

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

Friday, September 12, 2014

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 (via telephone)
The Honorable George Anagnost (via
telephone)
Professor Dave Cole
Mr. Timothy Eckstein
The Honorable Pamela Gates
The Honorable Wallace Hoggatt (via
telephone)
Mr. William Klain
Mr. Carl Piccarreta

Members Not Present:

Mr. Milton Hathaway
The Honorable Paul Julien
Ms. Shirley McAuliffe
The Honorable Michael Miller
Ms. Patricia Refo

Quorum:

Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order at 10:05 a.m. and welcomed new member, Judge Wally Hoggatt. Judge Hoggatt briefly introduced himself to the committee

2. Approval of Minutes from Meeting of April 25, 2014—Judge Thumma

The minutes were approved by acclamation. Judge Armstrong referred the committee to item #8 in the minutes and apologized for not including the recommended technical changes to Rule 1101(c) in the final rules order in R-14-0002 (see item #4 below). Judge Armstrong stated he and Judge Thumma would prepare a petition to make these changes. Mr. Klain suggested asking Chief Supreme Court Staff Attorney Ellen Crowley if the changes could be accomplished more simply by *sua sponte* order. Judge Armstrong will check on the simplest way to effectuate these technical changes.

3. Future Meeting Schedule—Judge Thumma

Judge Thumma reminded the committee that our next meeting is scheduled for December 12, 2014. Judges Thumma and Armstrong will work on setting up a quarterly meeting schedule for 2015, recognizing that some meetings may be cancelled if unwarranted.

4. R-14-0002—Petition to Amend Rules 801(d)(1)(B) and 803(6)-(8)—Judge Armstrong

Judge Armstrong reported that the Supreme Court approved the petition on September 2, 2014, with an effective date of January 1, 2015. The Court modified the comment to Rule 801(d)(1)(B) by deleting the last two sentences of the second paragraph and the last sentence of the fourth paragraph. These sentences provided historical context for the proposed federal rule changes but are inapplicable in Arizona. Historically, in Arizona, prior consistent statements have been admissible only if the requirements of Rule 801(B)(1)(d) have been met. They have not been separately admissible for rehabilitation purposes only, as they have been in some other state and federal courts. Under the amended rule, prior consistent statements of a witness will be admissible substantively both “(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground,” such as faulty memory or inconsistency (new language underlined). The change expands the admissible use of prior consistent statements in Arizona.

Judge Armstrong further reported that the comparable federal rule changes have been approved by the United States Supreme Court. If Congress does not act to defer, modify or reject them, they will become effective December 1, 2014.

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

This agenda item was deferred at the last committee meeting pending the results of the federal technology symposium that was scheduled to be held October 11, 2013, and the next edition of the

civil and criminal benchbook, which may include a revised admonition. The symposium was cancelled due to the federal government shutdown and rescheduled to April 4 of this year. Ms. Refo has agreed to contact Professor Dan Capra, reporter to the federal Advisory Committee on Evidence Rules, to ascertain the results of the symposium and the Advisory Committee's meeting of the same date.

Mr. Klain reported that remaining issues include whether to add a comment to Rule 611 and whether trial subpoenas should include a Rule 615 admonition. This likely would require amendment of the applicable civil and family law subpoena rules. Mr. Klain will follow-up with the State Bar Civil Practice and Procedure Committee concerning possible changes to Rule 45 (civil trial subpoena rule). Judge Thumma will check on the progress of changes to the benchbook.

Judge Gates stated she does not believe a Rule 611 comment is necessary; changes to the benchbook and trial subpoenas should be sufficient. The model admonition is constantly evolving in light of changing technology. Judge Gates will circulate the admonition(s) currently being used in Maricopa County Superior Court.

The committee reached a consensus that it is not ready at this time to propose a comment to Rule 611.

6. Report of Subcommittee on California Evidence Code § 1109—Paul Ahler and All

Judge Thumma reported that Judge Julien could not attend the meeting because his Mother recently passed away. The committee expressed that its thoughts were with Judge Julien and his family.

Mr. Ahler reported on behalf of the subcommittee. He observed that the California rule allows for the admission of prior acts in domestic violence cases much like Rule 404(c) operates with respect to sexual offenses. The subcommittee met with Judge Cohen who reported that the California rule has been in effect for some time. She was not aware of any other jurisdictions that have adopted a similar rule.

The subcommittee recommended that this agenda item be tabled unless and until a specific Arizona rule is proposed by another entity. The committee agreed. This item will be tabled and will not appear on a future agenda unless such a proposal is made.

