Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Nicole Salazar-Hall, Chair

Location: WebEx Meeting

Date: February 11, 2025

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

Action: Welcome and approve January 14, 2025 Minutes	Tab 1	Nicole Salazar-Hall
Welcome to Judge Westmoreland and Committee member introductions		Nicole Salazar-Hall
Update: Supreme Court Conference re URE 106, 613, and 1102		Nicole Salazar-Hall
Discussion: Informal poll of judges re need for AI-related rules or amendments	Tab 2	Jace Willard
Discussion: URE 404 committee note redline (*Shickles* factors)	Tab 3	Nicole Salazar-Hall
Discussion: URE 107 and 1006 redlines and Subcommittee Report (illustrative aids)	Tab 4	Prof. Teneille Brown
Discussion: URE 702 redline and Subcommittee Report (blind experts)	Tab 5	Nicole Salazar-Hall
Discussion: URE 804 Subcommittee Report (statement against interest)		Adam Merrill

Committee Web Page

Meeting Schedule:

January 14, 2025
February 11, 2025
March 11, 2025
April 8, 2025
May 13, 2025
June 10, 2025
October 14, 2025
November 11, 2025

Rule Status:

URE 106 – Going up to Supreme Court
URE 107 – In draft
URE 404 – In draft
URE 408 – In draft with subcommittee
URE 613 – Going up to Supreme Court
URE 702 – In draft
URE 707 – In draft (on hold pending FRE AI-amendments)
URE 801 – Awaiting further federal caselaw
URE 804 – In draft with subcommittee
URE 901 – In draft (on hold pending FRE AI-amendments)
URE 1006 – In draft
URE 1102 – Going up to Supreme Court

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Draft
January 14th, 2025
5:15 p.m.-6:45 p.m.
Via Webex

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Nicole Salazar-Hall Sarah Carlquist David Billings Teneille Brown Tony Graf Clint Heiner Hon. Linda Jones Hon. Michael Leavitt Scott Lythgoe Ryan McBride Hon. Richard McKelvie Adam Merrill Benjamin Miller Andres Morelli Rachel Sykes Dallas Young	Adam Merrill Hon. David Williams		Jace Willard

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1. Welcome, Approval of Minutes, and Introductions to New Member

Ms. Salazar-Hall welcomed everyone to the meeting. Judge Leavitt moved for approval of the November meeting minutes. Mr. Billings seconded. The motion carried.

2. Review Public Comments re URE 1102

A draft amendment to URE 1102 adding a reference to the legislation amending that rule last year was published for public comment. No comments were received. Judge McKelvie moved that the Committee seek Supreme Court approval for the draft amendment to be made final. Ms. Sykes seconded. The motion carried.

3. URE 106 Subcommittee Report

Ms. Carlquist summarized the report prepared by the URE 106 Subcommittee in response to

questions raised by Justice Hagen about the proposed amendments to that rule, which were published for public comment last year. The report reviews the work of the FRE advisory committee on the corresponding federal rule and concludes that Utah should follow the federal rule amendments here and add a committee note so indicating. Ms. Carlquist moved that the report and revised rule be approved for submission to the Supreme Court with a request that the draft amendments be made final. Judge Leavitt seconded. The motion carried.

4. URE 408 Subcommittee Formed

A recent Court of Appeals opinion, Small v. Small, 2024 UT App 173, ¶ 13 n.2, noted a difference between FRE 408 and the Utah rule. There does appear to be conflicting caselaw on the subject from the appellate courts: compare Anderson v. Thompson, 2008 UT App 3, ¶¶ 29-32, 176 P.3d 464 (evidence of settlement negotiations could not be used for impeachment purposes, although Utah has not adopted the federal rule's express prohibition against such use) and Matter of Est. of Osguthorpe, 2021 UT 23, ¶ 143 n.40, 491 P.3d 894 (settlement negotiations could be used for impeachment purposes; noting that Utah has not adopted prohibition in federal rule) (not mentioning but impliedly overruling Anderson). Ms. Carlquist noted that amending URE 408(a)(2) to correspond with the federal rule may result in conflict with URE 410. A subcommittee was formed to look at possible amendments. Subcommittee members include Mr. Young, Ms. Carlquist, Mr. Billings, and Ms. Sykes.

5. Artificial Intelligence and URE 702, 707, and 901 Discussed

The Committee discussed a recent report regarding possible amendments to FRE 702, 707, and/or 901 to address issues arising from the proliferation of deepfakes and generative artificial intelligence. The Committee discussed options for similar amendments to the corresponding Utah rules. Several members expressed the view that it may be premature to amend the rules at this point and that it would be preferable to wait and see if and how the federal rules are amended to address these issues. But several members also supported taking an informal poll of judges regarding their experience and the need for related URE amendments. Mr. Willard will consult with Keisa Williams to see about conducting such a poll. Committee members can also visit with other attorneys on this issue. The Committee will revisit the issue in the next few months.

