

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

Friday, April 5, 2019

Arizona Courts Building

1501 W. Washington Street, Conf. Room 331

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

**Members Present:**

Hon. Sara Agne  
Mr. Paul Ahler  
Hon. Mark Armstrong (Ret.), Co-Chair  
Prof. Jessica Berch  
Hon. Maria Elena Cruz  
Hon. Pamela Gates (present telephonically)  
Mr. Milt Hathaway (present telephonically)  
Mr. George Krauja  
Hon. Doug Metcalf (present telephonically)  
Mr. Randall Papetti  
Ms. Patricia Refo  
Mr. Mikel Steinfeld  
Hon. Sam Thumma, Co-Chair

**Members Not Present:**

Hon. Jill Davis  
Hon. Statia Hendrix

**Quorum:**

Yes

**1. Call to Order**

Judge Thumma called the meeting to order at 10:01 a.m.

**2. Approval of Minutes from Meeting of December 14, 2018**

The minutes were approved by acclamation as circulated.

**3. Report of Workgroup on Uniform Standard for Certain Limited Jurisdiction Cases**

The report and materials of the workgroup on this issue were discussed, including that the standard has been adopted in Admin. Order 2018-01, of the Arizona Supreme Court, which established a small claims pilot program in justice of the peace courts. This pilot program has been extended through June 30, 2019 in Admin. Order 2018-104. The standard appears in the highlighted language on page 8 of Admin. Order 2018-01 and Appendix A page 7 and Appendix B page 9 of Admin. Order 2018-104.

#### **4. Update on Proposal to Amend Fed. R. Evid. 615**

Judge Armstrong deferred discussion of this item—to be discussed under agenda item (9).

#### **5. Report of Rule 408 Subcommittee**

Subcommittee Chair, Judge Agne, presented on behalf of the subcommittee based on the subcommittee memorandum, dated April 5, 2019. The subcommittee recommended that no change be made to the rule in accordance with the committee's commitment to follow the comparable federal rule absent good cause. The subcommittee determined that, in light of *Phillips v. O'Neil*, 243 Ariz. 299 (2017), as well as federal notes and case law, no change is necessary. Substantial discussion ensued with some members suggesting that a comment might be helpful. Subcommittee member, Trish Refo, volunteered to ask Professor Dan Capra whether he thought a change to the rule's title might be appropriate in light of case law, which appears to have expanded the scope of the rule beyond compromise offers and negotiations. This agenda item will be continued as an action item on the agenda for the next committee meeting.

As a reminder, in *Phillips*, the majority held that a consent judgment arising from a civil consumer fraud case was inadmissible under Rule 408 in a subsequent attorney disciplinary proceeding to prove liability. Although the decision was based on Rule 408, the court observed that the language of the consent judgment also precluded its use in most other proceedings.

Justice Bolick, who dissented in *Phillips*, discussed at the last committee meeting his concerns. Principally, he observed that consent judgments and decrees are nowhere mentioned in Rule 408, and that inclusion of judgments and decrees appears contrary to the heading of the rule—"Compromise Offers and Negotiations." He acknowledged that federal courts have consistently interpreted the rule to apply to consent judgments and decrees, but he does not believe interpretation of Arizona rules should require resort to federal notes and case law. He expressed concern about amending rules by judicial decision, adding this also has an access-to-justice and fairness component. He suggests amending the rule to include consent judgments and decrees if that is indeed the settled law.

Judge Armstrong suggested at last committee meeting that one possibility would be to add a comment to the effect that *Phillips* interpreted "Rule 408 as applying to consent judgments and h[e]ld that the rule precludes the use of a consent judgment's substantive facts to establish liability for a subsequent claim." 299 Ariz. at 303 ¶ 18.

#### **6. Standards for Admissibility of Evidence in Arizona Subject Matter Procedural Rules Given Changes to Family Law Rules in R-17-0054**

Judges Thumma and Armstrong discussed the project of aligning the evidentiary standards applicable in family, probate, and order-of-protection proceedings when the formal rules of evidence are not invoked. Judge Armstrong also discussed new Rule 2(b) from the Family Law Task Force's work, which took effect January 1, 2019. The amended Family Law Rule

incorporates Evidence Rule 403 by reference and general references the Rules of Evidence expressly.

Judge Thumma stated that he has presented a proposal to the Probate Rules Task Force that would conform Probate Rule 3(D) to Evidence Rule 403. This proposal was arrived at in collaboration with Judge Agne and Mikel Steinfeld. That Task Force agreed to incorporate the proposal in its proposed rules, which will be effective January 1, 2020, if approved.

