

MEMORANDUM

TO: Ad Hoc Committee on Rules of Evidence

FROM: Subcommittee on Rule 606;
Subcommittee on Unassigned Rules in Articles V and VI

DATE: June 11, 2010

RE: Recommended Action

I. BACKGROUND

At the committee's second meeting on May 21, 2010, Justice Hurwitz assigned Rules 606, 609 and 611 to subcommittees. Justice Hurwitz assigned all unassigned rules to an ad hoc subcommittee consisting of himself, Trish Refo (Rule 612 only) and Mark Armstrong. A review of the unassigned rules revealed substantial differences between the Arizona and federal rules only with respect to Rules 501, 502, 601, 608, 612 and 615. In reviewing these rules, as well as Rule 606 (the members of the Rule 606 subcommittee are the same as the members of the ad hoc subcommittee), which are individually addressed below, the subcommittees were mindful of the committee's apparent preference to make the rules consistent absent "good reason."

II. RULES 501 AND 502

ARE 501 and FRE 501 are worded quite differently, but their substantive thrust is the same. There was no need for the Arizona rule to incorporate the provision in the federal rule that requires the application of state law with respect to privileges where claims and defenses governed by state law are litigated in federal courts. ARE 501 provides as follows:

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States, the Constitution of Arizona, or by applicable statute or rule, privilege shall be governed by the principles of the common law as they may be interpreted in light of reason and experience, or as they have been held to apply in former decisions.

Whereas FRE 501 provides:

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The subcommittee sees no need to amend ARE 501 but would note the use of the phrase "applicable statute or rule" in the event the committee decides to make such phraseology consistent throughout the rules.

Likewise, the subcommittee does not recommend further changes to ARE 502, which was only recently adopted in Arizona effective January 1, 2010 (R-09-0004;

petition filed by committee member Trish Refo). ARE 502 is modeled on a provision added to the FRE legislatively as a new Rule 502, and the two rules are substantively identical, except that the Arizona rule is limited to the impact of privilege waivers that take place in Arizona proceedings while the federal rule is not subject to such a limitation.

III. RULE 601

As can be seen below, the only difference between the two versions of Rule 601 is that FRE 601 includes a second sentence addressing state law, which does not belong in the Arizona rule. Thus, the subcommittee recommends no change to ARE 601.

ARE 601 provides as follows:

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules or by statute.

While FRE 601 provides:

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

IV. RULE 606

Justice Hurwitz appointed a subcommittee consisting of himself, Trish Refo and Mark Armstrong to review this rule, which addresses the competency of jurors as witnesses. Specifically, the subcommittee was asked to look at whether the Arizona Rules of Criminal Procedure and Arizona case law are consistent with the federal rule.

There are no differences between the two versions of subsection (a) of the rule. The versions diverge, however, with respect to subsection (b). ARE 606(b) provides as follows:

(b) Inquiry into validity of verdict in civil action. Upon an inquiry into the validity of a verdict in a civil action, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes.

FRE 606(b) applies more broadly and states:

(b) Inquiry into validity of verdict or indictment.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The "redline" version of subsection (b) looks as follows (additions to ARE indicated by underline; deletions to FRE by ~~strikeout~~):

(b) Inquiry into validity of verdict in civil action. ~~or indictment.~~
Upon an inquiry into the validity of a verdict in a civil action,~~or indictment,~~ a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, ~~or indictment~~ or concerning the juror's mental processes in connection

therewith, except that. ~~But~~ a juror may testify on the question ~~about (1)~~ whether extraneous prejudicial information was improperly brought to the jury's attention, ~~(2)~~ or whether any outside influence was improperly brought to bear upon any ~~juror, juror, or (3) whether there was a mistake in entering the verdict onto the verdict form.~~ Nor may a ~~A~~ juror's affidavit or evidence of any statement by the juror, ~~concerning~~ ~~may not be received on~~ a matter about which the juror would be precluded from testifying, ~~be~~ received for these purposes.

