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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of ARIZONA RULES OF EVIDENCE 803(16) AND 902	Arizona Supreme Court No. R-17-0003 PETITION TO AMEND ARIZONA RULES OF EVIDENCE 803(16) AND 902

PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, Mark W. Armstrong and Samuel A. Thumma, petitions the Court to amend Arizona Rules of Evidence 803(16) and 902, as reflected in the attachment hereto, effective January 1, 2018.

I. INTRODUCTION AND BACKGROUND

Arizona Supreme Court Administrative Order No. 2012-43, dated June 11, 2012, established the Advisory Committee on Rules of Evidence with the following purpose:

> The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012. The Advisory Committee has met regularly since September 28, 2012.

At its regular meeting on December 8, 2016, the Advisory Committee unanimously recommended that Arizona Rules of Evidence 803(16) and 902 be amended to be consistent with proposed amendments to Federal Rules of Evidence 803(16) and 902, which are expected to become effective December 1, 2017. The federal Committee on Rules of Practice and Procedure and the Judicial Conference

have recommended that the United States Supreme Court adopt the proposed amendments to Rules 803(16) and 902, and transmit them to Congress in accordance with the law. Before the Advisory Committee's formal vote, a subcommittee had studied the proposed amendments and recommended their adoption.

II. SUMMARY OF THE PROPOSED AMENDMENT TO ARIZONA RULE OF EVIDENCE 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents;" that is, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Over time, the rationale for the exception has been criticized because it assumes that just because the document itself is authentic, all of the statements in the document are reliable enough to be admissible despite the fact they are hearsay. The federal Advisory Committee on Rules of Evidence has concurred with this criticism, but has not felt the need to address it because the exception is used infrequently. However, because electronically stored information can be retained for more than 20 years, a strong likelihood exists that the ancient documents exception will be used much more frequently going forward. Accordingly, the federal Advisory Committee determined that the time had come to address the ancient documents exception. As a result, the Advisory Committee then focused on the issue as well.

The decision to address the exception was based on a concern that, with its increased use, the exception could become a receptacle for *unreliable* hearsay—that

is, if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to electronically stored information, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment to Federal Rule of Evidence 803 that was issued for public comment would have abrogated the ancient documents exception. While some commentators supported elimination of the exception, most did not. Lawyers in several practice areas—*e.g.*, product liability litigation involving latent diseases, land-use disputes, environmental clean-up disputes—said they had come to rely on the exception. After considering several alternatives, the federal Advisory Committee decided to amend the rule to limit the ancient documents exception to documents prepared before 1998. This date was chosen for two reasons: (1) going backward, it addressed the reliance-interest concerns of many commentators; and (2) going forward, reliable electronically stored information is likely to be preserved that can be used to prove the facts that are currently proved by scarce hardcopy. If the electronically stored information is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the proposed comment emphasizes

that the residual exception remains available to qualify old documents that are reliable, and makes clear the expectation that the residual exception not only can, but *should*, be used by courts to admit reliable documents prepared after January 1, 1998, that previously would have been admitted under the ancient documents exception. The federal Advisory Committee unanimously approved the modification.

The federal Judicial Conference has recommended that the United States Supreme Court adopt the proposed amendment to Rules 803(16), as modified, and transmit it to Congress in accordance with the law. In recommending this change to the Arizona Rules of Evidence, the Arizona Advisory Committee on Rules of Evidence recognizes that the proposed amendment to Federal Rule of Evidence 803(16) has not been finally adopted. Thus, the Advisory Committee has conditioned its recommendation on the final adoption of the proposed federal rule in its current form.

III. SUMMARY OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 902

The proposed amendments to Rule 902 (Evidence That Is Self-Authenticating) add two new subdivisions that would allow certain electronic evidence to be authenticated by a certification of a qualified person (in lieu of that person's testimony at trial). New Rule 902(13) would allow self-authentication of machine-generated information (such as a web page) upon a submission of a

certificate prepared by a qualified person. New Rule 902(14) would provide a similar certification procedure for a copy of data taken from an electronic device, media, or file. The proposed new subdivisions are analogous to Rule 902(11) and 902(12), which permit a foundation witness to establish the authenticity and admissibility of business records by way of certification, with the burden of challenging authenticity on the opponent of the evidence.

The purpose of the two new subdivisions is to make authentication easier for certain kinds of electronic evidence that, under current law, would likely be authenticated under Rule 901 but only after calling a witness to testify to authenticity. The federal Advisory Committee has found that electronic evidence is rarely the subject of a legitimate authenticity dispute yet, under current law, a proponent must still go to the expense of producing authenticating witnesses for trial. The amendments would alleviate the unnecessary costs of this production by allowing the qualifying witness to establish authenticity by way of certification.

Those who commented on the proposed federal rule changes were generally supportive of the proposed amendments.

The federal Judicial Conference has recommended that the United States Supreme Court adopt the proposed amendments to Rule 902, and transmit them to Congress in accordance with the law. In recommending these changes to the Arizona Rules of Evidence, the Arizona Advisory Committee on Rules of Evidence

recognizes that the proposed amendments to Federal Rule of Evidence 902 have not been finally adopted. Thus, the Advisory Committee has conditioned its recommendation on the final adoption of the proposed federal rule in its current form.

CONCLUSION

Petitioners respectfully request that the Court consider this petition and proposed rule changes at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2017, and that the Court adopt the proposed rules as they currently appear, or as modified in light of comments received from the public, with an effective date of January 1, 2018.

DATED this ____ day of December, 2016.

_____
Mark W. Armstrong
Co-Chair, Advisory Committee on Rules of Evidence

_____
Samuel A. Thumma
Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT[1]

ARIZONA RULES OF EVIDENCE

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as witness:

* * * * *

(16) ***Statements in Ancient Documents*****.** A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998, and whose authenticity is established.

* * * * *

Comment to 2018 Amendment to Rule 803(16)

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Court has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Court is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(13) *Certified Records Generated by an Electronic Process or System*. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Comment to 2018 Amendment Adding Subdivision (13)

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Court has determined that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Comment to 2018 Amendment Adding Subdivision (14)

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Court has determined that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that the person checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.