7. Report of Subcommittee on Varying Evidentiary Standards in Subject-Matter Rules—Judge Thumma and All

Judge Thumma reported on proposed changes to the family, protective order and probate evidentiary rules, which provide for a unified, restyled evidentiary standard based on the family law rule. Judge Thumma observed that the current family law rule uses essentially an administrative law standard when the formal rules of evidence are not invoked. The proposed changes to Ariz. R. Fam. Law P. 2(B) are restyling only, while the proposed changes to Ariz. R. Prot. Order. P. 5(A) and Ariz. R. Prob. P. 3(D) are more substantive.

Judge Gates inquired whether the proposed changes to the probate rule may have unintended consequences, particularly in light of the proposed comment which purports to incorporate the family law standard into the probate rule. She observed, for example, that the family court is required to consider the child(ren)'s best interests in deciding evidentiary issues. Judge Hoggatt agreed with this concern but also agreed that the family and protective order rules should be consistent.

Judge Armstrong agreed to present the proposed family and protective order rules to the State Bar Family Practice and Procedure Committee for consideration and input. These proposed changes will also need to be presented to the Supreme Court's Committee on the Impact of Domestic Violence and the Courts (CIDVC).

Judge Thumma agreed to draft two alternative probate rules, without the currently-proposed comment, and present them to the State Bar Probate and Trust Section for consideration and input.

Finally, Judge Thumma discussed the concept of a one-sentence, unified standard for limited jurisdiction court proceedings that have no clearly applicable evidentiary standard.

8. Report on April 4, 2014 Meeting of Federal Advisory Committee on Evidence Rules— Judge Armstrong and All

Judge Armstrong reminded committee members that he had sent them the most recent federal Agenda Book, which consists of 312 pages. The book contains the agenda for the April 4, 2014 meeting of Federal Advisory Committee on Evidence Rules, which includes the following items.

Possible Amendment to Rule 803(16)

The agenda book contains a memo on consideration of a possible amendment to Rule 803(16), the hearsay exception for ancient documents. The question addressed is whether the exception needs to be altered or abrogated in light of the fact that electronically stored information is widespread, does not degrade, and can be fairly easily stored for 20 years.

Possible Amendment to Rule 609(a)

The agenda book contains a memo on consideration of a possible amendment to Rule 609(a), the rule governing admission of most prior convictions to impeach a witness's character for truthfulness. The possible amendment is to abrogate the part of the rule that provides for automatic admission of all recent convictions involving a dishonest act or false statement, and to allow some judicial discretion to exclude such convictions by balancing probative value against the risk of prejudice, confusion and delay.

Consideration of Possible Changes to the Hearsay Exceptions

The agenda book contains the Seventh Circuit's recent decision in *United States v. Boyce*. In that case, Judge Posner in a concurring opinion recommends that the hearsay exceptions for present sense impressions and excited utterance should be reconsidered, because the rationales for these exceptions are not supported either by social science data or common sense. Judge Posner suggests more broadly that the hearsay exceptions are too complex — and that there should be a single exception for hearsay that the trial court finds to be reliable: “essentially a simplification of Rule 807.”

Review of Effect of Electronic Case Filing and Case Management on Evidence Rules

A Subcommittee of the Standing Committee is investigating to what extent the national rules of procedure should be amended to accommodate electronic case filing and case management. The Reporter prepared a report to the Subcommittee on whether changes to the Evidence Rules might be necessary because of cm/ecf. That memo is set forth in the agenda book for the Committee's information.

***Crawford* Outline**

The agenda book contains the Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence.

Privilege Project

Professor Broun will provide an oral report on his project surveying the law of privilege.

Judge Armstrong also reported that the Agenda Book includes memoranda from Professor Dan Capra on the possible amendments of Rules 609(a) and 803(16). In his memoranda, Professor Capra discusses pros and cons, and drafting alternatives. This Agenda Book is the most recent publication of the Federal Advisory Committee on Evidence Rules.

9. Other Items for Discussion—Judges Thumma and Armstrong

Judge Thumma reported on recent evidence CLE and COJET, and encouraged committee members to engage in judicial and bar continuing education programs on evidence, including next year's State Bar Convention. Professor Cole, Mr. Klain, Mr. Eckstein and Mr. Piccarreta all expressed interest.

Mr. Klain reported on ongoing efforts to create a business court in Maricopa County Superior Court and restyle the Arizona Rules of Civil Procedure, much as this committee's predecessor did with the rules of evidence.

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.

Following the call to the public, the meeting adjourned at approximately 11:30 a.m.