As can be seen ARE 606(b) applies only to civil actions while FRE 606(b) applies in criminal cases and to grand jury proceedings and indictments as well. FRE 606(b) also has a provision not contained in the Arizona rule permitting juror testimony on the question whether the verdict rendered was the result of a clerical mistake. As observed by McAuliffe and Wahl:

The earlier rule was that testimony from jurors, or juror affidavits, could not be used at all to impeach or explain a verdict. [Citations omitted.] The prohibition extended to all matters discussed by the jury in arriving at its verdict. *Valley Nat. Bank of Arizona v. Haney*, 27 Ariz. App. 692, 558 P.2d 720 (Div. 1 1976). That absolute rule was relaxed by the adoption of Rule 606 and of Rule 24.1(d), Ariz. R. Crim. P. Now, in civil cases, a juror may testify as to whether extraneous information was brought to the jurors' attention during deliberations and/or whether any outside influence was brought to bear on the jurors.

Arizona Practice Series: Law of Evidence § 606:1 (Daniel J. McAuliffe & Shirley J. Wahl eds., rev. 4th ed. 2008).

Ariz. R. Crim. P. 24.1(d), as adopted effective December 1, 1993, addresses this issue in criminal cases, and provides as follows:

d. Admissibility of Juror Evidence To Impeach the Verdict. Whenever the validity of a verdict is challenged under Rule 24.1(c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, which relates to the conduct of a juror, official of the court, or third person. No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.

The comment to the rule explains that:

This rule reverses the traditionally strict Arizona rule against the admission of juror testimony or affidavits to impeach a verdict. See *State v. Pearson*, 98 Ariz. 133, 402 P.2d 557 (1965); *State v. Mangrum*, 98 Ariz. 279, 403 P.2d 925 (1965). See ABA, Standards Relating to Trial by Jury § 5.7 (Approved Draft, 1968). See Arizona Code of Professional Responsibility, DR 7-108(D) (1971); Van Slyck, Ethical Propriety of Post-Trial Interrogation of Jurors, 4 Ariz.B.J., no. 2, p. 7 (1968); Ethical Opinion No. 319, 53 A.B.A.J. 1127 (1967). Rule 24.1(d) adheres closely to the ABA, Standards Relating to Trial by Jury (Approved Draft, 1968).

New trial motions involving the use of juror testimony should be heard and decided in the same way as any other new trial motion.

And, Rule 24(c)(3), referred to in subsection d., provides that a new trial may be granted based upon the following ground:

A juror or jurors have been guilty of misconduct by:

- (i) Receiving evidence not properly admitted during the trial or the aggravation or penalty hearing;
- (ii) Deciding the verdict by lot;
- (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination;
- (iv) Receiving a bribe or pledging his or her vote in any other way;
- (v) Becoming intoxicated during the course of the deliberations; or
- (vi) Conversing before the verdict with any interested party about the outcome of the case;

Although Ariz. R. Crim. P. 24.1(d) and FRE 606(b) are not necessarily inconsistent, the criminal rule appears to be broader in scope. See *State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468, 483 (1996) (exception to Lord Mansfield's rule exists in Arizona "when a juror is guilty of one of six specific types of misconduct enumerated in Rule 24.1(c)(3)"). Thus, the subcommittee does not recommend amending ARE 606 to include criminal cases. However, the subcommittee recommends that ARE 606 be amended as follows to be more consistent with its federal counterpart:

(b) Inquiry into validity of verdict in civil action. Upon an inquiry into the validity of a verdict in a civil action, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect

of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith, ~~except that~~ But a juror may testify about on the question (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) or whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. Nor may a juror's affidavit or evidence of any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

V. RULE 608

ARE 608 differs from FRE 608 only in that the Arizona rule uses the term "credibility" in two places in subsection (b) while the federal rule uses the phrase "character for truthfulness." Justice Hurwitz asked the subcommittee to determine whether "credibility" means the same thing as "character for truthfulness." Apparently, they do not necessarily mean the same thing. Thus, in 2003, the federal rule was amended to substitute "character for truthfulness" for "credibility." According to the Committee Notes on FRE 608, use of the term "credibility" was deemed potentially "overbroad" in this context. Thus, the Committee noted that:

On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. See Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case...").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence

offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.

