Utah Supreme Court
Rules of Evidence Committee

Meeting Agenda

Nicole Salazar-Hall, Chair

Location: WebEx Meeting

Date: April 8, 2025

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

Action: Welcome and approve February 11, 2025 Minutes	Tab 1	Nicole Salazar-Hall
Welcome and Introductions for New Member: Third District Court Judge Coral Sanchez		Nicole Salazar-Hall
AI Poll Update: approved for Board of Juvenile Court Judges and Board of District Court Judges		Nicole Salazar-Hall
Courts Website Historical Rules Feature Update: under IT priorities review		Jace Willard
Discussion: URE 613 back from public comment (none received)		Nicole Salazar-Hall
Discussion: SJR4 amendment of URCP 26 and URE 510	Tab 2	Nicole Salazar-Hall
Discussion: URE 408 redline (use of settlement discussions for impeachment, etc.)	Tab 3	Sarah Carlquist
Discussion: URE 702 draft letter with redline (blind experts)	Tab 4	Nicole Salazar-Hall

Discussion: URE 804 Subcommittee Report (statement against interest)	Tab 5	Adam Merrill
Discussion: URE 107 and 1006 Subcommittee Report	Tab 6	Teneille Brown
Discussion: URE 404 (*Shickles* note update options A and B)	Tab 7	Sarah Carlquist

Committee Web Page

Meeting Schedule:
January 14, 2025
February 11, 2025
April 8, 2025
May 13, 2025
June 10, 2025
October 14, 2025
November 11, 2025

Rule Status:
URE 107 – In draft with subcommittee
URE 404 – In draft with subcommittee
URE 408 – In draft with subcommittee
URE 613 – Back from comment
URE 702 – In draft; going to Supreme Court for feedback
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 with subcommittee

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES

February 11th, 2025
5:15 p.m.-7:00 p.m.
Via Webex

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

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

Ms. Salazar-Hall welcomed everyone to the meeting. Mr. Lythgoe moved for approval of the January meeting minutes. Ms. Carlquist seconded. The motion carried. Ms. Salazar-Hall welcomed new member, Second District Juvenile Judge Rick Westmoreland, to the Committee and invited him and all Committee members present to introduce themselves.

2. Update: Supreme Court Conference re URE 106, 613, and 1102

Ms. Salazar-Hall updated the Committee that the Supreme Court recently gave final approval as to the previously published proposed amendments for URE 106 and 1102, and approved for publication proposed amendments to URE 613.

3. Discussion: Informal Poll of Judges re Need for AI-Related Rules or Amendments

Ms. Salazar-Hall reviewed a draft letter to the various boards of judges seeking input on their experiences and perspective regarding the need for AI-related rules or amendments. Mr. Young moved that the letter be approved and sent. Ms. Carlquist seconded. The motion carried. Mr. Willard will send the letter to Professor Brown to be put into Qualtrics format.

4. URE 404 Subcommittee and URE Committee Notes Review Subcommittee Formed

A recent Court of Appeals opinion, State v. Estes, 2025 UT App 10, ¶ 20 n.3., encouraged the Committee to revise the committee note to Rule 404 to correct an outdated statement regarding the so-called "Shickles factors." Ms. Salazar-Hall suggested that the statement could be corrected by striking the final sentence of Rule 404's Original Advisory Committee Note.

Mr. Heiner asserted that the Shickles factors are still relevant to Rule 403. Judge Jones suggested drafting a new note to clarify how the factors are currently to be applied. Others agreed. A Rule 404 Subcommittee was formed and includes the following members: Mr. Heiner, Ms. Carlquist, and Mr. Young.

Additionally, at Mr. Young's suggestion, a separate subcommittee was formed to review all URE committee notes for other outdated statements. The URE Committee Notes Review Subcommittee includes the following members: Mr. Young (chair), Mr. Graf, Mr. Morelli, Prof. Merrill, and Ms. Sykes.

5. Update: URE 107 and 1006 Subcommittee

Professor Brown explained that proposed new Rule 107 arises from the need to distinguish between demonstrative evidence and illustrative aids. The latter is not evidence but may be helpful for understanding admitted evidence. Draft Rule 107 generally follows the new federal rule 107, but the subcommittee recommended that the word "reasonable" be substituted for the federal rule's "practicable" in subparagraph (c) as to when "an illustrative aid used at trial must be entered into the record." The subcommittee has also drafted a new committee note for Rule 107.

