

Former Testimony Subcommittee Recommendations

According to the minutes from the June 18, 2010, Committee meeting, the Subcommittee on Former Testimony was charged with “look[ing] at ARE 803(25), 804(b)(1), 801(d)(1), and Ariz.R.Crim.P. 19.3.”

1(a). ARE 803(25)

This rule, which has no counterpart in the FRE, provides as follows:

The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

(25) Former testimony (non-criminal action or proceeding). Except in a criminal action or proceeding, testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

1(b). Side-by-side comparison (ARE 804(b)(1) and FRE 804(b)(1))

The following are [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

Former testimony (criminal action or proceeding). Former testimony in criminal actions or proceedings as provided in Rule 19.3(c), Rules of Criminal Procedure.

The following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

1(c). Rule 19.3(c)(1), Ariz.R.Crim.P¹

Prior Recorded Testimony.

Admissibility. Statements made under oath by a party or witness during a previous judicial proceeding or a deposition under Rule 15.3 shall be admissible in evidence if:

- (i) The party against whom the testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and
- (ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

Given that there is no FRE 803(25), should the Committee recommend that ARE 803(25) be deleted? That question cannot be answered without taking into consideration both ARE 804(b)(1) (as compared to its federal counterpart) and Ariz.R.Crim.P. 19.3(c)(1).

Unlike its federal counterpart, ARE 804(b)(1) applies only in criminal proceedings. All “804” exceptions involve unavailable declarants; the offering party must, as a condition precedent to invoking any 804 exception, demonstrate that the declarant is unavailable as that term is defined in ARE 804(a). Arizona fills the civil void with ARE 803(25); of course, a party offering hearsay evidence pursuant to Rule 803 need not prove the declarant unavailable; availability or lack thereof is immaterial under Rule 803.

FRE 804(b)(1) is easier to apply than the Arizona version because (1) the same rule applies to both civil and criminal cases, and (2) there is no need to resort to an extraneous rule.

Recommendations: None, pending discussion by Committee on August 20, 2010.

¹ Because Rule 19.3(c)(2) does not appear to be related to the specific issue being addressed, only 19.3(c)(1) is reproduced here.

2. Side-by-side comparison (ARE 801(d)(1) and FRE 801(d)(1))²

(d) Statements which are not hearsay. A statement is not hearsay if --

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony

(d) Statements which are not hearsay. A statement is not hearsay if --

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, **and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition** (emphasis supplied)

The difference between the versions is that, while the federal rule requires the prior inconsistent statement to have been made under oath and subject to the penalty of perjury, the Arizona version does not.

One can make the argument that the federal rule is preferable because, consistent with the definition of hearsay, it permits the factfinder to consider the prior statement for the truth of the matter asserted and avoids the problem of distinguishing between that use and "mere impeachment" use. Those who prefer the Arizona rule might argue that all prior inconsistent statements (under oath or otherwise) should be treated similarly, and that it is up to the factfinder to determine the weight to be given the prior statement?³

The subcommittee recommends adoption of FRE 801(d)(1)(A), primarily because prior unsworn statements lack sufficient reliability for admission as substantive evidence.

² ARE and FRE subsections (d)(1)(B) and (d)(1)(C) are identical with one another; thus, only subsection (d)(1)(A) is reproduced here.

³ In *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973), a pre-rules case, the Arizona Supreme Court stated that "we believe that the better rule is to allow the substantive use of such statements, when properly admitted, and not limit them for [sic] impeachment only. In doing this we are persuaded by the futility of requiring that the trier of fact, be it judge or jury, consider such statements for the purpose of impeachment only and not for the truth of the facts stated." 110 Ariz. at 142, 515 P.2d at 887.