

**MINUTES OF  
AD HOC COMMITTEE ON RULES OF EVIDENCE**

Friday, November 19, 2010

Arizona Courts Building

1501 W. Washington, Conference Room 109

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

**Members Present:**

The Honorable Andrew Hurwitz, Chair  
The Honorable Michael Miller  
The Honorable Samuel Thumma  
Ms. Patricia Refo  
Mr. Paul Ahler  
Prof. Dave Cole  
Mr. Timothy Eckstein  
Mr. Milton Hathaway  
Mr. Carl Piccarreta

**Members Not Present:**

**Staff Present:**

Mark Armstrong

**Quorum:**

Yes

**1. Call to Order—Justice Hurwitz**

Justice Hurwitz called the meeting to order at 9:15 a.m., and explained that because the Committee’s agenda posted on the web provided that the meeting would begin at 10:00 a.m., the Committee would defer its discussion of Rules 701 and 702 until after 10:00 a.m.<sup>1</sup>

Justice Hurwitz discussed the prospect of the Committee recommending a standing Court committee on the rules of evidence. The Committee reached consensus that such a recommendation should be included in the rule petition and in the Committee Report to be prepared by Justice Hurwitz.

**2. Approval of Minutes from 10/15/2010 Meeting—Justice Hurwitz**

The committee voted unanimously to approve the draft minutes.

**3. Discussion and Consideration of Restyled Rules and Comments—Justice Hurwitz**

With respect to work completed to date, Justice Hurwitz explained that the committee had generally agreed to recommend conforming to the Federal Rules of Evidence, as restyled, with certain notable exceptions, including Rule 103(d) (Fundamental Error), Rule 302, Rule 404 (Character and Other Acts Evidence), Rule 408(a)(2) (Criminal Use Exception), Rule 611(b) (Scope of Cross-Examination), and Rule 706(c) (Compensation for Expert Testimony). The Committee discussed these rules and reached consensus to make the following revisions, which will be incorporated in the strikeout version of the proposed rules:

- (a) In the comment to Rule 103, explain that subsection (e) (currently subsection (d)) would not be amended to conform to the federal rule. The Arizona rule refers to “fundamental error” while the federal rule refers to “plain error.”
- (b) In the comment to Rule 408, cull out the “criminal use exception” language and make it a separate paragraph at the beginning of the comment.
- (c) Amend Rule 615(e) by replacing “in Rule 39(a), Rules of Criminal Procedure” with “by applicable law.” Also, add explanatory language to the comment substantially as follows:

Subsection (e) (formerly subsection (d)), which is a uniquely Arizona provision, has been retained but amended to reflect that “a victim of crime” means a crime victim “as defined by applicable law,” which includes any applicable rule, statute, or constitutional provision. The rule previously provided that “a victim of crime” would be “as defined by Rule 39(a), Rules of Criminal Procedure.”

Otherwise, Justice Hurwitz asked Committee members to carefully review the remaining portions of the strikeout version, with special emphasis on the comments.

**4. Discussion and Consideration of Rules 701 and 702—All**

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<sup>1</sup> In the end, the only public member to attend the meeting was Paul Julien.

Justice Hurwitz asked Committee members to express their views on whether or not to adopt FRE 702, and explained that he would not be doing so because of his position on the Court. Trish Refo later expressed the view that the decision on whether to retain ARE 702 or adopt FRE 702 is best suited to the deliberative rule-making process.

Carl Piccarreta referred the Committee to his e-mail message of November 16, 2010. He explained that he favors retaining ARE 702 because there is no good reason for change. He used the phrase, “knowing your poison.” He expressed a concern that adopting FRE 702 might increase the burden on trial courts and counsel. He believes the concerns expressed by criminal practitioners appear to be mainly “asset driven.” He fears adopting FRE 702 would open “Pandora’s Box.” He would rather see *Logerquist* overruled, if it is to be overruled, by judicial decision rather than by rule.

Judge Miller initially characterized the decision as a 50/50 decision with merits on both sides. However, he found Prof. Mauet’s presentation and suggestion of a modified FRE 702 (without subsection (c) in current FRE 702 and subsection (d) in restyled FRE 702) to be persuasive. He expressed that he has seen the “*Daubertization of Frye*” as it is. He also expressed that there is a lot to be said for requiring the “validity and reliability” of principles and methods, but he is concerned about having judges determine whether an expert has applied the principles and methods reliably. He believes this last issue should be a jury question as suggested by Prof. Mauet. In the end, he is 51/49 for Prof. Mauet’s proposal although he shares the concern that such a hybrid approach might deprive us of the benefits of prior jurisprudence.