Mr. Young disagreed with the proposed subparagraph (c) alteration, saying that "reasonable" is too discretionary and is inconsistent with the "must" language in the same provision. He maintained that everything that is shown to a jury at trial should be available for review on appeal. Ms. Sykes said that shouldn't always be the case, using the example of an expensive model human brain that she would not want to have kept in an evidence closet for years pending an appeal. Mr. Miller added that it might suffice to enter a photograph of the aid into the record. Mr. Lythgoe viewed "reasonable" and "practicable" as essentially synonymous. Ms. Carlquist referenced the definition of the record on appeal from Utah R. App. P. 11(a), noting that it doesn't include everything shown to a jury, and that an attorney should object if something isn't entered into evidence that should be.

Professor Brown indicated that the subcommittee will give this matter further attention. She anticipates that Rule 107 and Rule 1006 will be ready to return to the Committee for the April agenda.

6. Update: URE 702 Subcommittee

Ms. Salazar-Hall noted the proposed revision of Rule 702(b)(3) to make the text conform to current practice regarding the use of "blind experts." Ms. Sykes said she agreed with certain feedback included in the materials from med-mal attorneys on the UAJ listserv expressing concern regarding the proposed amendments. Judge Jones pointed out that blind experts have been permitted in the Clopten case referenced in the draft committee note as well as State v. Martin, 2017 UT 63, ¶¶ 28-32. Mr. Young expressed doubt that Clopten is supportive of blind experts generally outside the specific context of that case (eyewitness testimony). He also referenced additional authority relevant to that context: Rule 617. Mr. Heiner said Judge Jones and Mr. Young were both right. Ms. Salazar-Hall noted that blind experts are frequently used in domestic cases and Mr. McBride says they are also common in criminal cases. Following further discussion, Mr. Morelli moved that a letter be drafted seeking direction from the Supreme Court as to whether the Justices would like the Committee to pursue this issue further. Ms. Carlquist seconded. The motion carried.

7. Update from URE 804 Subcommittee Postponed

Due to a scheduling conflict, Professor Merrill was unable to attend the full meeting. Accordingly, the Rule 804 Subcommittee determined to report to the Committee in March.

ADJOURN:

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

TAB 2

Enrolled Copy **S.J.R. 4**

Joint Resolution Amending Court Rules on Attorney Confidentiality

2025 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brady Brammer

House Sponsor: Jordan D. Teuscher

LONG TITLE

General Description:

This joint resolution amends court rules regarding attorney confidentiality.

Highlighted Provisions:

This resolution:

- amends Rule 26 of the Utah Rules of Civil Procedure to address the work-product doctrine with regard to a legislative audit; and
- amends Rule 510 of the Utah Rules of Evidence to address the waiver of the attorney-client privilege with regard to a legislative audit.

Other Special Clauses:

This resolution provides a special effective date.

Utah Rules of Civil Procedure Affected:

AMENDS:

Rule 26, Utah Rules of Civil Procedure

Utah Rules of Evidence Affected:

AMENDS:

Rule 510, Utah Rules of Evidence

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 26,** Utah Rules of Civil Procedure is amended to read:

Rule 26 . General provisions governing disclosure of discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing

disclosure and discovery in a practice area.

(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party must, without waiting for a discovery request, serve on the other parties:

(A) the name and, if known, the address and telephone number of:

(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries, and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(E) a copy of all documents to which a party refers in its pleadings.

(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) must be served on the other parties:

(A) by a plaintiff within 14 days after the filing of the first answer to that plaintiff's complaint; and

(B) by a defendant within 42 days after the filing of that defendant's first answer to the complaint.

(3) Exemptions.

(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(ii) governed by Rule 65B or Rule 65C;

(iii) to enforce an arbitration award; or

(iv) for water rights general adjudication under Utah Code Title 73, Chapter 4, Determination of Water Rights.

(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are

subject to discovery under paragraph (b).

(4) Expert testimony.

(A) Disclosure of retained expert testimony. A party must, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) the facts, data, and other information specific to the case that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition must not exceed four hours and the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition. A report must be signed by the expert and must contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert must pay the costs for the report.

(C) Timing for expert discovery.

(i) The party who bears the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the close of fact discovery. Within 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report must be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert must be permitted.

