MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE
Friday, September 30, 2016
Arizona Courts Building
1501 W. Washington, Conference Room 330
Web Site: http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx

Members Present:

The Honorable Sam Thumma, Co- Chair
The Honorable Mark Armstrong (Ret.), Co-Chair
Ms. Sara Agne
Mr. Paul Ahler
The Honorable Dave Cole (Ret.)
The Honorable Pamela Gates
The Honorable Wallace Hoggatt (via telephone)
Mr. Milton Hathaway (via telephone)
The Honorable Statia Hendrix
The Honorable Paul Julien (via telephone)
The Honorable Doug Metcalf
Ms. Patricia Refo

Members Not Present:

Mr. Timothy Eckstein
Mr. William Klain
Mr. Carl Piccarreta

Quorum:
Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order at 10:00 a.m. Judge Thumma welcomed our new members, Judges Hendrix and Metcalf, and Sara Agne, who then introduced themselves. Judge Armstrong advised the new members of the purpose of the committee and recommended that they sign up for e-mail updates at the federal rules website, **http://www.uscourts.gov/rules-policies**. Judge Thumma advised the new members of some of the educational opportunities members are encouraged to participate in, including new judge orientations, judicial conferences, and the State Bar Convention. Ms. Refo suggested the committee might want to present at CLE by the Sea, and Judge Gates volunteered to check into that.

2. Approval of Minutes from Meeting of March 4, 2016, and Future Meeting —Judges Thumma and Armstrong

The minutes were approved as circulated by acclamation.

The committee tentatively settled on Thursday, December 8, 2016, at 1:00 – 3:00 pm for the next meeting.

3. Rule 45, Arizona Rules of Civil Procedure, and Subpoena Form—Bill Klain and All

This item was deferred in Mr. Klain's absence.

4. Report of Subcommittee on Proposed Amendments to Federal Rules of Evidence 803(16) and 902(13) and (14)—Judge Armstrong and All

Judge Armstrong reported that the federal Committee on Rules of Practice and Procedure has recommended that the Judicial Conference approve the proposed amendments to Rules 803(16) and 902, and transmit them to the United States Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. Following are the proposed amendments:

> **PROPOSED AMENDMENTS TO THE FEDERAL 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:
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> * * * * *

(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.

* * * * *

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee 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 Committee 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 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.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged. The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI.
Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully. The Committee understands that the choice of a cutoff date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more

arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

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).

Committee Note

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 Committee has found 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.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

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.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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).

Committee Note

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 Committee has found 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 she 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.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

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 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(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered

item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Judge Armstrong agreed to prepare a draft petition for these rule changes for consideration by the committee as an action item for the next meeting.

5. Report of Subcommittee on Forensic Evidence—Tim Eckstein and All

This item was deferred in Mr. Eckstein's absence.

Judge Thumma reported on a forensic science conference to be held in early December 2016 in conjunction with the Governors Office of Highway Safety DUI and Traffic Conference. The focus of the forensic science conference will be to provide education and training to judges (both general and limited jurisdiction) in dealing with forensic science issues.

6. August 2016 Supreme Court Rules Agenda—Judge Armstrong

Judge Armstrong provided committee members with the minutes of the Supreme Court's August Rules Agenda.

7. Uniform Standard for Certain Limited Jurisdiction Cases—Judge Thumma

Judge Thumma reported on the potential adoption of a uniform standard for proceedings at which the rules of evidence are relaxed, particularly in limited jurisdiction courts. Judge Julien will take the lead on presenting this standard to limited jurisdiction courts at the forensic science and highway safety conferences in early December. He will report a recommendation to the committee at its December meeting. Judge Armstrong observed that any recommendation will need to address whether the standard should be incorporated into the evidentiary rules, or whether each rule set with an evidentiary standard should be amended to include the new uniform standard. In any event, it will be important to identify all rule sets that will be affected.

8. Query re Ariz. R. Civ. P. 75(d)-(e)—Judge Thumma

This item is related to item # 7 and will be deferred until further discussion of a possible uniform

standard.

9. Ariz. R. Crim. P. 19.3—Judge Gates

Judge Gates reported on the progress of the Criminal Rules Restyling Committee, of which she is a member. That Committee referred for our consideration a draft of the restyled version of Rule 19.3, which includes evidentiary provisions. The committee discussed whether this rule could be abrogated with or without changes to the rules of evidence. Judge Armstrong reported that the ad hoc evidence committee was aware of Rule 19.3 but decided not leave it in the criminal rules during its 2012 restyling. He also expressed that some research should be done to determine if there is Arizona case law addressing Rule 19.3(b)'s provisions on material variance and impeachment. Evidence Rule 801(d)(1)(A), which also addresses prior inconsistent statements, allows admission of such statements for both impeachment and substantive purposes and contains no requirement of material variance. Judge Armstrong also noted that if Criminal Rule 19.3(c) (former testimony) is abrogated, its provisions would likely need to be incorporated into Evidence Rule 803(25), which currently addresses prior testimony in non-criminal cases only.

Following discussion, the committee decided to create a subcommittee to further study the issues and make recommendations to the committee at a meeting to be set in December. The subcommittee will consist of Judge Gates, Mr. Ahler, and Ms. Agne, with Judge Gates as chair. The plan is to file any required evidence rule petition concurrently with the petition to restyle the criminal rules.

10. Other Items for Discussion, including June and Sept. 2016 Federal Committee on Rules of Practice and Procedure Reports; April 2016 Agenda Book, Federal Advisory Committee on Evidence Rules (http://www.uscourts.gov/rules-policies)--Judge Armstrong

Judge Armstrong discussed the latest agenda book of the federal advisory committee. Of particular note, the federal Advisory Committee on Evidence Rules is working on or considering hearsay reform, possible amendments to the notice provisions of the rules, and a best practices manual on authentication of electronic evidence. The agenda book contains an updated version of Professor Capra's *Crawford* tome.

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 11:40 a.m.