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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of )  
 ) Arizona Supreme Court No. R-18-\_\_\_\_  
 )  
ARIZONA RULE OF )  
EVIDENCE 807 )  
 ) PETITION TO AMEND ARIZONA  
 ) RULE OF EVIDENCE 807  
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\_\_\_\_\_ )

**PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE**

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, Mark W. Armstrong and Samuel

A. Thumma, petition the Court to amend Arizona Rule of Evidence 807, as reflected in the attachment hereto, effective January 1, 2019.

## **I. INTRODUCTION AND BACKGROUND**

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, which had been adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

Arizona Supreme Court Administrative Order No. 2010-42, dated March 24, 2010, established the Ad Hoc Committee on Rules of Evidence to compare the Arizona Rules of Evidence to the restyled Federal Rules of Evidence, identify differences, and provide input to this Court regarding conforming changes not later than December 2010. The Committee timely completed its work and recommended comprehensive changes to the Arizona Rules of Evidence in R-10-0035, which were generally approved by the Court with an effective date of January 1, 2012.

The Ad Hoc Committee's petition in R-10-0035 also recommended 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." Following this recommendation, the Court established the Advisory Committee on Rules of Evidence with the following purpose:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

At its regular meeting on December 8, 2017, the Advisory Committee unanimously recommended that Arizona Rule of Evidence 807 be amended to be consistent with a proposed amendment to Federal Rule of Evidence 807, which is expected to become effective December 1, 2018.

## **II. SUMMARY OF THE PROPOSED AMENDMENT TO ARIZONA RULE OF EVIDENCE 807**

The proposed amendment is intended to conform Arizona Rule of Evidence 807 (the residual exception to the rule against hearsay) to proposed Federal Rule of Evidence 807, which has been widely praised in comments filed with the federal standing Committee on Rules of Practice and Procedure. The federal proposal was precipitated by four primary concerns with the current rule. First, the requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Second, there is no requirement that courts consider corroborating evidence in the current

rule. It is thought that adding a requirement that the court consider corroboration would be an improvement to the rule. Third, the requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any helpful purpose and may have proved distracting to courts and parties. Fourth, the notice requirement in the current rule has been problematic and can be improved by, among other things, requiring that the notice be in writing.

If the proposed federal amendment is approved by the Judicial Conference of the United States, it will then be considered by the United States Supreme Court and finally Congress. If the proposed amendment proceeds in due course, it is expected that the amendment to the federal rule would become effective December 1, 2018.

In recommending this rule change to the Arizona Rules of Evidence, the Advisory Committee on Rules of Evidence recognizes that the proposed amendment to Federal Rule of Evidence 807 has not been finalized. Thus, the Advisory Committee has conditioned its recommendation on the amendment of Federal Rule of Evidence 807 in its current form.

## **CONCLUSION**

Petitioners respectfully request that the Court consider this petition and proposed rule change at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2018, and that the Court

adopt the proposed rule as it currently appears, or as modified in light of comments received from the public, with an effective date of January 1, 2019.

DATED this 8th day of January, 2018.

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Mark W. Armstrong  
Co-Chair, Advisory Committee on Rules of Evidence

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Samuel A. Thumma  
Co-Chair, Advisory Committee on Rules of Evidence

# ATTACHMENT<sup>1</sup>

## ARIZONA RULE OF EVIDENCE 807

### Rule 807. Residual Exception

(a) **In General.** Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804;

~~(1 2) the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and any evidence corroborating the statement; and

~~(2) it is offered as evidence of a material fact;~~

~~(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and~~

~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

### Comment to 2019 Amendment

Rule 807 was amended to conform to the changes made to Federal Rule of Evidence 807 that took effect on December 1, 2018.

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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~~.