:00 p.m.
Via Webex

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

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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, Tony Graf moved for approval of the April meeting minutes. Matt Hansen seconded. The motion carried.

2. URE Rule 106 Proposed Amendments Going Back to Supreme Court After Public Comment

Mr. Hogle noted that at the April 11th meeting, the group discussed the public comments on URE 106 received from the Attorney General's Office. The group voted "no" on reconsidering the Rule. The Proposed Amendments to URE 106 will go to the Supreme Court on June 26th.

3. URE Rule 615 Redlines

Sarah Carlquist provided an update on the proposed changes to URE 615. The committee had come down on two different versions and the main concerns were how other states are enforcing this and what it looks like if someone violates the exclusionary rule. Ms. Carlquist

didn't find any other state rules that had a remedy for violating the rule. She added that usually this would be an issue that a party could raise on appeal, but it generally comes down to the court's inherent powers of contempt.

Ms. Carlquist then posed to the group that it should decide which version of the rule it likes better.

Ms. Carlquist expressed her preference for the version that doesn't track the federal rule.

Judge Leavitt asked about the need for the change. Ms. Carlquist clarified that the federal rule recently changed and that the increase in remote/online hearings may have been a driving force behind the federal rule change.

Judge Leavitt suggested adding language to state that "this order might include accessing trial testimony." Mr. Hogle added that this change might be better in the rules of judicial administration.

The group then discussed the second version of the rule. The second version tracks the federal version. Mr. Hogle expressed that our default should be to go with the version that tracks the federal rule and suggested going with the federal version unless there are compelling reasons not to.

The group then discussed final tweaks to the federal version. The group agreed that there were edits that should be made to the federal version and adopted by this group.

Ms. Carlquist moved to send this modified version of the federal rule to the Supreme Court. Judge Williams seconded the motion. The group unanimously approved.

The group then turned to the comment to the rule. The group agreed that the comment is the same in both proposed versions. Judge Leavitt moved to approve the note. Ms. Carlquist seconded. That motion carried unanimously as well.

4. URE 702 Updated Memo

Tenielle Brown was unable to attend this meeting. Ed Haves presented Professor Brown's URE 702 memorandum on behalf of the subcommittee. The subcommittee unanimously agreed that Rule 702 was significantly different from the federal rule but that there was also no good reason to change it to align with the federal rule. No one identified any issues that would merit changes.

Mr. Hogle suggested some very small changes, but largely agreed with the subcommittee.

Mr. Haves clarified that the subcommittee members had no personal experience or comments that Rule 702 was difficult to administer, etc. Mr. Haves suggested that the group could survey more practitioners to gain more insight on if any changes are warranted.

For the time being, the group agreed to send the memorandum up to the Supreme Court.

Rachel Sykes moved to approve the memorandum. Nicole Salazar-Hall seconded. The motion carried unanimously. The memorandum will go to the Utah Supreme Court.

5. H.J.R. 13 and URE 1102 Committee Note

The next item for discussion was Resolution 13 as it relates to URE 1102. Mr. Hogle refreshed the group about the discussion during the April meeting regarding the legislature's amendment to 1102, including whether they needed to put anything in the committee note about the origins of this amendment.

Jace Willard researched how we addressed these issues in the past. Mr. Willard noted that Rule 409 includes a legislative note regarding a legislative amendment but he did not find any similar committee notes mentioning legislative amendments. There is no precedent for this.

No one in the group thought otherwise. This concludes the group's exploration of Resolution 13.

6. Acknowledgement and send off to Adam Alba, Matt Hansen, Ed Haves, Chris Hogle, Angelica Juarez, and Judge Trease

Ms. Salazar-Hall bid farewell to some departing members including Adam Alba, Matt Hansen, Ed Haves, Chris Hogle, Angelica Juarez, and Judge Trease. Ms. Salazar-Hall will become Chair of the Committee. Ms. Carlquist will become second chair. Mr. Hogle, a member since 2011, expressed his gratitude and appreciation toward the group. Mr. Haves, another long-time member, also expressed his appreciation toward the group.