(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph (a)(4)(C)(i) is due, or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within 14 days thereafter, the party opposing the expert

may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report must be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert must be permitted.

(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report must be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert must be permitted. The court may preclude an expert disclosed only as a rebuttal expert from testifying in the case in chief.

(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hours and, unless manifest injustice would result, the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition.

(5) Pretrial disclosures.

(A) A party must, without waiting for a discovery request, serve on the other parties:

(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will

call and witnesses the party may call;

(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition;

(iii) designations of the proposed deposition testimony; and

(iv) a copy of each exhibit, including charts, summaries, and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(B) Disclosure required by paragraph (a)(5)(A) must be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) must also be filed on the date that they are served. At least 14 days before trial, a party must serve any counter designations of deposition testimony and any objections and grounds for the objections to the use of any deposition, witness, or exhibit if the grounds for the objection are apparent before trial. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, other objections not listed are waived unless excused by the court for good cause.

(6) Form of disclosure and discovery production. Rule 34 governs the form in which all documents, data compilations, electronically stored information, tangible things, and evidentiary material should be produced under this Rule.

(b) Discovery scope.

(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below.

(2) Privileged matters.

(A) Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include:

(i) all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in Utah Code Title 78B, Chapter 3, Part 4, Utah Health Care Malpractice Act, for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider; and

(ii) except as provided in paragraph (b)(2)(C), (D), or (E), all communications, materials, and information in any form specifically created for or during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, including

any findings or conclusions from the investigation and any offer of compensation.

(B) Disclosure or use in a medical candor process of any communication, material, or information in any form that contains any information described in paragraph (b)(2)(A)(i) does not waive any privilege or protection against admissibility or discovery of the information under paragraph (b)(2)(A)(i).

(C) Any communication, material, or information in any form that is made or provided in the ordinary course of business, including a medical record or a business record, that is otherwise discoverable or admissible and is not created for or during a medical candor process is not privileged by the use or disclosure of the communication, material, or information during a medical candor process.

(D) (i) Any information that is required to be documented in a patient's medical record under state or federal law is not privileged by the use or disclosure of the information during a medical candor process.

(ii) Information described in paragraph (b)(2)(D)(i) does not include an individual's mental impressions, conclusions, or opinions that are formed outside the course and scope of the patient's care and treatment and are used or disclosed in a medical candor process.

(E) (i) Any communication, material, or information in any form that is provided to an affected party before the affected party's written agreement to participate in a medical candor process is not privileged by the use or disclosure of the communication, material, or information during a medical candor process.

(ii) Any communication, material, or information described in paragraph (b)(2)(E)(i) does not include a written notice described in Utah Code section 78B-3-452.

(F) The terms defined in Utah Code section 78B-3-450 apply to paragraphs (b)(2)(A)(ii), (B), (C), (D), and (E).

(G) Nothing in this paragraph (b)(2) shall prevent a party from raising any other privileges provided by law or rule as to the admissibility or discovery of any communication, information, or material described in paragraph (b)(2)(A), (B), (C), (D), or (E).

(3) Proportionality. Discovery and discovery requests are proportional if:

(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(C) the discovery is consistent with the overall case management and will further the

just, speedy, and inexpensive determination of the case;

(D) the discovery is not unreasonably cumulative or duplicative;

(E) the information cannot be obtained from another source that is more convenient, less burdensome, or less expensive; and

(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(4) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(5) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost must describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(6) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(7) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is: (A) a written statement signed or approved by the person making it[,] ; or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(8) Trial preparation; experts.

(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(6)

protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(6) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(9) Claims of privilege or protection of trial preparation materials.

(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party must make the claim expressly and must describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C) Information disclosed in a legislative audit. If a party is an entity that is subject to an audit by the legislative auditor general under Utah Constitution, Article VI, Section 33, and

information that is privileged or prepared in anticipation of litigation or for trial is disclosed to the legislative auditor general or an arbitrator as described in Utah Code section 36-12-15, the disclosure to the legislative auditor general or the arbitrator does not make the information discoverable or prevent the party from claiming that the information is privileged and prepared in anticipation of litigation or for trial.

(c) Methods, sequence, and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery must not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2. Domestic relations actions are permitted standard discovery as described for Tier 4.

