

**MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, April 25, 2014

Arizona Courts Building

1501 W. Washington, Conference Room 330

Web Site: <http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx>

Members Present:

The Honorable Samuel Thumma, Co- Chair
The Honorable Mark Armstrong (Ret.), Co-
Chair
Professor Dave Cole
Mr. Timothy Eckstein
The Honorable Pamela Gates
Mr. Milton Hathaway
Mr. William Klain
The Honorable Michael Miller (via
telephone)
Ms. Patricia Refo

Members Not Present:

The Honorable George Anagnost
Mr. Paul Ahler
The Honorable Paul Julien
Ms. Shirley McAuliffe
Mr. Carl Piccarreta
The Honorable James Soto

Quorum:

Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order at 10:05 a.m. and welcomed members.

2. Approval of Minutes from Meeting of January 31, 2014—Judge Thumma

The minutes were approved by acclamation.

3. Future Meeting Schedule—Judge Thumma

Judge Thumma went over the proposed meeting schedule for the remainder of the year (September 12 and December 12). Judge Miller and Mr. Hathaway stated they likely would not be able to attend the September meeting due to scheduling conflicts.

4. R-14-0002—Petition to Amend Rules 801(d)(1)(B) and 803(6)-(8)—Judge Armstrong

Judge Armstrong reported that the petition has been opened for a comment period ending May 20, 2014. No comments have been filed to date. Mr. Klain reported that the State Bar of Arizona Civil Practice and Procedure Committee had approved a supporting comment. He stated that the comparable criminal law committee may suggest some language changes to the comment(s). If the Arizona Supreme Court adopts the proposed rule changes at its August Rules Agenda, the changes will become effective January 1, 2015.

Judge Armstrong further reported that the comparable federal rule change proposal has been approved by the Judicial Conference and is pending before the United States Supreme Court. If the proposed federal amendments are approved by the Court, as expected, and Congress does not act to defer, modify or reject them, they will become effective December 1, 2014.

5. Ariz. R. Evid. 615 and 611(a)—Judges Armstrong and Thumma, Bill Klain, Trish Refo and All

This agenda item was deferred at the last committee meeting pending the results of the federal technology symposium to be held October 11, 2013, and the next edition of the civil and criminal benchbook, which may include a revised admonition. Unfortunately, the symposium was cancelled due to the federal government shutdown and rescheduled to April 4 of this year. Ms. Refo will contact Professor Dan Capra, reporter to the federal Advisory Committee on Evidence Rules, to ascertain the results of the symposium and the Advisory Committee's meeting of the same date.

Mr. Klain reported that remaining issues include whether to amend the comment to Rule 611 (which should wait until we see what happens to the benchbook) and whether subpoenas should include a Rule 615 admonition. This likely would require amendment of the applicable civil and family law subpoena rules. This agenda item will be continued.

6. Report of Subcommittee on California Evidence Code § 1109—Judge Thumma and All

Subcommittee member Tim Eckstein stated that the subcommittee had spoken to Judge Suzanne Cohen by telephone but he had nothing further to report. Judge Armstrong suggested that the subcommittee may wish to invite Judge Cohen to speak to the committee as a whole because this issue originated with her. Judge Thumma stated he would follow up with Judge Julien.

7. Report of Subcommittee on Varying Evidentiary Standards in Subject-Matter Rules—Judge Thumma and All

Judge Thumma discussed the memoranda he has authored and distributed, dated August 28, 2013 and January 28, 2014. He also discussed the concept of a one-sentence, unified standard for limited jurisdiction court proceedings that have no clearly applicable evidentiary standard. Committee members expressed significant interest in developing such a standard.

Judge Thumma further queried whether it would be advisable to make the probate, protective order and family law evidentiary standards more consistent. He will work on drafting a unified standard based on the family law rule. Both Judges Miller and Gates expressed support for such an effort. Judge Gates stated that the family law rule gives judges sufficient discretion to meet their own comfort levels while providing both fairness and the appearance of fairness.

