

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

Friday, March 27, 2020

Teleconference-Only

Website: <https://www.azcourts.gov/rules/Advisory-Committee-on-Rules-of-Evidence>

Members Present Telephonically:

Hon. Sara Agne
Hon. Maria Elena Cruz
Hon. Darci Weede
Hon. Karl Eppich
Mr. Bill Hughes
Mr. Andrew Becke
Prof. Jessica Berch
Hon. Kellie Johnson
Hon. Doug Metcalf
Mr. Mikel Steinfeld
Hon. Danielle Viola
Hon. Statia Hendrix
Mr. George Krauja
Mr. Randall Papetti

Members Not Present:

Hon. John Napper*

*Judge Napper previously advised Judges Cruz and Agne of an emergency conflict due to revised procedures necessary due to COVID-19.

Quorum:

Yes

1. Call to Order; Welcome of New Member

Judge Cruz called the meeting of the Committee (“ARE” or “the Committee”) to order at 10:01 a.m.

2. Approval of Minutes from Meeting of December 6, 2019

The minutes of the prior meeting noted above were approved by unanimous vote, without any changes, additions, or corrections, after a motion by Professor Berch and a second by Mr. Steinfeld.

3. Hypotheticals Reminder and Thank You to Those Submitted

Judge Agne discussed the numerous great hypotheticals submitted already from members, and Judges Agne and Cruz thanked those who have already turned in their hypotheticals. A reminder was given to those who have not, as our summer 2020 educational program deadlines are approaching. At completion, each member will have submitted three to four hypotheticals and suggested answers to Judge Agne and Judge Cruz via email.

4. Brief Overview of the Arizona Supreme Court Rule 28 Process

Judge Agne gave a brief overview of the State rule change process, as occurs largely in the Arizona Supreme Court's Rules Forum, and discussed the point in the process at which the Committee's petition, R-20-0011, currently resides.

5. Overview of Petition R-20-0029 to Amend the Arizona Rules of Evidence

Judge Agne discussed this petition, which claims to seek to amend the Arizona Rules of Evidence such that 'the laws against Perjury are enforced.' The petition proposes that "[u]pon a complaint registered with a Judge which is then forwarded to law enforcement, proceedings shall be suspended until the criminal matter has been resolved." Judge Eppich noted that the petition's proposal is impractical and unworkable, and previous rulemaking groups he has been involved with have submitted very short comments opposing such petitions.

Mr. Steinfeld noted that not only does the petition not specify a rule of evidence to be changed, but the rules of evidence do not seem to be a good fit for such a proposal; it appears to be more of a procedural rule that is sought. Judge Cruz favored a short comment in opposition being submitted by our Committee and noted the petitioner's request was very unclear. Mr. Steinfeld volunteered to draft one.

Professor Berch advocated for slightly longer comment in opposition, and Judges Metcalf and Eppich disagreed to an extent with that. The Committee's favor settled on a short comment of a couple sentences in length, sufficient to communicate the Committee's opposition to the Arizona Supreme Court. Judge Agne discussed how the Committee would follow open-meeting laws in ensuring the comment drafts are reviewed electronically.

6. Update on Federal Proposals to Amend Fed. R. Evid. 615

Judge Johnson, chair of the Committee's Rule 615 subcommittee, gave a brief update on the federal proposals, and the Committee consensus remains to consider and possibly follow what the federal bodies suggest regarding this rule in September. The Committee will consider and provide any needed changes to Arizona's benchbook, after that.

7. Report re Petition R-20-0011 re Rule 404(b)

Professor Berch reported on our Committee's petition, and she and Judge Agne noted that no comments had yet been filed in the Rules Forum. Professor Berch stated she would watch for any comments, so the Committee can reply to them.

8. Overview of Petition R-20-0023 to Amend Rule 404

Rule 404 Subcommittee Chair Professor Berch discussed this petition, which seeks to add Rule 404(d) to the Arizona Rules of Evidence, regarding “Other acts of domestic violence.” The rule subsection would provide:

In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, “domestic violence” has the meaning given in A.R.S. § 13-3601(A).

Professor Berch noted that the proposed rule would allow ‘other acts evidence’ to be used in domestic violence prosecutions and that it is modeled nearly word-for-word after the rule in the state of Alaska. She also noted that the federal rules do not have this provision, but that Rules 412 through 415 (not adopted in Arizona) do expand on other acts evidence in a similar fashion to Arizona’s Rule 404(c)—though neither Arizona’s 404(c), nor those federal rules, specifically addresses domestic-violence other acts evidence. Professor Berch noted that this change would be racing ahead of the federal rules on this issue.

Four to five other states have similar rules, but the petition—while well-written and inclusive of interesting secondary sources—does not reference a specific problem, either empirical or anecdotal, in Arizona. Judge Cruz stated that the issues raised by this petition may be larger than can be addressed in a typical rules cycle. Judge Eppich noted that he opposed the change, as problematic in a number of respects, and he had heard of no data showing a problem requiring this solution.

He also noted that the phrasing “by the defendant against the same *or another person*” (emphasis added) is especially broad in this context. The interpersonal dynamics common to these relationships may not make broad admissibility of other acts evidence reliable or appropriate, he stated. Professor Berch noted that the burden of proving a proposed rule change is necessary does fall on the petitioner. Judge Agne noted that successful petitions often report on what other states have done in the area of the particular change and on how well the change has functioned in those states.

Given that, Committee consensus was reached that a comment regarding the petition should be filed. Professor Berch volunteered to draft the comment and moved that it be filed. Judge Agne proffered a friendly amendment that the comment be drafted in opposition to the petition, and Professor Berch accepted that. Judges Johnson and Eppich seconded the motion as amended, and it passed unanimously.

Judge Cruz, by acclamation, set an April 13, 2020, deadline for first drafts of the comments on R-20-0023 and R-20-0029, which are due to be filed before May 1, 2020.

9. Other Items for Discussion—Latest Agenda Book of the Standing Committee on Rules of Practice and Procedure (January 2020) (https://www.uscourts.gov/sites/default/files/2020-01_standing_agenda_book_final.pdf) & **Discussion re Evidentiary Proceedings in light of Admin. Order No. 2020-48 and others** (<http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-48.pdf?ver=2020-03-18-160342-583>)

Judge Agne reviewed briefly the January agenda book of the Standing Committee, particularly the portions of the federal Evidence Committee's reports in it.

Brief discussion ensued on courts and practices' responses to the COVID-19 public health emergency. Mr. Hughes noted that Yavapai County in particular has pivoted swiftly and that proceedings are going forward with new technology that is working far better than expected.

10. Next Meeting

Judge Cruz noted that the next meetings were previously set by acclamation for Friday, September 4, 2020; and Friday, December 4, 2020. Meetings will be held from 10 to noon in a conference room at 1501 W. Washington Street in Phoenix.

11. Call to the Public and Adjournment

Judge Cruz made a call to the public. No members of the public were present telephonically, though the agenda, containing the call-in number, was posted publicly in advance on the Committee's website. The meeting was adjourned at approximately 10:46 a.m.