

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

Friday, June 18, 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 Samuel Thumma
Mr. Timothy Eckstein
Mr. Milton Hathaway
Mr. Paul Ahler
Prof. Dave Cole

Members Not Present:

The Honorable Michael Miller
Mr. Carl Piccarreta
Ms. Patricia Refo

Staff Present:

Mark Armstrong

Quorum:

Yes

1. Call to Order—Justice Hurwitz

Justice Hurwitz called the meeting to order at 9:10 a.m., and introduced guest Shirley Wahl McAuliffe.

2. Approval of Minutes from 5/21/2010 Meeting—Justice Hurwitz

The committee voted unanimously to approve the draft minutes.

3. Revisit Rules 104(b) and 301—Justice Hurwitz and Judge Armstrong

The committee revisited Rule 104(b) and reached consensus to amend ARE 104(b) to be consistent with its restyled federal counterpart, as recommended in the report of the Workgroup on Undesignated Rules in Articles I – IV, dated May 14, 2010.

Justice Hurwitz announced that the restyling of the federal rules was approved by the Committee on Rules of Practice and Procedure at its meeting held June 14-15, 2010. The Committee will now transmit the proposed amendments to the Judicial Conference with a recommendation that they be approved and transmitted to the Supreme Court.

The committee revisited Rule 301 and reached consensus to adopt FRE 301 as recommended in the report of the Workgroup on Undesignated Rules in Articles I – IV, dated May 14, 2010. The committee believes the rule change will provide needed consistency. The committee also expressed the view that this proposal may benefit from public comment. Finally, the committee opined that we may need to eliminate the current comment to ARE 302 or change it to provide as follows:

Federal Rules of Evidence, Rule 302 was not adopted because ~~of the non-adoption of Rule 301~~ it is inapplicable to state court proceedings.

4. Revisit Rule 404 and 412—Judge Thumma, et al.

Judge Thumma reported on behalf of the Rule 404 Subcommittee, which prepared a supplemental report, dated June 15, 2010. Judge Thumma reported that the subcommittee drafted a new ARE 412 patterned after Arizona’s Rape Shield Law, A.R.S. § 13-1421, and considered whether Rule 404(a) and (b) could be simplified or further conformed to its federal counterpart. After substantial discussion, the committee reached consensus that no change should be made to ARE 404 because ARE 404 is a uniquely Arizona rule that was crafted and approved after much deliberation and compromise.

The committee next considered the proposed new ARE 412, which would incorporate almost precisely the language of A.R.S. § 13-1421 into the rule. After substantial discussion, the committee reached consensus to add a new ARE 412, with the federal heading and a comment to the following effect:

Federal Rule not adopted. See A.R.S. § 13-1421 (Evidence relating to victim’s chastity; pretrial hearing).

The committee felt this approach would be preferable to merely parroting the statute, which may be changed from time to time. This approach also will achieve the objective of alerting readers that Arizona has not adopted FRE 412 but that it does have a law on the same subject.

Similarly, the committee reached consensus that ARE 413-415 should be added, including the federal headings, with comments as follows:

Federal Rule not adopted. See Arizona Rule of Evidence 404(c).

5. Revisit Rule 408—Paul Ahler, et al.

Paul Ahler reported that he contacted the Attorney General’s office to determine if it has any concerns similar to those raised by the U.S. Justice Dept. that gave rise to the criminal exception. He reported that it did not. Thus, the committee reached consensus that “Arizona should not adopt the criminal use exclusion and should intentionally depart from FRE 408 in that respect,” as recommended in the original report of the Subcommittee on Rules 407 and 408, dated May 3, 2010.

6. Rule 410 Subcommittee Report—Paul Ahler, et al.

Paul Ahler reported for the subcommittee and recommended adopting FRE 410 with Arizona-specific provisions as recommended at page 3 of the undated Rule 410 Subgroup Report. According to Paul, the subcommittee further recommended amending Ariz. R. Crim. P. 17.4(f) to be consistent with Fed. R. Crim. P. 11(f), as recommended at page 5 of the undated Rule 410 Subgroup Report.

After substantial discussion, the committee reached tentative consensus to adopt the recommended changes as well as incorporating subdivision (ii) in the last sentence of FRE 410 into the Arizona rule, subject to additional research as described below. The committee also reached consensus to delete “Arizona” before “statute” in the first sentence of ARE 410 to be consistent with other usage in the rules.

Justice Hurwitz asked the subcommittee to attempt to determine the meaning of “on the record” in subdivision (ii) of FRE 410 as interpreted in federal case law. Justice Hurwitz agreed to attempt to ascertain why the federal committee added the two exceptions in the last sentence of FRE 410. These issues will be revisited at the August 20, 2010, meeting.