This agenda item will be continued and the subcommittee will continue to discuss these issues.

8. Rule 1101(c) (“Rule of Privilege”)—Judge Armstrong

The Committee unanimously approved the following technical amendment of Rule 1101(c) to be consistent with the federal rule and to recognize that there are now two rules of privilege, 501 and 502:

ARIZONA RULE OF EVIDENCE 1101

Rule 1101. Applicability of the Rules

(a) [No change in text.]

(b) [No change in text.]

(c) **Rules on ~~of~~ privilege.** The rules on ~~with respect to~~ privileges apply ~~ies~~ at ~~to~~ all stages of a ~~all~~ actions, cases, and or ~~or~~ proceedings.

(d) **Exceptions.** [No change in text.]

COMMENT TO 2012 AMENDMENT

[No change in text.]

COMMENT TO ORIGINAL 1977 RULE

[No change in text.]

Judge Armstrong will include these technical changes in any order adopting the proposed changes to Rules 801 and 803 in R-14-0002.

9. Federal Advisory Committee Agenda Book April 2014—Judge Armstrong

Judge Armstrong reminded committee members that he had sent them a link to the Agenda Book,

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2014-04.pdf>, which consists of 312 pages. The book contains the agenda for the April 4, 2014 meeting of Federal Advisory Committee on Evidence Rules, which includes the following items.

Possible Amendment to Rule 803(16)

The agenda book contains a memo on consideration of a possible amendment to Rule 803(16), the hearsay exception for ancient documents. The question addressed is whether the exception needs to be altered or abrogated in light of the fact that electronically stored information is widespread, does not degrade, and can be fairly easily stored for 20 years.

Possible Amendment to Rule 609(a)

The agenda book contains a memo on consideration of a possible amendment to Rule 609(a)—the rule governing admission of most prior convictions to impeach a witness’s character for truthfulness. The possible amendment is to abrogate the part of the rule that provides for automatic admission of all recent convictions involving a dishonest act or false statement, and to allow some judicial discretion to exclude such convictions by balancing probative value against the risk of prejudice, confusion and delay.

Consideration of Possible Changes to the Hearsay Exceptions

The agenda book contains the Seventh Circuit’s recent decision in *United States v. Boyce*. In that case, Judge Posner in a concurring opinion recommends that the hearsay exceptions for present sense impressions and excited utterance should be reconsidered, because the rationales for these exceptions are not supported either by social science data or common sense. Judge Posner suggests more broadly that the hearsay exceptions are too complex — and that there should be a single exception for hearsay that the trial court finds to be reliable: “essentially a simplification of Rule 807.”

Review of Effect of CM/ECF on Evidence Rules

A Subcommittee of the Standing Committee is investigating to what extent the national rules of procedure should be amended to accommodate electronic case filing and case management. The Reporter prepared a report to the Subcommittee on whether changes to the Evidence Rules might be necessary because of cm/ecf. That memo is set forth in the agenda book for the Committee's information.

Crawford Outline

The agenda book contains the Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence.

Privilege Project

Professor Broun will provide an oral report on his project surveying the law of privilege.

Judge Armstrong also reported that the Agenda Book includes memoranda from Professor Dan Capra on the possible amendments of Rules 609(a) and 803(16). In his memoranda, Professor Capra discusses pros and cons, and drafting alternatives. The committee approved Ms. Refo's request to report the committee's deliberations on Rule 609(a) to Professor Capra.

10. Other Items for Discussion—Judges Armstrong and Thumma

Judge Armstrong reported that there are no pending evidence rule petitions other than the one filed on behalf of this committee.

Judge Thumma asked committee members whether they had any suggestions for evidentiary topics at the State Bar Convention. Ms. Refo stated that Rule 502 would be a topic worthy of discussion. Judge Gates mentioned character and summary evidence as important topics.

11 and 12. Call to the Public/Adjournment—Judge Thumma

Judge Thumma made a call to the public. No members of the public were present.

Following the call to the public, Judge Thumma adjourned the meeting at approximately 11:00 a.m.