Trish Refo favors adopting FRE 702 because it either screens out unreliable evidence or it makes no difference, in which case principles of “harmony and uniformity” should prevail.

Judge Thumma expressed that this is a close question. He does not believe that *Frye* has caused mischief although he struggles with *Logerquist*, which is multifaceted. He wants to focus on doing the right thing. He does not believe the Arizona constitution precludes the Court from adopting FRE 702. He expressed that he finds *Frye* case law helpful where applicable while *Daubert* case law is less so, in part because of the abuse of discretion standard under *Daubert* as compared to the *de novo* standard under *Frye*. He also finds Prof. Mauet’s proposal to be an attractive alternative that more fully respects the right to jury trial.

Prof. Cole favors retaining ARE 702 because he sees no need to change; juries are doing fine and ARE works. He is not convinced judges are any better prepared to address whether the application of principles and methods is reliable. He also believes Prof. Mauet’s proposal is worthy of consideration.

Tim Eckstein favors the adoption of FRE 702 for uniformity. He recalls the Committee’s initial franchise to conform unless there are good reasons not to do so. He sees no good reason not to do so. He believes the ability to screen out unreliable testimony is especially salutary in criminal cases, in which there have been numerous instances of wrongful convictions based on unreliable testimony. He believes juries tend to focus on the “bottom line” and judges are better prepared to address whether principles and methods have been reliably applied in a given case. He believes FRE 702 provides greater guidance to judges than ARE 702. Finally, he expressed that preventing wrongful convictions outweighs the concerns expressed by civil practitioners.

Paul Ahler favors retaining ARE 702 because it is “not broken.” There is no failure in the current system. He agrees with Justice Feldman’s concerns about adopting FRE 702 and is concerned that adopting FRE 702 would engender more litigation. He believes juries “get it right” and judges are not uniquely better qualified.

Milt Hathaway is leaning toward adoption of FRE 702. Harkening back to the Committee’s initial mission, he sees no good reason not to do so for the same reasons expressed by others.

Justice Hurwitz thanked Committee members for their views and raised three issues for further Committee consideration: (1) whether the Committee should refer all three options (ARE 702, FRE 702, modified FRE 702 as suggested by Prof. Mauet) to the Court in its petition, recognizing that the Committee has failed to reach consensus on any one option; (2) whether the Committee should include a comment with the FRE 702 option; and (3) whether Rule 701 should be linked to Rule 702.

Justice Hurwitz also observed that *Logerquist* would not necessarily be disturbed under any option. He also expressed his belief that Arizona courts have stopped having *Frye* hearings much as the federal courts appear to have stopped having *Daubert* hearings. Finally, he opined that the constitutional issue is informative but is one that can be addressed in judicial decisions if any rules change is made.

The Committee reached consensus that all three options should be included in the petition for the Court’s consideration. The Committee agreed that the federal rule option should be accompanied by a comment substantially as follows:

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise. The amendment is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues. However, the rejection of expert testimony should be the exception rather than the rule. And, the trial court’s gatekeeping function is not intended to serve as a replacement for the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

The preceding comment has been derived from the Notes to Federal Rule of Evidence 702. The Court also incorporates by reference the remaining Notes to the federal rule.

The Committee also agreed that the modified federal rule option should be accompanied by a comment similar to the following:

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702 without subsection (d) because generally the issue of whether principles and methods have been reliably applied to the facts of a particular case is for the trier of fact. The

amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

Finally, the Committee agreed that Rule 701 should be linked to Rule 702. In other words, FRE 701 should not be adopted unless FRE 702 is adopted.

**5. Call to the Public—Justice Hurwitz**

No members of the public were present.

**6. Next Meeting and Roadmap—Justice Hurwitz**

Justice Hurwitz explained that the rule petition needs to be filed by January 10, 2011. Judge Armstrong agreed to circulate a draft petition by December 15. The Committee agreed to cancel its December in-person meeting and to meet by conference call if necessary. The Committee also discussed the prospect of meeting after the public comment period expires on May 20, 2011, to consider whether to reply to any comments received. A review of the Administrative Order creating the Committee revealed that the Committee has no expiration date.

Justice Hurwitz expressed his appreciation of the Committee's diligence and hard work.

**7. Adjournment—Justice Hurwitz**

Justice Hurwitz adjourned the meeting at 1:15 p.m.