(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs (a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete

			Interrogatories including all discrete subparts			Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210
4	Domestic relations actions	4	10	10	10	90

(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party must:

(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, file a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and, for each party represented by an attorney, a statement that the attorney consulted with the client about the request for extraordinary discovery;

(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, file a request for extraordinary discovery under Rule 37(a)<u>;</u> or

(C) obtain an expanded discovery schedule under Rule 100A.

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(1) A party must make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party must act through one or more officers, directors, managing agents, or other persons, who must make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(3) A party is not excused from making disclosures or responses because the party has

not completed investigating the case, the party challenges the sufficiency of another party's disclosures or responses, or another party has not made disclosures or responses.

(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document, or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery, and objection to a request for discovery must be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party must not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but must file only the certificate of service stating that the disclosure, request for discovery, or response has been served on the other parties and the date of service.

Section 2. **Rule 510,** Utah Rules of Evidence is amended to read:

Rule 510 . Miscellaneous Matters.

(a) Waiver of Privilege.

(1) [~~A~~] Except as provided in paragraph (a)(2) or (a)(3), a person who holds a privilege under these rules waives the privilege if the person or a previous holder of the privilege:

[~~(a)(1)~~] (A) voluntarily discloses or consents to the disclosure of any significant part of the matter or communication[~~,~~] ; or

[~~(a)(2)~~] (B) fails to take reasonable precautions against inadvertent disclosure.

(2) [~~This~~] The privilege is not waived if the disclosure is itself a privileged communication.

(3) If a party is an entity that is subject to an audit by the legislative auditor general under Utah Constitution, Article VI, Section 33, and information that is privileged under Rule 504 is disclosed to the legislative auditor general or an arbitrator as described in Utah Code section 36-12-15, the disclosure to the legislative auditor general or the arbitrator does not

waive the privilege under paragraph (a)(1).

(b) Inadmissibility of Disclosed Information. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or made without opportunity to claim the privilege.

(c) Comment or Inference Not Permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from any claim of privilege.

(d) Claiming Privilege Without the Jury's Knowledge. To the extent practicable, jury cases shall be conducted to allow claims of privilege to be made without the jury's knowledge.

(e) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to a jury instruction that no inference may be drawn from that claim of privilege.

(f) Privilege Against Self-Incrimination in Civil Cases. In a civil case, the provisions of [~~paragraph (c)-(e)~~] paragraphs (c) through (e) do not apply when the privilege against self-incrimination has been invoked.

Section 3. **Effective Date.**

(1) Except as provided in Subsection (2), this resolution takes effect on May 7, 2025.

(2) If S.B. 154, Legislative Audit Amendments, does not pass and become law, this resolution does not take effect.

TAB 3

Rule 408. Compromise Offers and Negotiations.

(a) Prohibited Uses. Evidence of the following is not admissible either to prove or disprove liability for or the validity or amount of a disputed claim:

(a)(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise or attempt to compromise the claim; and

(a)(2) conduct or a statement made in compromise negotiations.

(b) Exceptions.

(b)(1) The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(b)(2) The court is not required to exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

2025 Advisory Committee Note. This rule is no longer the federal rule, verbatim. Unlike the federal rule, Utah's rule does not expressly disallow using conduct or statements described in Subsections (a)(1) and (a)(2) to impeach by a prior inconsistent statement.

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. This rule is the federal rule, verbatim, and is comparable to Rules 52 and 53, Utah Rules of Evidence (1971) but is broader to the extent that it excludes statements made in the course of negotiations.

TAB 4

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
NICOLE SALAZAR-HALL
CHAIR

March 24, 2025

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

Re: URE Amendments to Rule 702 (guidance)

Dear Chief Justice Durrant:

The Rules of Evidence Advisory Committee requests guidance as to certain proposed amendments to Rule 702.

1. Rule 702 – Testimony by Experts.

The Committee has recently considered a proposal to amend the text of Rule 702 to reflect more clearly the current practice regarding so-called "blind experts." As currently written, subparagraph (b) conditions admissibility of expert testimony on "a threshold showing that the principles or methods that are underlying in the testimony" meet certain criteria, including that they "have been reliably applied to the facts." Utah R. Evid. 702(b)(3). Also as presently written, subparagraph (c) provides that this threshold showing "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." *Id*. 702(c). An accompanying committee note recognizes that "[i]t 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." *Id*. 702, Original [2007] Advisory Committee Note. The note further provides that such testimony "will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony." *Id*.

