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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of )  
 ) Arizona Supreme Court No. R-11-\_\_\_\_  
 )  
THE ARIZONA RULES )  
OF EVIDENCE )  
 ) PETITION TO AMEND THE ARIZONA  
 ) RULES OF EVIDENCE  
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**PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE**

Pursuant to Rule 28, Rules of the Supreme Court, Mark W. Armstrong, Staff Attorney, Arizona Supreme Court, petitions the Court to amend the Arizona Rules of Evidence, as reflected in the attachment hereto, effective January 1, 2013.

**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 met regularly beginning in April 2010, and filed a petition to amend the Arizona Rules of Evidence on December 10, 2010. In an amended order

filed September 8, 2011, the Chief Justice adopted the proposed rules with a few exceptions not pertinent here.

This petition proposes a few additional changes that were either overlooked in the adopted version of the rules or suggested by the Court at its September 2011 Rules Agenda.

## **II. SUMMARY OF THE PROPOSED AMENDMENTS TO THE ARIZONA RULES OF EVIDENCE**

### **Prefatory Comment to 2012 Amendments**

The petition proposes to add three rule references to the prefatory comment that were inadvertently left out of the original version of the comment.

#### **Rule 608**

The petition proposes to delete the references to cross-examination in subsection (b) and subdivision (b)(2), and to add an explanatory comment to the 2013 amendment. The references to cross-examination appear to be unnecessary in light of Rule 607 and the Committee Note to Federal Rule of Evidence 608, as restyled.

Rule 607 provides that “[a]ny party, including the party that called the witness, may attack the witness’s credibility.” Similarly, the Committee Note to Federal Rule of Evidence 608, as restyled, provides in pertinent part as follows:

The Committee is aware that the Rule’s limitation of bad-act impeachment to “cross-examination” is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term “on cross-examination” to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

#### **Rule 609**

The petition proposes to amend the comment to this rule to clarify that evidence of convictions involving a dishonest act or false statement *must* be admitted “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.”

### **Rule 803**

The petition proposes to amend the comment to this rule by clarifying that Rule 803(25) has *not* been changed to conform to the federal rules.

### **Rule 804**

The petition proposes to amend the comment to this rule by clarifying that Rule 804(b)(1) has *not* been changed to conform to the federal rules.

## **III. 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, 2012, 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, 2013.

DATED this \_\_\_\_\_ day of December, 2011.

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Mark W. Armstrong  
Staff Attorney, Arizona Supreme Court

# ATTACHMENT<sup>1</sup>

## ARIZONA RULES OF EVIDENCE

### Prefatory Comment to 2012 Amendments

The 2012 amendments to the Arizona Rules of Evidence make three different kinds of changes: (1) the Arizona rules have generally been restyled so that they correspond to the Federal Rules of Evidence as restyled. These “restyling” changes are not meant to change the admissibility of evidence; (2) in several instances, the Arizona rules have also been amended to “conform” to the federal rules, and these changes may alter the way in which evidence is admitted (see, e.g., Rule 702); and (3) in some instances, the Arizona rules either retain language that is distinct from the federal rules (see, e.g., Rule 404), or deliberately depart from the language of the federal rules (see, e.g., Rule 412).

The Court has generally adopted the federal rules as restyled, with the following 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 706(c) (Compensation for Expert Testimony); ~~and~~ Rule 801(d)(1)(A) (Prior Inconsistent Statements as Non-Hearsay); Rule 803(25) (Former testimony (non-criminal action or proceeding)); and Rule 804(b)(1) (Former Testimony in a Criminal Case). The restyling is intended to make the rules more easily understood and to make style and terminology consistent throughout the rules and with the restyled Federal Rules. Restyling changes are intended to be stylistic only, and not intended to change any ruling on the admissibility of evidence.

The Court has adopted conforming changes to Rule 103 (Rulings on Evidence); Rule 201 (Judicial Notice); Rule 301 (Presumptions); Rule 407 (Subsequent Remedial Measures); Rule 410 (Plea Discussions); Rules 412-415; Rule 606 (Juror’s Competency as a Witness); Rule 608 (Character Evidence); Rule 609 (Impeachment by Criminal Conviction); Rule 611 (Mode of Presenting Evidence); Rule 615 (Excluding Witnesses); Rule 701 (Opinion Testimony by Lay Witnesses); Rule 702 (Testimony by Expert Witnesses); Rule 704(b) (Opinion on an Ultimate Issue—Exception); Rule 706 (Court Appointed Experts); Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay); Rule 803(6)(A), (6)(D) and (24) (Hearsay Exceptions Regardless of Unavailability); Rule 804 (b)(1), (b)(3) and (b)(7) (Hearsay Exceptions When Declarant Unavailable); and Rule 807 (Residual Exception).

Conforming changes that are not merely restyling, as well as deliberate departures from the language of the federal rules, are noted at the outset of the comment to the corresponding Arizona rule.

Where the language of an Arizona rule parallels that of a federal rule, federal court decisions interpreting the federal rule are persuasive but not binding with respect to interpreting the Arizona rule.

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<sup>1</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

**Rules 101 through 607 [No change in text.]**

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

**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, ~~on cross-examination,~~ allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness ~~being cross-examined~~ has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

**Comment to 2013 Amendment**

This rule has been amended by deleting the references to cross-examination in subsection (b) and subdivision (b)(2) because such references are unnecessary in light of Rule 607 and the Committee Note to Federal Rule of Evidence 608, as restyled. The type of inquiry referred to in these provisions may be permitted on direct or cross-examination.

**Comment to 2012 Amendment**

[No change in text.]

**Comment to Original 1977 Rule**

[No change in text.]

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

[No change in text.]

### **Comment to 2012 Amendment**

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~~ must 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 of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

### **Comment to Original 1977 Rule**

[No change in text.]

**Rules 610 through 802 [No change in text.]**

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

[No change in text.]

**Comment to 2012 Amendment**

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) has not been amended to conform to the federal rules.

~~Additionally~~ Otherwise, the language of Rule 803 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

**Comment to 1994 amendment**

[No change in text.]

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

[No change in text.]

**Comment to 2012 Amendment**

~~Rule 804(b)(1) has been amended to incorporate the language of Arizona Rule of Criminal Procedure 19.3(e).~~

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(b)(5) and 807, Rule 804(b)(7) has been deleted and transferred to Rule 807.

Rule 804(b)(1) has been amended to incorporate the language of Arizona Rule of Criminal Procedure 19.3(c), but has not been amended to conform to the federal rules.

~~Additionally~~ Otherwise, the language of Rule 804 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

**Comment to 1994 amendment**

[No change in text.]

**Rules 805 through 1103 [No change in text.]**