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**IN THE SUPREME COURT  
 STATE OF ARIZONA**

In the Matter of	)	
	)	Arizona Supreme Court No. R-10-____
	)	
ARIZONA RULES OF EVIDENCE; ARIZONA RULES OF CRIMINAL PROCEDURE	)	PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(f), ARIZONA RULES OF CRIMINAL PROCEDURE
	)	
	)	

**PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE AND RULE 17.4(f),  
 ARIZONA RULES OF CRIMINAL PROCEDURE**

Pursuant to Rule 28, Rules of the Supreme Court, the Ad Hoc Committee on Rules of Evidence, by and through its staff, the Honorable Mark W. Armstrong, petitions the Court to amend the Arizona Rules of Evidence, and Rule 17.4, Arizona Rules of Criminal Procedure, as reflected in the attached Appendix A, effective January 1, 2012.

**I. INTRODUCTION AND BACKGROUND**

In Supreme Court Administrative Order No. 2010-42, dated March 24, 2010, a copy of which is attached as Appendix B, Chief Justice Rebecca White Berch established the Ad Hoc Committee on Rules of Evidence with the following purpose: “compare the *Arizona Rules of*

*Evidence* to the proposed restyled *Federal Rules of Evidence*, identify differences, and provide input to the Supreme Court regarding conforming changes.” The Committee has met monthly beginning in April 2010, with the exception of July, and proposes changes to the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, as reflected in Appendix A and summarized below. In the course of its proceedings, the Committee has prepared subcommittee reports and minutes that reflect the details of its work. The reports and minutes are available at the Committee’s website:

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

One of the Committee’s most important recommendations is to restyle the Arizona rules, except for Rules 302, 404, 412-415, and perhaps Rules 701 and 702,<sup>1</sup> consistent with the restyling of the federal rules. The federal restyling is intended to update the language of the rules and make them more easily understood. No substantive changes are intended by the restyling, as made clear in the comment to each restyled rule. The federal restyling was approved by the Advisory Committee on Evidence Rules in April 2009, by the Standing Committee in June 2010, and by the Judicial Conference in September 2010. The restyled federal rules have been transmitted to the Supreme Court of the United States with a recommendation that they be approved and transmitted to Congress in accordance with the Rules Enabling Act. The restyled federal rules are proposed to be effective December 1, 2011. The background of the federal restyling and the text of the restyled rules may be viewed at:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09-Appendix-D.pdf>.

Following is a summary of the Committee’s proposed changes to the Arizona Rules of Evidence. Generally, the Committee recommends that the Court conform the Arizona Rules of

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<sup>1</sup> The Committee has recommended options for Rules 701 and 702, one of which is the current rule without restyling.

Evidence to the Federal Rules of Evidence, as restyled, with some notable exceptions—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), Rule 701, Rule 702, and Rule 706(c) (Compensation for Expert Testimony)—as more fully explained below. Also, the Committee recommends throughout that both current and proposed comments be dated to reflect the year of the comment.

Finally, the Committee recommends the creation of a standing committee to periodically review the rules of evidence similar to the federal Advisory Committee on Evidence Rules. One reason that the proposed changes to the Arizona rules are so extensive is that the Arizona Rules of Evidence, which were originally adopted in 1977 and patterned after the Federal Rules of Evidence, have not been systemically reviewed and revised. Thus, from time-to-time, worthwhile changes were made to the federal rules that were not made in Arizona, perhaps intentionally but also perhaps by oversight. A new standing committee would avoid any oversights and ensure that the Arizona Rules of Evidence are current and consistent, to the extent appropriate, with the Federal Rules of Evidence. Such a committee could also advise the Court about future petitions filed under Arizona Rules of the Supreme Court 28 which seek to amend the Arizona rules.

## **II. SUMMARY OF THE PROPOSED AMENDMENTS TO ARIZONA RULES OF EVIDENCE<sup>2</sup>**

### **ARTICLE I. GENERAL PROVISIONS**

#### **Rule 101. Scope; Definitions**

Restyling only.

#### **Rule 102. Purpose**

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<sup>2</sup> The titles in this section are the restyled titles.

Restyling only.

**Rule 103. Rulings on Evidence**

Subsection (b) has been added to conform to Federal Rule of Evidence 103(b).

Additionally, the language of Rule 103 has been amended to conform to the federal restyling.

The substance of subsection (e) (formerly subsection (d)), however, which refers to “fundamental error,” has not been changed to conform to the federal rule, which refers to “plain error,” because Arizona and federal courts have long used different terminology in this regard.

