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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-10-0035
)
ARIZONA RULES OF EVIDENCE;)
ARIZONA RULES OF CRIMINAL) REPLY TO COMMENTS
PROCEDURE) RE: PETITION TO AMEND ARIZONA
) RULES OF EVIDENCE AND
) RULE 17.4(f), ARIZONA
) RULES OF CRIMINAL
) PROCEDURE
)
)
_____)

REPLY TO COMMENTS RE: PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE AND RULE 17.4(f), ARIZONA RULES OF CRIMINAL PROCEDURE

Pursuant to Rule 28(D)(2), Rules of the Supreme Court, the Ad Hoc Committee on Rules of Evidence, by and through its staff, the Honorable Mark W. Armstrong, hereby replies briefly to comments filed concerning the subject petition. The Committee 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. The proposed rules contained in Appendix A include the proposed changes made in response to the comments received, as explained below.

I. INTRODUCTION AND BACKGROUND

In Supreme Court Administrative Order No. 2010-42, dated March 24, 2010, 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 regularly and proposes changes to the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, as reflected in Appendix A. 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 702,¹ 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 Supreme Court recommended minor restyling revisions to Rules 408(a)(1) and 804(b)(4), which are included in Appendix A. The restyled federal rules are proposed to be effective December 1,

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

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>.

II. REPLY TO COMMENTS

Rule 201(f): The Maricopa County Attorney’s Office (“MCAO”) opposes the proposed change. The Committee recommends that the proposed rule remain as is because the proposal is consistent with current Arizona law.

Rule 405(b): The MCAO recommends reinstating the reference to Rule 404(c). The Committee agrees and has reinstated the reference in Appendix A.

Rule 410: The MCAO recommends changing the reference to “nolo contendere” to “no contest” in subsection (a)(2). The Committee agrees to change the reference to “nolo contendere” to “nolo contendere or no contest,” consistent with the usage in the current rule.

Rule 410: The State Bar of Arizona (“State Bar”) recommends three changes: (1) retaining the reference to administrative proceedings; (2) inserting “Except as otherwise provided by statute,” at the beginning of subsection (a); and (3) adding certain language to subsection (a)(1). The Committee agrees with the first two suggestions but not the third because it would decouple our rule from the restyled federal rule. The Committee acknowledges the concerns raised in the federal note but would note that the proposed Arizona rule is consistent with the final version of the restyled federal rule. The Committee believes the State Bar’s suggested language would amount to a substantive change that should be pursued, if at all, by separate rule petition. With

respect to the State Bar's first two suggestions, the Committee recommends adding the following language at the beginning of subsection (a): "Except as otherwise provided by statute, [i]n a civil or criminal case, or administrative proceeding, . . ." See Rule 410 Subcommittee Report.

Rule 605: The State Bar recommends changing "presiding judge" to "judge presiding at trial," consistent with the current rule and Arizona practice. The Committee agrees and has made this change in Appendix A.

Rule 609: The MCAO raises two concerns with respect to this rule. The Committee recommends that the proposed rule remain as is because the proposal is consistent with current Arizona law. See Report of Rule 609 Subcommittee.

Rules 701 and 702: The vast majority of comments received concerned Rules 701 and 702. The Committee declines to reply to these comments because it is evenly split on whether to adopt Arizona Rule of Evidence 702 or Federal Rule of Evidence 702. Additionally, two public hearings were held on these rules and video-recordings of the hearings are available for the Court's review.

Rule 801(d)(1)(A): Several commentators expressed opposition to the proposed change to this rule. The commentators argue that unsworn prior inconsistent statements should be admissible as non-hearsay for the truth of the matter asserted, at least if they survive a Rule 403 balancing. In the end, the Committee was divided but a bare majority supported the comments. Thus, the current language of the rule has been reinstated in Appendix A. The minority expressed

concerns about the reliability of unsworn prior statements. The Committee recognizes that this matter presents a policy issue for the Court. *See* Report of Subcommittee on Undesignated Rules in Articles VIII-XI.

Rule 801(d)(2): The MCAO opposes the addition of the last paragraph to this rule. The Committee recommends that the proposed rule remain as is because the proposal is consistent with current Arizona law. *See* Report of Subcommittee on Article VIII residual exceptions and last paragraph of FRE 801.

Rule 803(25): The State Bar recommends retaining the current version of this rule. The Committee agrees and has revised Appendix A accordingly. *See* Report of Subcommittee on Article VIII residual exceptions and last paragraph of FRE 801.

Rule 804(a)(5)(A): The MCAO expressed concern that the reference to Rule 804(b)(5) might be a drafting error. The Committee does not view the reference as a drafting error because the proposed rule is consistent with the restyled federal rule and appropriately refers to Rule 804(b)(5).

Rule 804(b)(1): The State Bar commented upon Rules 803(25) and 804(b)(1), and Criminal Rule 19.3(c). The Committee having agreed to reinstate Rule 803(25), further recommends that proposed Rule 804(b)(1) be limited to “Former Testimony in Criminal Cases,” by incorporating the language of Criminal Rule 19.3(c). *See* Report of Former Testimony Subcommittee.

Rule 1002: The State Bar pointed out the inappropriate reference to “a federal statute.” The Committee agrees and has made the appropriate change in Appendix A.

III. CONCLUSION

Petitioner respectfully requests that the Court consider the petition, reply, and proposed rule changes at its earliest convenience. Petitioner additionally requests that the court adopt the proposed rules 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 29th day of June, 2011.

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

Attachment: Appendix A (Proposed Rules)