Judge Thumma has also requested that Committee on Impact of Domestic Violence in the Courts (CIDVC) propose similar conforming changes to Rule 36(a) of the Rules of Protective Order Procedure, which CIDVC has agreed to do. Judge Hendrix, a member of CIDVC, stated at the committee's last meeting that the timing of such a proposal has not yet been finalized.

## **7. Report of the Rule 404(b) Subcommittee**

Judge Armstrong projected the proposed federal rule change on the screen. Subcommittee Chair, Professor Berch, presented on behalf of the subcommittee, first explaining the nature of the proposed federal rule change. The primary change would require the government to provide reasonable notice and articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose. The proposal would also require the government to provide such notice in writing prior to trial.

Professor Berch explained that the federal comment period ended February 15, 2019, and that the proposed federal rule changes, if approved, would be effective December 1, 2020. Therefore, any conforming proposal by our committee should be filed by January 10, 2020, seeking an effective date of January 1, 2021.

Substantial discussion ensued concerning whether a time frame for the notice should be included in the rule. Judge Gates proposed that the notice be filed not later than 45 days prior to the final trial setting, consistent with the time period set forth in Rule 404(c)(3). Trish Refo agreed to check with Professor Capra as to whether the federal advisory committee is considering adding a time frame in response to one of the comments to proposed federal rule change. Judge Armstrong observed that the federal advisory committee has tentatively agreed to change the proposal in accordance with a suggestion made by a Standing Committee member: the word "non-propensity" will probably be changed to "non-character" because Rule 404(b) uses the term character throughout. This agenda item will be continued as an action item for the next committee meeting.

## **8. Petition to Amend Rule 807 (R-18-0041)**

Judge Armstrong reported that Judge Thumma and he filed this petition, on behalf of the committee, on December 18, 2018. No comments have yet been filed. The Court will consider the petition at its August 2019 Rules Agenda.

## **9. Other Items for Discussion, including the latest Agenda Books of the Committee on Rules of Practice and Procedure (Jan. 2019) <https://www.uscourts.gov/sites/default/files/2019-01->**

[standing agenda book.pdf](http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2018), and the Advisory Committee on Rules of Evidence: (Oct. 2018) <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2018>

Judge Armstrong announced that committee members Ahler, Armstrong, Gates, Hathaway, Refo, and Thumma have completed their terms of service and will be rotating off the committee effective June 30, 2019. Judges Thumma and Armstrong expressed their appreciation for the excellent service by these members, all of whom have served for at least six years. Judge Armstrong advised that, on March 6, 2019, he sent an e-mail to Chief Justice Bales and Vice Chief Justice Brutinel recommending that they appoint Judges Cruz and Agne to succeed Judges Thumma and Armstrong as co-chairs. Judge Armstrong solicited suggestions for replacements from those rotating off, noting the Court's HR Department has asked that suggestions for replacements be provided by April 16, 2019.

Judge Armstrong next related the following proposals being considered by the federal Advisory Committee on Rules of Evidence: (1) Whether Rule 702 should be amended to address the problem of experts (especially forensic experts) overstating their opinions; (2) Whether Rule 702 should be amended to address decisions in the case law which seem to indicate that some courts are allowing defects in an expert's basis and application to be addressed by the jury, without first finding that those admissibility requirements have been met by a preponderance of the evidence; (3) Whether Rule 106, the rule of completeness, should be amended to prohibit a proponent who makes a misleading presentation of a statement from objecting that the remainder necessary to correct the misimpression is hearsay --- and whether the rule should be amended to specifically cover oral as well as written and recorded statements; and (4) Whether Rule 615 should be amended to provide for discretion to deny a motion to exclude witnesses, to include language on timing and experts, and to provide more clarity about whether a Rule 615 order prevents prospective witnesses from having access to trial testimony outside the courtroom,

Judge Armstrong further observed that the Agenda Book includes extensive reports on each agenda item by the committee reporter, Fordham Law Professor Capra. The Agenda Book also includes a comprehensive section on all federal cases interpreting the Confrontation Clause since the *Crawford* case was decided.

## **10. Next Meeting**

The next meeting was set for Friday, September 6, 2019.

## **11. Call to the Public and Adjournment**

Judges Thumma discussed educational opportunities for the committee, including the committee's recent expansion into programming at the State Bar of Arizona's CLE by the Sea annual program. Judge Thumma encouraged committee members to participate in these educational endeavors.

Judge Thumma made a call to the public. No members of the public were present. The meeting was adjourned at approximately 11:30 a.m.