**Rule 104. Preliminary Questions**

Restyling only.

**Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes**

Restyling only.

**Rule 106. Remainder of or Related Writings or Recorded Statements**

Restyling only.

**ARTICLE II. JUDICIAL NOTICE**

**Rule 201. Judicial Notice of Adjudicative Facts**

The last sentence of subsection (f) (formerly subsection (g)) has been added to conform to Federal Rule of Evidence 201(f). Additionally, the language of Rule 201 has been amended to conform to the federal restyling.

**ARTICLE III. PRESUMPTIONS IN CIVIL CASES**

**Rule 301. Presumptions in Civil Cases Generally**

The language of this rule has been added to conform to Federal Rule of Evidence 301, as restyled.

**Rule 302. Applying State Law to Presumptions in Civil Cases**

A comment has been added to this rule stating that “Federal Rule of Evidence 302 has not been adopted because it is inapplicable to state court proceedings.”

#### **ARTICLE IV. RELEVANCY AND ITS LIMITS**

##### **Rule 401. Test for Relevant Evidence**

Restyling only.

##### **Rule 402. General Admissibility of Relevant Evidence**

Restyling only.

##### **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

Restyling only.

##### **Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes**

No change is recommended except to date the original comment to the rule. Because this rule was amended in 1997 to incorporate Arizona case law and uniquely Arizona policy considerations, the Committee decided not to recommend any changes.

##### **Rule 405. Methods of Proving Character**

Restyling only.

##### **Rule 406. Habit; Routine Practice**

Restyling only.

##### **Rule 407. Subsequent Remedial Measures**

This rule has been amended to conform to Federal Rule of Evidence 407 in order to provide greater clarity regarding the applicable scope of the rule. Additionally, the language of Rule 407 has been amended to conform to the federal restyling.

##### **Rule 408. Compromise Offers and Negotiations**

The “criminal use exception” in Federal Rule of Evidence 408(a)(2) has not been included in the amended Arizona rule because it is unnecessary. Otherwise, the language of Rule 408 has been amended to conform to the federal restyling.

**Rule 409. Offers to Pay Medical and Similar Expenses**

Restyling only.

**Rule 410. Pleas, Plea Discussions and Related Statements**

This rule has been amended to conform to Federal Rule of Evidence 410, including the addition of subdivision (b)(2) and the Arizona-specific provision in subdivision (a)(3). Additionally, the language of Rule 410 has been amended to conform to the federal restyling.

The Committee has also recommended that Arizona Rule of Criminal Procedure 17.4(f) be amended to conform to its federal counterpart, Federal Rule of Criminal Procedure 11(f).

**Rule 411. Liability Insurance**

Restyling only.

**Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition**

This rule has been added to conform the numbering of the Arizona rules with the federal rules, but with language stating that “Federal Rule of Evidence 412 has not been adopted. See A.R.S. § 13-1421 (Evidence relating to victim’s chastity; pretrial hearing).” The federal rule is sometimes called the “rape-shield” rule. Rather than adopt the federal language, the Committee thought it more appropriate simply to refer to Arizona’s “rape-shield” law, A.R.S. § 13-1421.

**Rule 413. Similar Crimes in Sexual-Assault Cases**

This rule has been added to conform the numbering of the Arizona rules with the federal rules, but with language stating that “Federal Rule of Evidence 413 has not been adopted. See

Arizona Rule of Evidence 404(c),” referring to the Arizona rule that applies to this subject matter.

**Rule 414. Similar Crimes in Child-Molestation Cases**

This rule has been added to correspond to the comparable federal rule but with language stating that “Federal Rule of Evidence 414 has not been adopted. See Arizona Rule of Evidence 404(c),” referring to the Arizona rule that applies to this subject matter.

**Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation**

This rule has been added to conform the numbering of the Arizona rules with the federal rules, but with language stating that “Federal Rule of Evidence 415 has not been adopted. *See* Arizona Rule of Evidence 404(c),” referring to the Arizona rule that applies to this subject matter.

**ARTICLE V. PRIVILEGES**

**Rule 501. Privilege in General**

Restyling only.

**Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

Because this rule was adopted effective January 1, 2010, and is consistent with restyled Federal Rule of Evidence 502, no changes are recommended.

**ARTICLE VI. WITNESSES**

**Rule 601. Competency to Testify in General**

Restyling only.

**Rule 602. Need for Personal Knowledge**

Restyling only.

**Rule 603. Oath or Affirmation to Testify Truthfully**

Restyling only.

