

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

Friday, April 6, 2018

Arizona Courts Building

1501 W. Washington, Conference Room 230

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

**Members Present:**

Ms. Sara Agne

Mr. Paul Ahler (via telephone)

The Honorable Mark Armstrong (Ret.), Co-Chair

The Honorable Dave Cole (Ret.)

Mr. Timothy Eckstein

The Honorable Pamela Gates

The Honorable Statia Hendrix

The Honorable Wallace Hoggatt (via telephone)

The Honorable Paul Julien (via telephone)

Mr. William Klain

The Honorable Doug Metcalf (via telephone)

Mr. Carl Piccarreta (via telephone)

Ms. Patricia Refo

The Honorable Sam Thumma, Co-Chair

**Members Not Present:**

Mr. Milt Hathaway

**Quorum:**

Yes

### **1. Call to Order—Judge Thumma**

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

### **2. Approval of Minutes from Meeting of December 8, 2017—Judge Thumma and All**

The minutes were approved by acclamation as circulated.

### **3. Report of Subcommittee on Rule 807 (R-18-0003)—Judge Armstrong and All**

Judges Armstrong and Thumma, on behalf of the committee, filed this petition on January 8, 2018. Comments are due by May 21, 2018, but none have been filed to date. The petition requests an effective date of January 1, 2019.

Judge Armstrong summarized the comments filed concerning the proposed amendment of FRE 807, most of which concern the proposed notes. The comments will be considered by the federal advisory committee at its meeting on April 26-27, 2018. Dan Capra, the committee's reporter, recommends only two changes to the text of the rule: (1) Changing "not specifically covered by" to "not admissible under" in subsection (a)(1); and (2) deleting the language "the court determines that" in subsection (a)(2). Professor Capra also recommends several changes to the notes, which, if approved, would be incorporated by reference into our committee's proposed comment. Although the second proposed textual change is clearly non-substantive, Mr. Ahler expressed a concern that the first such change may be substantive in that it could be read to unduly expand the admissibility of hearsay. Judge Armstrong referred committee members to the April 2018 federal Agenda Book for a more complete description of the proposed changes. See <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2018>.

In the end, Judge Cole made a motion, as amended, seconded by Mr. Klain, that Judges Armstrong and Thumma have discretion to revise the current rule petition to conform to any changes to the proposed federal rule, subject to any committee member requesting a meeting after the final version of the proposed federal rule is settled. The committee voted unanimously in favor of the motion, as amended. Ms. Refo agreed to consult Professor Capra following the federal advisory committee's April meeting.

### **4. Report of Workgroup on Uniform Standard for Certain Limited Jurisdiction Cases — Judges Thumma and Julien**

Judges Thumma and Julien reported on the adoption of Arizona Supreme Court Administrative Order No. 2018-01, concerning a small claims pilot project in the justice courts, which provides in Rule 14(e) that "[a]ny non-privileged evidence tending to make a fact at issue more or less probable is admissible unless the justice of the peace or the hearing officer determines the

evidence lacks reliability or will cause unfair prejudice, cause confusion, or waste time.”

This represents the first opportunity to formally introduce a uniform evidentiary standard in the justice courts. Judge Thumma requests this agenda item remain open for further developments in this area.

#### **5. Rules 16 and 45, Arizona Rules of Civil Procedure, and Subpoena Form—Bill Klain**

Mr. Klain reported that the changes to the bench books appear to have adequately addressed this issue. However, this agenda item will remain open in the event the State Bar Civil Practice and Procedure Committee decides to further address the issue.

#### **6. Report of Subcommittee on Forensic Science—Judges Armstrong and Thumma, Tim Eckstein and All**

Mr. Eckstein reported there are no new developments on this issue.

#### **7. Petition by Task Force on Court Management of Digital Evidence (R-18-0008)—Judge Armstrong and All**

Judge Thumma reported on the mission and ongoing work of the Supreme Court’s Task Force on Court Management of Digital Evidence, including its petition in R-18-0008, which proposes to amend several procedural rules as well as adding a definition of “video” to Article 10 of the evidence rules. Judge Thumma also asked for any input committee members might have concerning the proposed changes to ARFLP 2, which were described by Judge Armstrong. After introducing the issue, Judge Thumma recused himself from the committee’s discussion and potential vote on the issue and left to allow the remaining committee members to discuss the issue.

Thereafter, Judge Metcalf made a motion, as amended to make “video” plural in Rule 1006, seconded by Ms. Agne, to file a comment in support of the task force’s proposal to amend Article 10 of the evidence rules. By a vote of 9-4, the committee voted to file such a comment. Voting in favor of the motion: members Agne, Ahler, Armstrong, Gates, Hendrix, Julien, Klain, Metcalf and Piccarreta. Voting against: members Cole, Eckstein, Hoggatt and Refo. Those opposed expressed a concern that the proposal may be an unnecessary effort to fix a problem that does not exist as videos apparently are currently admitted as recordings under Rule 1001(b). Moreover, they observed, the proposal would deviate from the federal rules contrary to our guiding principle to follow the federal rules absent good reason. Ms. Refo also expressed reluctance to support the proposal absent time to research case law to determine if a need exists. She also agreed to consult Professor Capra concerning the necessity and/or desirability for such a change.

#### **8. Rule 408 in light of *Phillips v. O’Neil*, 243 Ariz. 299 (2017)—Judge Cole and All**

Judge Cole introduced this issue and committee members discussed whether a comment to Rule 408, referring to *Phillips v. O’Neil*, is warranted. Judge Armstrong agreed to contact Justice Bolick for

any thoughts he might have on a rule or comment change.

**9. Other Items for Discussion, including the latest Agenda Book, Federal Advisory Committee on Evidence Rules)—Judge Armstrong and All**

Judge Armstrong discussed the latest agenda book of the federal advisory committee, dated April 2018. Of note, the federal advisory committee is studying possible amendments to Rules 106, 404(b), 606(b), 609(A)(1), 616, 702, and 801(d)(1)(A). The committee previously discussed the potential effect of *Pena-Rodriguez* in Arizona, which is somewhat unclear because Arizona's comparable rule, Ariz. R. Crim. P. 24.1(d), differs from Fed. R. Evid. 606(b). The agenda book also contains an updated version of Professor Capra's *Crawford* tome. See <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2018>.

**10. Next Meeting/Future of Committee/Statement of Appreciation—Judges Armstrong, Thumma and All**

Judge Armstrong suggested that the next meeting be held September 14, 2018. All committee members present tentatively agreed to that date.

Judges Armstrong and Thumma thanked the following committee members who will be rotating off the committee in July after serving six years: members Cole, Eckstein, Julien, Klain and Piccarreta. Judges Armstrong and Thumma also solicited names of potential new members that they will submit to the Chief Justice at a meeting on Tuesday, April 10, 2018. They also reported their intention to rotate off the committee themselves next June, and their recommendation to be replaced by Ms. Agne and a court of appeals judge as co-chairs.

**11 and 12. Call to the Public/Adjournment—Judge Armstrong**

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

The meeting adjourned at approximately 12:14 p.m.