7. Unassigned Rules and Rule 606 Subcommittee Report—Judge Armstrong and Justice Hurwitz

Judge Armstrong reported that the only unassigned rules in Articles V and VI in which there are significant differences between the state and federal versions are Rules 501, 502, 601, 606, 608, 612 and 615.

For the reasons set forth in the subcommittee report, dated June 11, 2010, the committee reached consensus not to change ARE 501, 502 and 601.

For the reasons set forth in the subcommittee report, dated June 11, 2010, the committee reached consensus not to apply the criminal provisions of FRE 606(b) but otherwise to conform the two versions so that ARE 606(b) would read as follows, subject to restyling:

(b) Inquiry into validity of verdict in civil action. Upon an inquiry into the validity of a verdict in a civil action, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith; ~~except that~~ But a juror may testify about ~~on the question~~ (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or whether any outside influence was improperly brought to bear upon any juror, or~~ (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Not~~ may a juror's affidavit or evidence of any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

For the reasons set forth in the subcommittee report, dated June 11, 2010, the committee reached consensus to amend ARE 608(b) to be consistent with its federal counterpart by changing the two references to “credibility” to “character for truthfulness.”

For the reasons set forth in the subcommittee report, dated June 11, 2010, the committee reached tentative consensus not to amend ARE 612 although this decision may be revisited after considering the history of the rule.

For the reasons set forth in the subcommittee report, dated June 11, 2010, the committee reached consensus to amend ARE 615, to be consistent with its federal counterpart, by adding the following clause to subdivision (4):

, or a person authorized by statute to be present.

8. Rule 609 Subcommittee—Prof. Cole, et al.

Prof. Cole reported for the subcommittee. The committee discussed numerous issues, including: (1) why the Arizona rule uses “credibility”; (2) whether to add the last clause of FRE 609(a)(2) to the Arizona rule; and (3) what are the ramifications of amending ARE 608, as recommended above, but not ARE 609.

Justice Hurwitz asked the subcommittee to ascertain whether Arizona case law makes any distinction between “credibility” and “character for truthfulness.” Justice Hurwitz will attempt to determine why the federal rules distinguish between the two terms. Justice Hurwitz and Judge Armstrong will look at the history of the two versions of the rule. These issues will be revisited at the August 20, 2010, meeting.

9. Rule 611 Subcommittee—Milt Hathaway, et al.

Milt Hathaway reported for the subcommittee. The committee reached consensus to adopt FRE 611(a) and (c) with comments as recommended in the subcommittee report, dated June 3, 2010, subject to a review of the 1995 Arizona petition, comments and order, if available, with respect to subsection (c) only. The committee further reached consensus not to change subsection (b). Justice Hurwitz asked Judge Armstrong to attempt to determine how the Arizona comment came about. These issues will be revisited at the August 20, 2010 meeting.

10. Future Subcommittee Assignments—Justice Hurwitz

Justice Hurwitz created the following subcommittees to report at the next meeting:

Subcommittee on Article VIII Residual Exceptions and Last ¶ of FRE 801—Milt Hathaway, Chair, Judge Thumma and Trish Refo (will look at why Arizona has two exceptions; whether we should adopt FRE 807 as an alternative; and whether we need the last ¶ of FRE 801)

Subcommittee on Former Testimony—Prof. Cole, Chair, Paul Ahler and Tim Eckstein (will look at ARE 803(25), 804(b)(1), 801(d)(1), and Ariz. R. Crim. P. 19.3)

Subcommittee on Unassigned Rules—Justice Hurwitz, Judge Armstrong and Carl Piccarreta (will look at whether there are any other issues that need to be addressed in Articles VIII – XI)

Reminder: The Committee previously agreed that subcommittee reports would be distributed to all committee members by Friday of the week prior to the week of the meeting at which the report is to be discussed.

11. Call to the Public—Judge Armstrong

Shirley Wahl McAuliffe thanked the committee for its work and its invitation for her to attend.

12. Next Meeting—Judge Armstrong

The next committee meeting will be held on August 20, 2010, from 9:00 a.m. – 2:00 p.m., at the Arizona Courts Building, Room 109, 1501 W. Washington, Phoenix, Arizona. The conference call number will be listed on the agenda.

The committee confirmed that it will begin consideration of Article VII at its September 17, 2010, meeting.

13. Adjournment—Justice Hurwitz

Justice Hurwitz thanked the committee and adjourned the meeting at 1:45 pm.