

MEMO

TO: Ad Hoc Committee on Arizona Rules of Evidence

FROM: Subcommittee on Rule 611
Carl Piccarreta, Milton Hathaway & Hon. Samuel Thumma

RE: Rule 611 – Mode and Order of Interrogation and Presentation

DATE: June 3, 2010

I. INTRODUCTION

The Subcommittee reviewed and compared Rule 611 after consideration of practical application and reference to both Comments and Commentaries.

The Subcommittee did not feel that one Rule was preferred, in its entirety, over the other. It is the Subcommittee's preference to blend the two rules. If, however, a selection of one over the other must be made, then ARE 611 is preferred.

II. RECOMMENDATION

A. Rule 611(a)

The two rules are near identical. The exceptions lie in the caption and last sentence:

(ARE) Control By Court; Time Limitations
(FRE) Control By Court

The inclusion by Arizona of the phrase "Time Limitations" is expanded upon in the last sentence of 611(a) where the Arizona Rule contains:

The court may impose reasonable time limits on the trial proceedings or portions thereof.

The federal rule does not contain that specific discretionary direction.

Based on the Subcommittee’s experience, it is believed that federal trial judges do not hesitate, as a matter of every day practice, to impose time limits on trial proceedings, consistent with the ARE direction. However, the Subcommittee was concerned that by adopting federal rule 611(a), some would interpret the change as relieving Arizona trial courts of time limitation discretion.

The Subcommittee recommends adoption of FRE 611(a) with a comment that there was no intent to change Arizona practice in granting trial judge discretion to impose reasonable time limits on the trial proceedings, or continue with ARE 611(a) as written.

B. Rule 611(b) Scope of Cross-Examination

There is significant difference between the Arizona and federal rule. The Arizona rule limits cross-examination to “any relevant matter”. In contrast, the federal rule limits cross-examination to “the subject matter of the direct examination or matters affecting the credibility of the witness.” It also grants the trial court discretion to permit inquiries into additional matters.

The Subcommittee favors the Arizona Rule as history and practical application are its strengths. In support, *McCormick on Evidence* and the U.S. Supreme Court both recommended wide open cross-examination. *McCormick* noted that considerations of economy of time and energy strongly favored wide open cross-examination as restricted cross was productive of continual bickering as to the “scope of the direct” and application to particular cross-examination questions. “These controversies are often reventilated on appeal, and reversals for error in their determination are frequent”. The House, nonetheless, narrowed Rule 611(b) to its current federal position.

The Subcommittee recommends ARE Rule 611(b).

C. Rule 611(c) Leading Questions

The Subcommittee favored certain federal language over the Arizona language. The Subcommittee felt that the Arizona language is overly verbose¹ and did not add any further clarity or specificity. However, the Subcommittee felt that the last sentence of ARE 611 (c) should be retained – “the witness thus called may be interrogated by leading questions on behalf of the adverse party also” – or if omitted, a comment should be added to indicate that we intended no change to existing Arizona law.

¹ ARE 611(c) states that “a party may interrogate an unwilling, hostile or biased witness by leading questions. A party may call an adverse party or an officer, director or managing agent of a public or private corporation of a partnership or association which is an adverse party or witness whose interests are identified with an adverse party may interrogate that person by leading questions”. That portion of rule 611(c) was felt to be verbose when compared to its federal counterpart. FRE 611(c) uses the following language: “When a party calls a hostile witness, an adverse party or witness identified with an adverse party, interrogation may be by leading questions”.

The Subcommittee felt that the federal language encompassed its lengthier counterpart in the Arizona rule and was, therefore, preferable.

The comment to ARE 611(c) indicates that the 1995 amendments to that rule, which added the last sentence quoted above, changed the Arizona Supreme Court's holding in J & B Motors, Inc. v. Margolis, 75 Ariz. 392, 257 P.2d 588 (1953). In Margolis, the Arizona Supreme Court affirmed the trial court's ruling preventing the cross-examination of defendant with leading questions after plaintiff had called the defendant on direct and used leading questions. The rule in 1953 only allowed leading questions to be used when a witness was hostile or biased. The 1995 amendment changed Arizona law.

III. SUMMARY

The Subcommittee recommendations are as follows:

1. Adoption of FRE 611(a) with the comment that this rule encompasses trial court discretion to impose reasonable time limits on the trial proceedings or portions thereof;
2. Retain ARE 611(b);
3. Adopt FRE 611(c) with a comment that a witness called on direct and interrogated by leading questions may be interrogated by leading questions on behalf of the adverse party also.

In the absence of the recommended comments accompanying FRE 611(a) and 611(c), the Subcommittee favors retention of the Arizona rule, verbose or not.