

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

Friday, March 4, 2016

Arizona Courts Building

1501 W. Washington, Conference Room 330

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

**Members Present:**

The Honorable Samuel Thumma, Co- Chair  
The Honorable Mark Armstrong (Ret.), Co-  
Chair  
Mr. Paul Ahler  
Mr. Timothy Eckstein  
The Honorable Pamela Gates  
The Honorable Wallace Hoggatt (via  
telephone)  
Mr. Milton Hathaway  
The Honorable Paul Julien  
Mr. William Klain  
The Honorable Michael Miller (via  
telephone)  
Mr. Carl Piccarreta

**Members Not Present:**

The Honorable George Anagnost  
The Honorable Dave Cole (Ret.)  
Ms. Shirley McAuliffe  
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 25, 2015, and Future Meetings—Judges Thumma and Armstrong**

The minutes were approved as amended by acclamation.

Judge Thumma reported that he had reached out to CJ Bales yesterday by e-mail asking if he would like to address the committee on the Court's views concerning comments to the Arizona Rules of Evidence and other rules addressing the admissibility of evidence. The CJ responded that he had a leadership meeting this morning but might stop by if time permitted. The committee adjourned before the CJ had an opportunity to appear.

In light of the status of the proposed federal rule changes, discussed below, and the fact that no petitions to amend the Arizona Rules of Evidence are pending, Judge Armstrong suggested cancelling the meetings scheduled on May 20 and October 28, and scheduling a meeting in late September to discuss Arizona rule changes approved by the Court at its August 2016 Rules Agenda. The committee agreed to this approach and Judge Armstrong and Mr. Klain will report on the approved rule changes. Judge Thumma agreed to invite the CJ to attend and discuss the Court's views on rulemaking.

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

This item remains from prior discussions of Rules 615 and 611(a). Judge Thumma reported that the committee's suggested changes to the Bench Books have been incorporated therein. The proposed changes to the RAJIs and subpoena form are pending. Mr. Klain will ask the restyling Task Force on the Arizona Rules of Civil Procedure, of which he is a member, or the State Bar Civil Practice and Procedure Committee, to consider amending the subpoena form accordingly. Mr. Klain requested that Judge Julien e-mail him the related Bench Book provisions.

Mr. Klain summarized the ongoing work of the civil rules restyling task force. He reported that a staggered comment period is being used with an initial comment period ending April 1, a revised petition due May 13, a second comment period ending June 20, and any task force reply due July 8. He also reported on the other rule restyling efforts have been or will be initiated during the CJ's term.

Mr. Klain further reported that some evidentiary provisions have been stripped from the civil rules but he asked the committee to review proposed Rule 44, which still contains some evidentiary provisions. He will e-mail the proposed version of Rule 44 to committee members for review and individual comment.

Judge Julien reported on a proposed change to S.Ct. Rule 28 concerning promulgation of local rules.

#### **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 on the proposed abrogation of Federal Rule of Evidence 803(16), and the comments that have been filed. He also reported on the proposed amendments of Federal Rules of Evidence 902(13) and 902(14). The public comment period ended February 16, 2016.

Judge Armstrong passed on Ms. Refo's subcommittee report that the proposed abrogation of Rule 803(16), which has generated a firestorm of opposition, is likely to fail; and that the proposed amendments of Rule 902, which generated little comment, may be tweaked but are unlikely to be adopted this year.

#### **5. Report of Subcommittee on Forensic Evidence—Judge Miller and All**

Judges Miller and Thumma reported on work being done in the area of forensic evidence. The judges noted that part of CJ Bales' strategic agenda looks to identifying new and enhanced training programs for judges regarding forensic science issues. Judge Thumma observed that the Supreme Court has recently created a Forensics Workgroup, of which he is member, chaired by Judge Ron Reinstein. Judge Julien reported that the goal of the workgroup is to create an Arizona Forensic Science Academy.

Judge Miller reported on some national forensic science training sessions he has attended through A-Star, now NCSI. Some hot forensic issues being discussed nationally include nano technology, breathalyzer, gas chromatography, etc. Judge Miller observed that the work of the subcommittee may overlap the work of the new workgroup, and questioned the need for continuation of the subcommittee. The committee agreed to continue the subcommittee for the foreseeable future with Mr. Eckstein replacing Judge Miller when his term ends June 30, 2016. Thereafter, the subcommittee will consist of Chair Eckstein, Judge Hoggatt and new member Judge Julien.

Judge Thumma asked Judge Miller to share the work of the subcommittee with Judge Reinstein.

#### **6. Reappointment of Members—Judge Armstrong and All**

Judge Armstrong reported on the Supreme Court's June 2016 Expiration Report. All members present whose terms expire June 30, 2016, except for Judge Miller, agreed to be reappointed for a final two-year term. Judge Armstrong will reach out to Judge Anagnost and Ms. McAuliffe to determine their preferences. Judge Miller suggested a number of possible replacements, including Judges Paul Tang, Richard Gordon, Doug Metcalf and Tom Fink. He agreed to send an e-mail to Judge Armstrong with additional suggestions. Mr. Klain suggested attorney Jodi Feuerhelm. Other suggestions are welcomed.

CJ Bales will make the final decision on any replacements.

Judge Thumma thanked Judge Miller for his outstanding contributions to the committee.

**7. Other Items for Discussion, including October 2015 Agenda Book, Federal Advisory Committee on Evidence Rules, and Report of the Advisory Committee on Evidence Rules, November 7, 2015 —Judges Armstrong and Thumma**

Judge Armstrong discussed the latest report of the federal advisory committee and agenda book. 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. Judge Armstrong also reported that the federal standing Committee on Rules of Practice and Procedure met in Phoenix on January 7 and 8, 2016. The committee took no formal action on the proposed federal evidence rule changes as the public comment period had not yet ended.

Judge Thumma reported on other committee-related presentations and encouraged committee members to engage in presentations concerning the evidence rules and ongoing work of the committee.

**8 and 9. 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 11:30 a.m.