The proposed amendment would alter subdivision (b)(3) to require a showing that the underlying principles "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 principles relevant to the case." The proposal is intended to make the text more clearly reflect the permissibility of the expert testimony explained in the committee note.

In discussing this proposal, the Committee was divided, with some members taking the view that amending the Rule to further address blind expert testimony is unnecessary. Others have urged that if, as this Court has held,[1] expert testimony may be admitted without applying scientific or technical principles to specific facts, that possibility should be reflected in the text rather than only in a committee note.

The Committee is cognizant of the Court's preference to have the law reflected in the body of court rules rather than in the related committee notes. Accordingly, the Committee seeks direction from the Court as to whether the Rule as it presently stands is sufficient as to the admissibility of blind expert testimony, or whether instead the Committee should continue working to address this issue in the text of the Rule.

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

Sincerely,
/s/ Nicole Salazar-Hall

[1] *See State v. Martin*, 2017 UT 63, ¶¶ 28-32, 423 P.3d 1254 (upholding, "based on the arguments and evidence before the district court and before us," admissibility of expert testimony to "explain in general terms the behavioral characteristics of child abuse victims and the reasons they might make multiple or differing disclosures about the abuse they suffered") (citation and internal quotation marks omitted); *State v. Clopten*, 2009 UT 84, ¶¶ 35-36, 223 P.3d 1103 (explaining reliability of eyewitness expert testimony under Rule 702(b) and (c)).

TAB 5

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant is Unavailable as a Witness.

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(a)(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(a)(2) refuses to testify about the subject matter despite a court order to do so;

(a)(3) testifies to not remembering the subject matter;

(a)(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(a)(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(b)(1) Former Testimony. Testimony that:

(b)(1)(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(b)(1)(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(b)(2) Statement Under the Belief of Imminent Death. In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

(b)(3) Statement Against Interest. A statement that:

(b)(3)(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(b)(3)(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and any evidence that supports or undermines it~~, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

(b)(4) Statement of Personal or Family History. A statement about:

(b)(4)(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(b)(4)(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

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

2024 Advisory Committee Note. The language of subparagraph (b)(3)(B) 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.

Original Advisory Committee Note. Subdivision (a) is comparable to Rule 63(7), Utah Rules of Evidence (1971). Rule 62(7)[(e)], Utah Rules of Evidence (1971), seems to be encompassed in Rule 804(a)(5). Subdivision (a)(5) is a modification of the federal rule which permits judicial discretion to be applied in determining unavailability of a witness.

Subdivision (b)(1) is comparable to Rule 63(3), Utah Rules of Evidence (1971), but the former rule is broader to the extent that it did not limit the admission of the testimony to a situation where the party to the action had the interest and opportunity to develop the testimony. Condas v. Condas, 618 P.2d 491 (Utah 1980); State v. Brooks, 638 P.2d 537 (Utah 1981).

Subdivision (b)(2) is comparable to Rule 63(5), Utah Rules of Evidence (1971), but the former rule was not limited to declarations concerning the cause or circumstances of the impending death nor did it limit dying declarations in criminal prosecutions to homicide cases. The rule has been modified by making it applicable to any civil or criminal proceeding, subject to the qualification that the judge finds the statement to have been made in good faith.

Subdivision (b)(3) is comparable to Rule 63(10), Utah Rules of Evidence (1971), though it does not extend merely to social interests.

Subdivision (b)(4) is similar to Rule 63(24), Utah Rules of Evidence (1971).

Subdivision (b)(5) had no counterpart in Utah Rules of Evidence (1971).

TAB 6

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 reasonable, an illustrative aid used at trial must be entered into the record.~~ If requested, the court shall permit a party to describe the illustrative aid to be included in the trial record, and if practicable and upon request, the illustrative aid itself 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.~~

TAB 7

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.

2025 Advisory Committee Note. The original committee note directs courts to consider the so-called *Shickles* factors. Subsequent cases have held that consideration of the *Shickles* factors is no longer mandatory, but the factors may be relevant and properly considered depending on the facts and circumstances of the case. *See State v. Lucero*, 2014 UT 15, ¶ 32, 328 P.3d 841; *State v. Thornton*, 2017 UT 9, ¶ 53, 391 P.3d 1016.

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).

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.

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(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.

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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).