6. URE 702 Subcommittee Formed

Judge Leavitt suggested that the text of URE 702 should be amended to comport with a committee note and case law recognizing the propriety of “blind experts” giving testimony to educate the factfinder regarding general principles relevant to the case. Mr. Young indicated that this is a hot-button issue but that he opposes the practice as essentially telling the factfinder whom to believe. Ms. Salazar-Hall said that in her experience such testimony can be very helpful in domestic cases, where the judge is the factfinder and understands the law. Professor Brown added that the practice is very useful to provide “framework” evidence to help people unfamiliar with a given group to understand how members of the group tend to behave. She said the evidence comes in for both sides and is conditionally relevant, with the jury

deciding whether a party is a member of the group at issue. She acknowledged that problems arise where this type of evidence is carelessly allowed, such as in cases where police with insufficient familiarity with a given group are permitted to testify about that group's common behavior. Following further discussion regarding the need for an amendment, a subcommittee was formed to look at the issue more closely. Members of the subcommittee include Ms. Salazar-Hall, Mr. Heiner, Mr. Morelli, Mr. Miller, and Mr. Lythgoe.

7. URE 613 Update

Draft amendments to URE 613 that the Committee approved in November will be going up to the Supreme Court with URE 1102 and 106.

8. URE 613 Farewell to Judge Leavitt

Judge Leavitt, who will complete his first term of service on the Committee next month, was recently appointed to the Judicial Council and will thus be stepping down from the Committee. He has greatly enjoyed serving on the Committee and will miss it. Ms. Salazar-Hall and other members of the Committee likewise expressed appreciation for his service and bid him a fond farewell.

ADJOURN:

With no further items to discuss, Ms. Salazar-Hall adjourned the meeting. The next meeting will be February 11, 2025, at 5:15 pm, via Webex Webinar video conferencing.

TAB 2

DRAFT Informal Poll of Board of [Appellate/District/Juvenile/Justice] Court Judges re Need for Amendments to Address Artificial Intelligence Developments

Dear Board of [Appellate/District/Juvenile/Justice] Court Judges:

In light of recent developments in generative artificial intelligence and the proliferation of "deepfakes" (AI-created or modified audio or video falsely representing a person's speech or conduct), the Utah Supreme Court's Advisory Committee on the Rules of Evidence invites feedback from the Board of [Appellate/District/Juvenile/Justice] Court Judges regarding your experience and perspective regarding these developments. Specifically:

- Have you as judges encountered problems such as efforts to admit deepfakes into evidence, or allegations of deepfakery from the opponent of any given evidence, that could not easily be addressed by the existing rules of evidence as to authentication?

- Do you think the rise of deepfakes would warrant new treatment in the rules?

- Utah's evidence rules are modeled after the federal rules. Are you comfortable if, prior to pursuing AI-related amendments to Utah's rules, the Committee waits to see if and how the federal rules of evidence are amended to address this challenge?

Thank you in advance for any thoughts or feedback you may offer relating to this issue.

Respectfully,

Nicole Salazar-Hall
Chair, Advisory Committee on the Utah Rules of Evidence

TAB 3

The Court of Appeals recently "encourage[d]" the Committee to revise the committee note to Rule 404 as follows:

> Indeed, in State v. Thornton, 2017 UT 9, 391 P.3d 1016, our supreme court repudiated the prior requirement of a "scrupulous examination" of the Shickles factors. Id. ¶ 53. In State v. Lowther, 2017 UT 34, 398 P.3d 1032, abrogated on other grounds by State v. Green, 2023 UT 10, 532 P.3d 930, the court held that a mechanical application of these factors is error. Id. ¶ 45. And at least one member of this court has noted that in the rule 404(c) context, it makes little sense to apply factors developed specifically to guard against propensity considerations to a rule specifically developed to invite consideration of propensity evidence. State v. Fredrick, 2019 UT App 152, ¶ 53, 450 P.3d 1154 (Mortensen, J., concurring). Although it has been suggested that the advisory committee note's direction that trial courts "should ... consider" the Shickles factors is wrong and a misdirection, id., the note lives on to this day, see Utah R. Evid. 404 original advisory committee's note. We encourage the advisory committee to remedy this error and redraft its note to be consistent with present-day law.

State v. Estes, 2025 UT App 10, ¶ 20 n.3.

Rule 404. Character Evidence; Crimes or Other Acts.

Effective: ~~**4/1/2008**~~

(a) Character Evidence.

