

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

Thursday, December 8, 2016

Arizona Courts Building

1501 W. Washington, Conference Room 230

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

**Members Present:**

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

Ms. Sara Agne

The Honorable Dave Cole (Ret.)

Mr. Timothy Eckstein

The Honorable Wallace Hoggatt (via telephone)

Mr. Milton Hathaway

The Honorable Statia Hendrix (via telephone)

The Honorable Paul Julien

Mr. William Klain

Mr. Carl Piccarreta

The Honorable Doug Metcalf

Ms. Patricia Refo

**Members Not Present:**

Mr. Paul Ahler

The Honorable Pamela Gates

The Honorable Sam Thumma, Co- Chair

**Quorum:**

Yes

### **1. Call to Order—Judge Armstrong**

Judge Armstrong called the meeting to order at 10:05 a.m., and advised the Committee that Judge Thumma is on jury duty in Phoenix Municipal Court.

### **2. Approval of Minutes from Meeting of September 30, 2016, and Future Meeting—Judge Armstrong and All**

The minutes were approved as circulated by acclamation.

The Committee tentatively settled on a meeting in mid-May 2017, following the comment period on new rule petitions, which ends May 10.

**LATER:** Judge Armstrong scheduled the next meeting for May 19, 2017, 10:00 a.m. – Noon, in Room 330.

### **3. Petition to Amend Rules 803(16) and 902(13), (14)—Judge Armstrong and All**

Judge Armstrong reported that the federal Judicial Conference has approved the proposed amendments to Rules 803(16) and 902, and transmitted 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.

Judge Armstrong summarized the proposed amendments. The Committee unanimously approved the draft petition prepared by Judges Armstrong and Thumma, with the amendments proposed by Judges Armstrong and Hoggatt. The final petition will be recirculated to the Committee before filing on the Court's Rules Forum.

### **4. Report of Subcommittee on Ariz. R. Crim. P. 19.3—Sara Agne and All**

Ms. Agne reported for the subcommittee in accordance with Judge Gates' e-mail message of November 23, 2016, and attachments thereto. Following substantial discussion, the Committee voted to recommend that Rule 19.3, Ariz. R. Crim. P., be abrogated as unnecessary, with corresponding comments inserted into both the rules of evidence and those of criminal procedure. The general sense of the Committee, per known direction from the Court, was that shorter comments are better and that comments not refer to case law or other rules. The text of the comment the Committee would like to pursue follows, as does the text of the comment it would like to recommend that the Criminal Rules Task Force (CRTF) insert in place of Rule 19.3 in its upcoming petition.

The Committee voted on this language, subject to any comments that subcommittee members

Judge Gates and Paul Ahler might have, as well as the CRTF. Given Tim Eckstein’s dual membership on the Committee and the CRTF, he offered to transmit the Committee's recommendation to the CRTF at its meeting on December 9, 2016.

Evidence rules comment:

2018 Comment

Arizona Rule of Criminal Procedure 19.3 has been abrogated as unnecessary in light of Rule 801(d)(1)(A) and 804(b)(1) of these rules.

Criminal Procedure rules comment:

2018 Comment

Arizona Rule of Criminal Procedure 19.3 has been abrogated as unnecessary in light of Arizona Rules of Evidence 801(d)(1)(A) and 804(b)(1).

Judge Armstrong agreed to prepare and circulate for Committee approval a rule petition to amend Rule 801 accordingly. The CRTF will file the proposed amendment of Criminal Rule 19.3, if approved.

## **5. Uniform Standard for Certain Limited Jurisdiction Cases—Judge Armstrong**

This item, which is addressed in the minutes from our last meeting, was deferred given the absence of Judge Thumma. [The minutes of our last meeting stated: “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.”]

## **6. Query re Ariz. R. Civ. P. 75(d)-(e)—Judge Armstrong and All**

Attorney Doug Fitzpatrick questioned why “the Arizona Rules of Evidence apply to justice court and small claims court proceedings but are relaxed for cases subject to compulsory arbitration in superior court where more money is in controversy?” *See* Ariz. R. Civ. P. 75(d) and (e) [re-lettered as (c) and (d) under the restyled rules effective January 1, 2017]. This item is related to item # 5 and will be deferred until further discussion of a possible uniform standard. Also, the Committee would like to see what the Committee on Civil Justice Reform does with this rule, if anything.

## **7. Report of Subcommittee on Forensic Science—Tim Eckstein and All**

Mr. Eckstein reported on the Arizona Forensic Science Conference held December 2, 2016 in conjunction with the Governor's Office of Highway Safety DUI and Traffic Conference. The focus of the forensic science conference was to provide education and training to judges (both general and limited jurisdiction) in dealing with forensic science issues. Mr. Eckstein provided the Committee with the agenda from the conference and Judge Julien stated he would arrange to provide the conference materials to Committee members by e-mail. Judges Armstrong and Thumma spoke at the conference on "The Judge as Gatekeeper."

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

Mr. Klain summarized the issue and reported that he will continue his efforts to have the State Bar Civil Practice and Procedure Committee consider amending the subpoena form to include a Rule 615-like admonition to witnesses.

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

Judge Armstrong discussed the latest agenda book of the federal advisory committee, dated October 21, 2016. Of particular note, the federal Advisory Committee on Evidence Rules is working on or considering possible amendments to Rule 404(b), 702, 801(d)(1)(A) and 807. The agenda book contains an updated version of Professor Capra's *Crawford* tome as well as the final version of the Best Practices on Authentication of Electronic Evidence manual, which will be published by West together with the Rules of Evidence.

#### **10 and 11. 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 11:30 a.m.