

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

Friday, May 19, 2017

Arizona Courts Building

1501 W. Washington, Conference Room 330

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

**Members Present:**

Ms. Sara Agne

Mr. Paul Ahler

The Honorable Mark Armstrong (Ret.), Co-Chair

The Honorable Dave Cole (Ret.) (via telephone)

Mr. Timothy Eckstein

Mr. Milton Hathaway

The Honorable Statia Hendrix

The Honorable Paul Julien

Mr. William Klain

The Honorable Doug Metcalf

Mr. Carl Piccarreta (via telephone)

The Honorable Sam Thumma, Co-Chair

**Members Not Present:**

The Honorable Pamela Gates

The Honorable Wallace Hoggatt

Ms. Patricia Refo

**Quorum:**

Yes

### **1. Call to Order—Judge Thumma**

Judge Thumma called the meeting to order at 10:00 a.m.

### **2. Approval of Minutes from Meeting of December 8, 2016/Future Meetings—Judge Thumma and All**

The minutes were approved as circulated by acclamation.

The Committee tentatively settled on meetings in mid-September and early December 2017. Dates will be circulated once a conference room is secured.

### **3. R-17-0003—Petition to Amend Rules 803(16) and 902(13), (14)—Judge Armstrong and All**

Judge Armstrong summarized the proposed amendments and reported that no comments have yet been filed. The comment period ends May 22. However, Judge Armstrong expects a comment to be filed by the State Bar of Arizona generally supporting the petition but recommending an addition to the proposed comment. Ms. Agne reported that the recommended additional language concerns metadata. Once the comment is filed, Judge Armstrong will circulate it to the Committee and ask whether any member has any objection to the recommended language. If no objection is made, Judge Armstrong will add the recommended language during the rule review process at the Court.

Judge Armstrong reported that the U.S. Supreme Court has approved the proposed amendments to Fed. R. Evid. 803(16) and 902, and transmitted them to Congress in accordance with the law. If Congress does not act to reject or amend the rules, they will take effect as approved by the Court on December 1, 2017. If the comparable Arizona rule changes are approved by the Arizona Supreme Court, they will become effective one month later on January 1, 2018.

### **4. R-17-0004—Petition to Amend Ariz. R. of Evid. 801 & 804—Judge Armstrong**

Judge Armstrong summarized the proposed comments to Rules 801 and 804, which explain that Ariz. R. Crim. P. 19.3 has been abrogated as unnecessary in light of Rules 801(d)(1)(A) and 804(b)(1). Mr. Eckstein reported that a petition has been filed by the Task Force on the Arizona Rules of Criminal Procedure proposing to abrogate current Criminal Rule 19.3, including a comparable comment.

### **5. Uniform Standard for Certain Limited Jurisdiction Cases—Judge Thumma and All**

Judge Thumma reported on the potential adoption of a uniform standard for proceedings at which the rules of evidence are relaxed, particularly in limited jurisdiction courts. Judge Armstrong observed that any recommendation will need to address whether the standard should be incorporated into the evidentiary rules, or whether each rule set with an evidentiary standard should be amended to include the new uniform standard. It will be important to identify all rule

sets that will be affected.

The Committee voted to create a Workgroup including Judges Thumma, Hendrix and Julien. The Workgroup will be chaired by Judge Julien, who was authorized to add urban and rural JPs, a rural municipal court judge, and a court administrator. Judge Thumma stated that the Workgroup will identify the rule sets implicated, vet any proposal, and draft a rule change petition if deemed appropriate. Ms. Agne observed that the Arizona Code of Judicial Administration contains evidentiary standards that may be of interest to the workgroup.

#### **6. Query re Ariz. R. Civ. P. 75(d)-(e)—Judge Armstrong and All**

Attorney Doug Fitzpatrick has questioned why “the Arizona Rules of Evidence apply to justice court and small claims court proceedings but are relaxed for cases subject to compulsory arbitration in superior court where more money is in controversy?” See Ariz. R. Civ. P. 75(c) and (d). This agenda item was referred to the newly formed Workgroup on a Uniform Standard for Certain Limited Jurisdiction Cases.

#### **7. Report of Subcommittee on Forensic Science—Tim Eckstein and All**

Mr. Eckstein reported on the Arizona Forensic Science Conference held December 2, 2016 in conjunction with the Governor’s Office of Highway Safety DUI and Traffic Conference. The focus of the forensic science conference was to provide education and training to judges (both general and limited jurisdiction) in dealing with forensic science issues. Judges Armstrong and Thumma spoke at the conference on “The Judge as Gatekeeper.” Mr. Eckstein reported that the issue of forensic science needs “constant attention.”

#### **8. Rule 45, Arizona Rules of Civil Procedure, and Subpoena Form—Bill Klain and All**

Mr. Klain summarized the issue and reported that this issue is on the agenda of the State Bar Civil Practice and Procedure Committee, which will consider amending Ariz. R. Civ. P. 16 and 45, as well as the subpoena form, to include a Rule 615-like admonition to witnesses. The suggested amendment of Rule 16 would allow parties to “invoke the rule” in their pretrial statement. Some committee members questioned whether similar changes would be appropriate for other than civil proceedings. If changes to the civil rules are ultimately proposed, other practice areas may follow suit.

#### **9. Other Items for Discussion, including April 2017 Agenda Book, Federal Advisory Committee on Evidence Rules (<http://www.uscourts.gov/rules-policies>)--Judges Armstrong, Thumma and All**

Judge Armstrong discussed the latest agenda book of the federal advisory committee, dated April 21, 2017. Of particular note, the federal Advisory Committee on Evidence Rules is working on or considering possible amendments to Rule 404(b); 606(b) in light of *Pena-Rodriguez v.*

*Colorado*, 137 S. Ct. 855 (2017); 702; 801(d)(1)(A) and 807. The Committee discussed the potential effect of *Pena-Rodriguez* in Arizona, which is somewhat unclear because Arizona's comparable rule, Ariz. R. Crim. P. 24.1(d), differs from Fed. R. Evid. 606(b). The agenda book also contains an updated version of Professor Capra's *Crawford* tome

Judge Armstrong commended to Committee members the final version of the Best Practices on Authentication of Electronic Evidence manual, which is included at Tab 7 of the October 2016 agenda book at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2016>.

Judge Thumma reported on upcoming evidence-related seminars and encouraged Committee members to actively engage in legal and judicial education. Judge Metcalf suggested an evidence presentation to juvenile court judges, which could be done during the annual Dependency 101 training. Judge Julien will coordinate this suggestion with the applicable AOC juvenile dependency division.

#### **10 and 11. Call to the Public/Adjournment—Judge Thumma**

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

The meeting adjourned at approximately 11:25 a.m.