(a)(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a)(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a)(2)(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a)(2)(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a)(2)(B)(i) offer evidence to rebut it; and

(a)(2)(B)(ii) offer evidence of the defendant's same trait; and

(a)(2)(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a)(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b)(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b)(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(b)(2)(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(b)(2)(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c)(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(c)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c)(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of 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.

Original Advisory Committee Note. Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. ~~The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).~~

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

TAB 4

Rule 107. Illustrative Aids.

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not substantive evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When ~~practicable~~reasonable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

2025~~4~~ Advisory Committee Note. This rule was developed to conform to the new Federal Rule 107, which provides guidance on the use of illustrative aids. Illustrative aids are sometimes referred to as "pedagogical evidence" in Utah case law.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test for the use of illustrative aids. Historically, courts have used the term "demonstrative evidence" to refer to both admissible, substantive evidence and inadmissible, non-substantive evidence. For example, in *State v. Perea*, the term "demonstrative evidence" is defined as evidence "that is meant only to illustrate a witness's testimony" and "carries no independent probative value in and of itself, but aids a jury in understanding difficult factual issues." *State v. Perea*, 2013 UT 68, ¶ 45, 322 P.3d 624. With the passage of URE 107, the evidence at issue in *Perea* should now be referred to as an "illustrative aid" and not "demonstrative evidence." The reason for this change in terminology is that illustrative aids are not evidence. Unlike demonstrative evidence, illustrative aids are not subject to the hearsay rules, authentication requirements, and other evidentiary screens.

Illustrative aids are not evidence because they are not offered to prove a disputed fact; however, they can be critically important in helping the trier of fact understand witness testimony. Examples of illustrative aids may include drawings, timelines, photos, diagrams, anatomical models, video depictions, charts, graphs, or computer simulations that are used for the narrow purpose of educating the jury on background issues that are not disputed. Given that some illustrative aids could also be used substantively to prove a disputed fact, the use of illustrative aids requires regulation. Therefore, this rule requires the court to balance the value of the illustrative aid against its potential dangers. Potential dangers include appearing to be substantive evidence of a disputed event, oversimplifying matters, causing undue prejudice, or misleading or confusing the jury. If the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument. While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is not reasonable to do so under the circumstances (e.g., it is a piece of jewelry or expensive anatomical model).~~This rule is the federal rule, verbatim.~~

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

Federal Rules of Evidence Rule 107, 28 U.S.C.A.

Rule 107. Illustrative Aids

Effective: April 2, 2024
Currentness

<[New rule effective December 1, 2024, absent contrary Congressional action.]>

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

CREDIT(S)
(Added Apr. 2, 2024, eff. Dec. 1, 2024, absent contrary Congressional action.)

ADVISORY COMMITTEE NOTES
<[Effective December 1, 2024, absent contrary Congressional action.]>

2024 Amendments

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but

rather to assist the trier of fact in understanding evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room during deliberations and use it to help determine the disputed facts.

The second category--the category covered by this rule--is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"--that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 107.

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence or argument. *Cf.* Fed. R. Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403--one particular problem being that the illustrative aid might appear to be substantive evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should prohibit the use of--or order the modification of--the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. *Cf.* Rule 105.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations.

If the court does allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

Fed. Rules Evid. Rule 107, 28 U.S.C.A., FRE Rule 107
Including Amendments Received Through 10-1-24

Rule 1006. Summaries to Prove Content.

~~The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.~~

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Effective: --/--/----

2024 Advisory Committee Note. The language of this rule has been amended in conformity with recent amendments to the federal rule.

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 is comparable to the substance of Rule 70(f), Utah Rules of Evidence (1971).

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United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article X. Contents of Writings, Recordings, and Photographs

Federal Rules of Evidence Rule 1006, 28 U.S.C.A.

Rule 1006. Summaries to Prove Content

Currentness

<[Text of rule effective until December 1, 2024, absent contrary Congressional action.]>

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

<[Text of rule effective December 1, 2024, absent contrary Congressional action.]>

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1946; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 2, 2024, eff. Dec. 1, 2024, absent contrary Congressional action.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore § 1230.

2011 Amendments

The language of Rule 1006 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, 2024, absent contrary Congressional action.]>

2024 Amendments

Rule 1006 has been amended to correct misperceptions about the operation of the rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings--or a portion of them--*have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, however, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has discretion in determining the reasonableness of the production in each case but must ensure that all parties have a fair opportunity to evaluate the summary. *Cf.* Fed. R. Evid. 404(b)(3) and 807(b).

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court," the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous admissible information offered to prove a fact, and illustrations offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 107.

