

**MINUTES OF  
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, February 13, 2015

Arizona Courts Building

1501 W. Washington, Conference Room 230

Web Site: <http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx>

**Members Present:**

The Honorable Samuel Thumma, Co- Chair  
The Honorable Mark Armstrong (Ret.), Co-  
Chair  
Mr. Paul Ahler  
Professor Dave Cole (via telephone)  
Mr. Timothy Eckstein  
The Honorable Pamela Gates (via  
telephone)  
The Honorable Wallace Hoggatt (via  
telephone)  
Mr. Milton Hathaway (via telephone)  
The Honorable Paul Julien  
Mr. William Klain  
The Honorable Michael Miller (via telephone)  
Mr. Carl Piccarreta  
Ms. Patricia Refo

**Members Not Present:**

The Honorable George Anagnost  
Ms. Shirley McAuliffe

**Quorum:**

Yes

### **1. Call to Order—Judge Thumma**

Judge Armstrong called the meeting to order at 10:05 a.m.

### **2. Approval of Minutes from Meeting of September 12, 2014—Judge Thumma**

The minutes were approved by acclamation.

### **3. Ariz. R. Evid. 615 and 611(a)—Judge Thumma, Bill Klain and All**

Judge Thumma reported that the Committee’s suggested changes to the Bench Books have been incorporated therein. The proposed changes to the RAJIs and subpoena form are pending. Bill Klain will ask the civil rules restyling task force to consider amending Rule 45 accordingly. Mr. Klain also reported on the ongoing work of the task force, which is scheduled to complete its first draft of the restyled civil rules in June 2015.

### **4. Future Meeting Dates—Judges Armstrong and Thumma**

Judges Armstrong and Thumma asked Committee members to review the currently scheduled meeting dates for conflicts. After discussion, the Committee agreed to cancel the April meeting and reschedule the September 11 meeting to September 25.

### **5. Report of Subcommittee on Varying Evidentiary Standards in Subject-Matter Rules—Judges Thumma, Armstrong and All**

Judges Thumma and Armstrong reported that they have filed, on behalf of the Committee, petitions to amend the evidentiary standards set forth in Arizona Rule of Probate Procedure 3(D) (R-15-0001) and Arizona Rule of Family Law Procedure 2(B)(2) (R-15-0002).

The Supreme Court’s Committee on the Impact of Domestic Violence and the Courts (“CIDVC”) has filed a petition to restyle the Arizona Rules of Protective Order Procedure (R-15-0010), which includes the Committee’s proposal to amend the evidentiary standard set forth in Rule 5(A)(1) (renumbered as Rule 36(a) in the restyled rules), to be consistent with the family law rule.

The Committee discussed whether to file a comment to the CIDVC petition. Bill Klain moved that the Committee file a comment in support of the proposed amendment of the evidentiary standard while remaining neutral on the remainder of the petition. The motion was seconded by Judge Hoggatt. The committee voted unanimously in favor of the motion. Judges Thumma and Armstrong will prepare and circulate a draft comment prior to the comment filing deadline of May 20, 2015.

## **6. Report on April 4, 2014 Meeting of Federal Advisory Committee on Evidence Rules—Judge Armstrong, Trish Refo and All**

Judge Armstrong and Trish Refo discussed this meeting and reported that no federal rule changes are imminent. The federal Advisory Committee on Evidence Rules met on October 24, 2014, and reported to the standing Committee on Rules of Practice and Procedure in a memorandum dated November 15, 2014, which Judge Armstrong distributed to the Committee. The report included several information items as follows: (1) the Advisory Committee will revisit the proposed amendment to Rule 803(16) (ancient documents) at its April 2015 meeting; the Advisory Committee; (2) in connection with Professor Bellin’s proposal to add hearsay exceptions for statements of recent perception, the Advisory Committee decided to begin a systematic review of the admissibility of prior statements of testifying witnesses but not to propose any rule changes at this time; (3) in connection with the proposal to amend Rules 901 and 902 to provide specific grounds for authenticating certain electronic evidence, the Advisory Committee decided not to propose rule amendments but rather to develop a best practices manual that would assist courts and litigants in negotiating the difficulties of authenticating such evidence; and (4) the Advisory Committee decided to consider at its April 2015 meeting, formal amendments to add new Rules 902(13) and (14) to allow certification of authenticity of certain electronic evidence.

The Committee agreed to closely follow the federal developments with an eye toward making suggestions for improvement of the federal proposals, if warranted. Bill Klain suggested that any proposals on electronic evidence should account for evidence stored in the “cloud.”

Judge Armstrong advised that the Committee’s role extends beyond merely monitoring federal amendments, and he encouraged Committee members to report any evidentiary issues that may benefit from rule amendments.

## **7. Presentation on Wendell and Bench Books —Judges Armstrong and Julien**

Judges Armstrong and Julien circulated a sampling of Bench Books, and presented a Wendell demonstration. The Committee engaged in a wide-ranging discussion of access to justice, including whether any of these materials should be publicly available.

## **8. Technical Amendment of Rule 804(a)(5)(A)—Judge Armstrong**

Judge Armstrong reported that Shirley McAuliffe had identified a typographical error in the referenced rule—the reference in the rule to Rule 804(b)(5) should have been (b)(6). This technical change has been reported to and corrected by West.

## **9. Other Items for Discussion—Judges Thumma and Armstrong**

Judge Armstrong reported that the three-year terms of six Committee members will expire on June 30, 2015. Judge Thumma asked that any members who did not wish to be reappointed let us know by the end of March because the reappointment package is due in mid-April. Judge Armstrong advised that the original intent was for members to serve at least two terms.

Bill Klain reported that his law firm has changed its name to Lang & Klain, P.C., and his e-mail address has changed to [wklain@lang-klain.com](mailto:wklain@lang-klain.com).

Paul Ahler reported that he will begin working next week at the Attorney General's office.

**10 and 11. Call to the Public/Adjournment—Judge Thumma**

Judge Thumma made a call to the public. No members of the public were present.

The meeting adjourned at approximately 11:55 a.m.