**Rule 604. Interpreters**

Restyling only.

**Rule 605. Judge’s Competency as a Witness**

Restyling only.

**Rule 606. Juror’s Competency as a Witness**

This rule has been amended to conform to Federal Rule of Evidence 606, including the addition of subdivision (b)(2)(C). However, subsection (b) has not been applied to criminal cases, as is done in Federal Rule of Evidence 606(b), because such cases are governed by Arizona Rule of Criminal Procedure 24.1(d). Additionally, the language of Rule 606 has been amended to conform to the federal restyling.

**Rule 607. Who May Impeach a Witness**

Restyling only.

**Rule 608. A Witness’s Character for Truthfulness or Untruthfulness**

This rule has been amended to conform to Federal Rule of Evidence 608, including changing two references to “credibility” to “character for truthfulness” in subsection (b). In 2003, the federal rule was amended to substitute “character for truthfulness” for “credibility.” According to the Committee Notes on Federal Rule of Evidence 608, use of the term “credibility” was deemed potentially “overbroad” in this context. Thus, the federal committee noted that:

On occasion the Rule’s use of the overbroad term “credibility” has been read “to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility.” American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove

the witness' character for veracity. See Advisory Committee Note to Rule 608(b) (stating that the Rule is “[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case...”).

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.

Additionally, the language of Rule 608 has been amended to conform to the federal restyling.

### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

This rule has been amended to conform to Federal Rule of Evidence 609, including changing “credibility” to “character for truthfulness” in subsection (a) and adding language to the last clause of subdivision (a)(2) to clarify that this evidence may be admitted only “if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.” Additionally, the language of Rule 609 has been amended to conform to the federal restyling.

### **Rule 610. Religious Beliefs or Opinions**

Restyling only.

### **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**

This rule has been amended to conform to Federal Rule of Evidence 611, except for subsection (b), which has not been changed. Additionally, the language of subsections (a) and (c) has been amended to conform to the federal restyling.

The proposed 2012 comment to the rule makes clear that the amendment of Rule 611(a) is not intended to diminish a trial court's ability to impose reasonable time limits on trial proceedings, which is otherwise provided for by rules of procedure; and that the amendment of Rule 611(c) is not intended to change existing practice under which a witness called on direct

examination and interrogated by leading questions may be interrogated by leading questions on behalf of the adverse party as well.

**Rule 612. Writing Used to Refresh a Witness’s Memory**

Restyling only.

**Rule 613. Witness’s Prior Statements**

Restyling only.

**Rule 614. Court’s Calling or Examining a Witness**

Restyling only.

**Rule 615. Excluding Witnesses**

This rule has been amended to conform to Federal Rule of Evidence 615, including the addition of subsection (d). 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.” Additionally, the language of Rule 615 has been amended to conform to the federal restyling.

**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**

**Rule 701. Opinion Testimony by Lay Witnesses**

The Committee has propounded two options for this rule: (1) retain the current rule in the event the Court decides not to change Rule 702; or (2) adopt the federal version in the event the Court decides to adopt Federal Rule of Evidence 702.

**Rule 702. Testimony by Expert Witnesses**

The Committee devoted several meetings to hearing comments from interested parties about adopting Federal Rule of Evidence 702.<sup>3</sup> In the end, the Committee was divided on whether to retain the current version of the rule or adopt Federal Rule of Evidence 702. Three Committee members favored retaining the current Arizona rule, citing considerations of predictability and the right to a jury trial, and opining that the current rule is not broken. Three Committee members favored adopting the federal rule, citing considerations of uniformity and the interest in ensuring that unreliable evidence is screened, particularly in criminal cases. The remaining two Committee members suggested a hybrid proposal recommended by Professor Thomas Mauet of the James E. Rogers College of Law. Under this approach, the last prong of the federal rule (“the expert has reliably applied the principles and methods to the facts of the case”) would not be included under the assumption that this issue should generally be left to the fact-finder. Thus, the Committee has put forth three options for the Court’s consideration.

**Rule 703. Bases of an Expert’s Opinion Testimony**

Restyling only.

**Rule 704. Opinion on an Ultimate Issue**

Subsection (b) has been added to conform to Federal Rule of Evidence 704, which was amended in 1984 to add comparable language. The new language in the Arizona rule is considered to be consistent with current Arizona law. Additionally, the language of Rule 704 has been to conform to the federal restyling.

**Rule 705. Disclosing the Facts or Data Underlying an Expert’s Opinion**

Restyling only.