For the same reasons, the subcommittee recommends that the Arizona rule be amended to conform to its federal counterpart.

VI. RULE 612

ARE 612 and FRE 612 vary in ways both stylistic and substantive. ARE 612 provides:

Rule 612. Writing Used to Refresh Memory

If a witness uses a writing to refresh memory for the purpose of testifying, either--

- (1) before testifying, if the court in its discretion determines it is necessary in the interests of justice, or
- (2) while testifying,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the action, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

While FRE 612 provides:

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

- (1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Closer examination reveals the following three differences between the two versions:

- (1) FRE 612 begins with an exception as provided by 18 U.S.C. § 3500 (the Jencks Act);
- (2) paragraphs (1) and (2) are reversed in the two rules; and (3) ARE 612 refers to "matters not related to the subject matter of the *action*," while FRE 612 refers to "matters not related to the subject matter of the *testimony*." (Emphasis added.)

This rule presents the unusual circumstance in which the Arizona rule was most recently amended. Thus, in 1988, ARE 612 was amended with the following comment on the differences between the two versions:

Subparagraphs (1) and (2) of Federal Rule 612 have been reversed in order to clarify the intent of the rule which is to invoke the court's discretion concerning matters used before testifying and to have production as a matter of right of materials used while testifying. The word "action" in the second sentence of the rule replaces "testimony" in the Federal Rule to accord with the broader scope of cross-examination used in Arizona.

Because it appears that all of the differences between the two versions of the rule were considered by the Supreme Court in amending ARE 612, the subcommittee does *not* recommend changing the Arizona rule.¹

VII. RULE 615

The only differences between the two versions of Rule 615 are in paragraph (4), a paragraph added to each rule for a similar reason. ARE 615 provides as follows:

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of crime, as defined in Rule 39(a), Rules of Criminal Procedure, who wishes to be present during proceedings against the defendant.

Whereas FRE 615 states:

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

In 1991, paragraph (4) was added to ARE 615. The Comment to 1991

Amendment provides that:

¹ However, Justice Hurwitz has opined that he is "not sure that the provision allowing any portion of the document that relates to the action really makes sense – after all, since the document comes in only because the witness used it to refresh his recollection, why does it matter that the scope of cross is broader in Arizona than under the FRE?"

The 1991 amendment to Rule 615 was necessary in order to conform the rule to the victim's right to be present at criminal proceedings, recognized in Ariz. Const. Art. II, § 2.1(A)(3).

Likewise, in 1998, paragraph (4) was added to FRE 615 for a similar reason. According to the Notes of Advisory Committee on 1998 amendments to Rules:

The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510).

At its last meeting, the committee discussed the prospects of adding a new paragraph (5) to the Arizona rule to include "a person authorized by statute or rule to be present," consistent with paragraph (4) of the federal rule, or adding paragraph (4) of the federal rule to paragraph (4) of the Arizona rule. On a substantive note, the subcommittee would observe that the court of appeals has expanded the right to attend evidentiary proceedings to the parent of a minor victim pursuant to A.R.S. § 13-4403(C). *State v. Uriarte*, 194 Ariz. 275, 279 ¶ 19, 981 P.2d 575, 579 (App. 1998), *review denied* March 23, 1999. This decision could be accommodated and the Arizona rule could be made more consistent with the federal rule by adding the federal language to paragraph (4) of ARE 615. Therefore, the subcommittee recommends that ARE 615 be amended to read:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of crime, as defined in Rule 39(a), Rules of Criminal Procedure, who wishes to be present during proceedings against the defendant, or a person authorized by statute or rule to be present.