Notes of Decisions (237)

Fed. Rules Evid. Rule 1006, 28 U.S.C.A., FRE Rule 1006
Including Amendments Received Through 10-1-24

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TAB 5

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 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, or if not applied to the specific facts of the case, are intended to educate the factfinder about ~~general~~ principles relevant to the case.

(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.

2025 Advisory Committee Note. The language of subparagraph (b)(3) has been amended to make express allowance for the possibility of so-called "blind experts," who are already permitted under existing Utah practice and caselaw. See, e.g., State v. Clopten, 2009 UT 84, ¶ 36, 223 P.3d 1103. These "blind experts" are subject to the same threshold showing outlined in parts (b), (b)(1), and (b)(2).

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.

Feedback and Comments to Rule 702 redline given by members of the UAJ (1/28/25):

- From Tyler Y.: “My initial reaction is that I love it! This might allow more leeway for experts to explain Rules of the Road stuff and/or Reptile ideas about community safety.”

- From John M.: “From the medical malpractice perspective I am seeing defense experts offer opinions generally stating opinions as to why Defendant's decisions would/could be within the standard of care when there is no evidence that: (1) that the defendant even considered or thought about the reasons or justifications being offered; or (2) the circumstances or facts that support the opinion occurred in my case. I like that the rule has a requirement that the opinions must be tied to the facts of the case. Otherwise, we run into defense experts and counsel throwing out general statements on the standard of care or practice that may or may not be true, but are not supported by the facts of the case. It runs the risk of juror latching on to or liking one of the statements and then using it as a justification for the negligent acts of a defendant, even though there is no evidence or insufficient evidence that the circumstances that make the "general principles" being discussed existed.

  In my most recent case for which I am preparing a motion in limine, I have a defense expert explaining a weighing of risks and benefits of giving an antibiotic and why it would be ok not to get a culture when the defendant doctor did not consider any of the reasons, risks, or justification the expert is now offering in hindsight. Hypotheticals of circumstances in which the defendants actions may not have been negligent are not helpful if there is no facts to suggest those circumstances existed. They run the risk that the jury will assume the doctor had reasons for his action or inaction that do not exist.

  I read the case paragraph and think that this language is too broad and runs the risk of what I describe above. In Clopten, they at least say he needs to talk about factors "found in the case" that are understood to contribute to eyewitness inaccuracy. I think no rule change is required and at worst could be resolved with a footnote and citation to this case noting in some circumstances it is "acceptable for an eyewitness expert to "give a dissertation or exposition" of factors or principles if they are "found in the case..."

  Let me know if I am not making any sense, but I think this additional language would be harmful. There must be some decent connection to the facts or it opens the door for confusion. I fear many judges would default to letting expert opinions in so long as they were generally "educational" for the jury if this language were accepted.”

- From John L.: “I agree with John [M.] that this proposed language is problematic. They can accomplish the purported purpose to “educate the factfinder about general principles relevant to the case”, within the current language if, and only if it is:

(b)(1) reliable,
(b)(2) based upon sufficient facts or data, and
(b)(3) has been reliably applied to the facts

To allow them to pontificate about alternative theories that aren't supported by the actual facts of the case would invite error, confuse the issues, mislead the jury… (URE 403)

- From Rick N.:

  But I will point out that there are competing views here. I don't practice MedMal so I can't personally speak to how this hurts those cases (although reading below, I get it), but I can say that in toxic exposure cases (like the asbestos cases I handle), we face more attacks on our experts than we can lob at those of the defendants - this rule may very well benefit my cases but I can readily see how others would not feel the same. As an example how this could benefit us in a toxic tort case: we will use "general" experts to explain the historic state of the art of the development of knowledge, the "general causation" principles involving the substance, etc. - done by experts who do not opine on the specific facts of the case (and often times don't want to know about the specifics) and they would benefit from a rule that allows them to testify per se versus having to explain how they are relevant on other grounds. For us this is a goose/gander conundrum - defendants in my cases often do the same with experts and while I'd like to keep them from doing it to me, that pesky burden of proof always means defendants only "have" to do it after I've been allowed to - and they fight to prevent my "general" witnesses from testifying at the outset to keep from having to call their experts to rebut mine. We generally win the fight for our experts to testify but this rule change could take the fight out altogether.

  Long email - sorry all - I'll end with: I have a hard time not liking this rule change were it to occur but I'm also fine with the status quo remaining in place which I've lived and done well with thus far.

- From Ryan S.:

  In a med mal setting, this seems like a wide open door for defense counsel and their experts to end-run around last year's removal of CV324 "Use of Alternative Treatment Methods" from MUJI 2nd. *See also Turner v. Univ of Utah Hosp. & Clinics*, 2013 UT 52, 310 P.3d 1212.