**Rule 706. Court Appointed Expert Witnesses**

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<sup>3</sup> These comments were recorded and preserved on two DVDs, which have been provided to the Court.

The language of subsection (c) of this rule has been amended to provide, consistent with Federal Rule of Evidence 706, that an expert is entitled to a reasonable compensation, as set by the court. Additionally, the language of subsections (a), (b), (d), and (e) of the rule has been amended to conform to the federal restyling.

## **ARTICLE VIII. HEARSAY**

### **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

To conform to Federal Rule of Evidence 801(d)(1)(A), Rule 801(d)(1)(A) has been amended to require that a prior inconsistent statement be made under penalty of perjury in order to be considered non-hearsay under this rule. Similarly, the last sentence of Rule 801(d)(2) has been added to conform to Federal Rule of Evidence 801(d)(2). Additionally, the language of Rule 801 has been amended to conform to the federal restyling.

### **Rule 802. The Rule Against Hearsay**

Restyling only.

### **Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**

To conform to Federal Rule of Evidence 803(6)(A), as restyled, the language “first hand knowledge” in Rule 803(6)(b) has been changed to “knowledge” in amended Rule 803(6)(A). The new language is not intended to change the requirement that the record be made by—or from information transmitted by—someone with personal or first hand knowledge.

To conform to Federal Rules of Evidence 803(24) and 807, Rule 803(24) has been deleted and transferred to Rule 807.

Rule 803(25), which has no counterpart in the Federal Rules of Evidence, has been deleted as unnecessary in light of the 2012 amendment of Rule 801(d)(1)(A).

Additionally, the language of Rule 803 has been amended to conform to the federal restyling.

**Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness**

Rule 804(b)(3) has been amended to conform to Federal Rule of Evidence 804(b)(3), as amended effective December 1, 2010.

To conform to Federal Rules of Evidence 804(5) and 807, Rule 804(7) has been deleted and transferred to Rule 807.

Additionally, the language of Rule 804 has been amended to conform to the federal restyling.

**Rule 805. Hearsay Within Hearsay**

Restyling only.

**Rule 806. Attacking and Supporting the Declarant’s Credibility**

Restyling only.

**Rule 807. Residual Exception**

Rule 807 has been added to conform to Federal Rule of Evidence 807, as restyled.

**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION**

**Rule 901. Authenticating and Identifying Evidence**

Restyling only.

**Rule 902. Evidence That is Self-Authenticating**

Restyling only.

**Rule 903. Subscribing Witness’s Testimony**

Restyling only.

**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS**

**Rule 1001. Definitions That Apply to This Article**

Restyling only.

**Rule 1002. Requirement of the Original**

Restyling only.

**Rule 1003. Admissibility of Duplicates**

Restyling only.

**Rule 1004. Admissibility of Other Evidence of Contents**

Restyling only.

**Rule 1005. Copies of Public Records to Prove Content**

Restyling only.

**Rule 1006. Summaries to Prove Content**

Restyling only.

**Rule 1007. Testimony or Statement of a Party to Prove Content**

Restyling only.

**Rule 1008. Functions of the Court and Jury**

Restyling only.

**ARTICLE XI. MISCELLANEOUS RULES**

**Rule 1101. Applicability of the Rules**

The title and language of Rule 1101(d) have been amended to conform to the federal restyling. No changes have been made to Rule 1101(a), (b), and (c) because those portions of the federal rule are generally inapplicable in Arizona.

**Rule 1102. Amendments**

The language of this rule has been added to be consistent with Federal Rule of Evidence 1102, as restyled.

**Rule 1103. Title**

Restyling only.

**III. SUMMARY OF THE PROPOSED AMENDMENT OF RULE 17.4(F) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE**

Arizona Rule of Criminal Procedure 17.4(f) has been amended in conjunction with the proposed changes to Arizona Rule of Evidence 410.

**IV. CONCLUSION**

Petitioner respectfully requests that the Court consider this petition and proposed rule changes at its earliest convenience. Petitioner additionally requests that the petition be circulated for public comment until May 20, 2011, and that the court adopt the proposed rules as they currently appear or as modified in light of comments received from the public, with an effective date of January 1, 2012.

Finally, the Committee respectfully requests that the Court create a standing committee on the Rules of Evidence to consider future amendment of the rules based on changes to the Federal Rules of Evidence or evolving case law.

DATED this \_\_\_\_ day of December, 2010.

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Mark W. Armstrong  
Staff, Ad Hoc Committee on Rules of Evidence