ADJOURN:

With no further items to discuss, Mr. Hogle adjourned the meeting. The next meeting will be October 8, at 5:15 pm, via Webex video conferencing.

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TAB 2

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.

Commented [JW1]: Justice Hagen would like the Committee to consider whether additional language is needed in the rule to clarify the meaning of this phrase (e.g., "that in fairness ought to be considered at the same time to avoid potentially misleading the jury as to the meaning of the statement first introduced"). She observed that the meaning of the phrase is clarified in the advisory committee notes to FRE 106, but pointed out that the policy in Utah is to clarify a rule's meaning in the rule language itself rather than in the notes.

She also questioned how the rule is intended to operate, expressing doubt that "fairness" requires that a defendant's explanation for admitted conduct, such as "I shot him because he was about to shoot me," should be admitted just because the prosecution introduces evidence of the admission "I shot him"). She says there's nothing misleading about introducing the admission in that example, and that the defense should therefore not be able to use Rule 106 to admit the hearsay explanation, but should rather present that defense through the defendant's testimony, and subject to cross-examination.

She welcomes feedback on her understanding of the rule.

TAB 3

Rule 615. Excluding Witnesses; 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 or from a place where they can see or hear the proceedings. ~~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) 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)~~(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. The court may also, by order:

(1) prohibit disclosure of trial testimony to excluded witnesses; and

(2) prohibit excluded witnesses from accessing trial testimony.

Public Comments

Stephen Howard
July 17, 2024 at 2:35 pm
Subsection (a) adds language that is missing from the FRE 615. Expanding the scope of the rule to include "a place where they can see or hear the proceedings" makes sense given that it is not uncommon to see evidentiary hearings conducted in Utah courts via a video conference systems.

Subsection (b) contains substantive additions to the rule, but is also in line with the existing practice of many Utah trial judges who enter orders that excluded witnesses "are not to discuss their testimony" with other witnesses, or other orders with similar intent.

However, subsection (b) needs to be understood and interpretted to be consistent with constitutional principles of due process and the right to the effective assistance of counsel in criminal cases.

New information or unexpected testimony that is presented at trial may require the attorney to discuss such testimony with potential rebuttal witnesses or expert witnesses. It is important to note that subsection (a) is mandatory ("the court must order witnesses excluded…"), whereas subsection (b) is discretionary ("[t]he court may also, by order…").

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. **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.	

TAB 4

Rule 1102. Reliable Hearsay in Criminal Preliminary Examinations.

Effective: 2/29/2024

(a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.

(b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only, reliable hearsay includes:

(1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(3) evidence establishing the foundation for or the authenticity of any exhibit;

(4) scientific, laboratory, or forensic reports and records;

(5) medical and autopsy reports and records;

(6) a statement of a non-testifying peace officer to a testifying peace officer;

(7) a statement made by a child victim of physical abuse or a sexual offense which is recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;

(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(A) under oath or affirmation; or

(B) pursuant to a notification to the declarant that a false statement made therein is punishable; and

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

(d)(1) Except as provided in paragraph (d)(2), a prosecutor, or any staff for the office of the prosecutor, may transcribe a declarant's statement verbatim or assist a declarant in drafting a statement.

(2) A prosecutor, or any staff for the office of the prosecutor, may not draft a statement for a declarant, or tamper with a witness in violation of Utah Code section 76-8-508.

(e) A court may not admit reliable hearsay evidence in accordance with this rule unless there is testimony presented at the preliminary examination as described in Rule 7B(d)(2) of the Utah Rules of Criminal Procedure. The prosecutor is not required to introduce evidence that corroborates the substance of a statement submitted under paragraph (b)(8) for the statement to be admissible at the preliminary examination. The prosecutor may, but is not required to, call the declarant of a statement submitted under paragraph (b)(8) at the preliminary examination. This paragraph (e) does not otherwise limit a defendant's right to call witnesses under Rule 7B of the Utah Rules of Criminal Procedure.

Amended effective Feb. 29, 2024, pursuant to 2024 UT H.J.R. 13 "Joint Resolution Amending Court Rules of Procedure and Evidence Regarding Preliminary Hearings."