

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

Friday, December 8, 2017

Arizona Courts Building

1501 W. Washington, Conference Room 330

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

Members Present:

Ms. Sara Agne
Mr. Paul Ahler
The Honorable Mark Armstrong (Ret.), Co-Chair
Mr. Timothy Eckstein
The Honorable Pamela Gates (via telephone)
Mr. Milton Hathaway
The Honorable Statia Hendrix (via telephone)
The Honorable Wallace Hoggatt (via telephone)
The Honorable Doug Metcalf (via telephone)
Mr. Carl Piccarreta
The Honorable Sam Thumma, Co-Chair

Members Not Present:

The Honorable Dave Cole (Ret.)
The Honorable Paul Julien
Mr. William Klain
Ms. Patricia Refo

Quorum:

Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order at 10:00 a.m.

2. Approval of Minutes from Meeting of September 8, 2017—Judge Armstrong and All

The minutes were approved by acclamation as circulated.

3. Report of Subcommittee on Rule 807—Judge Gates, Sara Agne and All

Ms. Agne researched Arizona case law on Rule 807, and the subcommittee considered case law as well as the comments filed thus far concerning to the federal rule proposal (the federal comment period ends February 15, 2018). Ms. Agne reported for the subcommittee, and recommended that the committee petition to amend Rule 807 to conform to the proposed federal rule. The subcommittee favored either “no comment” or a brief comment stating ARE 807 was amended to conform to the changes to the federal rule.

The federal proposal was precipitated by four primary concerns with the current rule. First, the requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Second, there is no requirement that courts consider corroborating evidence in the current rule. It is thought that adding a requirement that the court consider corroboration would be an improvement to the rule independent of any decision to expand the residual exception. Third, the requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any helpful purpose. Fourth, the notice requirement in the current rule has been problematic and can be improved by, among other things, requiring that the notice be in writing.

Judge Hoggatt made a motion to amend Rule 807 to conform to the federal rule proposal with the brief comment as noted above, contingent on the final adoption of the federal rule change. The motion was seconded by Mr. Piccarreta, and passed unanimously. Judges Armstrong and Thumma will prepare a rule petition to be filed on or before January 10, 2018, with a proposed effective date of January 1, 2019. The federal rule proposal, if approved, will be effective December 1, 2018.

4. Report of Workgroup on 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 has created a workgroup consisting of Judges Hendrix, Thumma, Jill Davis – Mohave County JP;

Gerald Williams – Maricopa County JP; Kristin McManus – San Luis City Magistrate, and Ken Kung Scottsdale Asst. Court Administrator. The workgroup has met once.

Judge Julien and the workgroup are addressing 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. This work is ongoing.

The proposal currently under consideration reads as follows: “Any non-privileged evidence tending to make a fact at issue more or less probable is admissible unless the court determines the evidence lacks reliability or will cause unfair prejudice, confusion or a waste of time.”

5. Rules 16 and 45, Arizona Rules of Civil Procedure, and Subpoena Form—Sara Agne

Mr. Klain reported at our last meeting that a model Rule 615-like admonition has been added to the bench book, and that the State Bar of Arizona Civil Practice and Procedure Committee believes the best approach, rather than amending Arizona Rule of Civil Procedure, would be to presume that “the rule” is invoked and amend the subpoena form accordingly. Mr. Klain agreed to prepare a rule petition for consideration at the October 2017 meeting of the Civil Practice and Procedure Committee.

Ms. Agne reported that Mr. Klain made a presentation to the Civil Practice and Procedure Committee. This agenda item will be continued in light of Mr. Klain’s absence.

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

Judge Armstrong reported that he sent to committee members the Fall 2017 edition of the ABA’s Judges’ Journal, entitled “Judicial Education and the Sciences,” which includes an article co-authored by Judge Thumma.

7. CLE by the Sea--Judges Armstrong, Thumma and All

Judge Armstrong reported that Judge Cole and Ms. Refo will be co-chairing an evidence presentation at CLE by the Sea in July 2018. Judge Gates and Ms. Agne will round out the evidence panel.

Judge Thumma has submitted and circulated the committee’s seminar information for the State Bar Convention. Faculty for the Evidence Law Update presentation include Sara Agne, Dave Cole, Tim Eckstein, Bill Klain, Carl Piccarreta, and Trish Refo.

Judge Armstrong also reported that members have submitted over 50 hypotheticals and suggested answers to be used at CLE by the Sea, the State Bar Convention, and other continuing

education opportunities. He also reported that the evidence presentation at the State Bar Convention will be weighted more heavily toward hypotheticals, with fewer case law summaries.

8. Other Items for Discussion, including the latest Agenda Book, Federal Advisory Committee on Evidence Rules (<http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2017>)—Judge Armstrong and All

Judge Armstrong discussed the latest agenda book of the federal advisory committee, dated October 26-27, 2017. Of particular note, the federal Advisory Committee on Evidence Rules is considering possible amendments to Rules 106, 404(b), 609(A)(1), 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.

Judge Thumma reported on the ongoing work of the Supreme Court's Task Force on Court Management of Digital Evidence. In response to a referral by the Arizona Supreme Court, the task force has filed a comment on the rule petition regarding body camera disclosure in criminal cases. Additionally, the task force will be filing a petition on or before January 10, 2018, concerning digital evidence, including a proposal to define videos in the 1000 series of the evidence rules.

9. Next Meeting—Judge Armstrong

Judge Armstrong suggested that the next meeting be held April 6, 2018, in order for the committee to consider the rule petition anticipated to be filed by the Task Force on Court Management of Digital Evidence, as well as any comments filed concerning this committee's Rule 807 petition. All committee members present tentatively agreed to that date.

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 11:15 a.m.