

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

Friday, September 14, 2018

Arizona Courts Building

1501 W. Washington Street, Conf. Room 230

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

**Members Present:**

Mr. Milt Hathaway (present telephonically)

Hon. Doug Metcalf (present telephonically)

Ms. Jessica Berch

Mr. Randall Papetti

Ms. Patricia Refo

Hon. Sam Thumma, Co-Chair

Hon. Maria Elena Cruz

Mr. Paul Ahler

Hon. Statia Hendrix

Mr. Mikel Steinfeld

Mr. George Krauja

**Members Not Present:**

Hon. Mark Armstrong (Ret.), Co-Chair

Hon. Jill Davis

Hon. Wallace Hoggatt

Hon. Pamela Gates

**Quorum:**

Yes

**1. Call to Order/Introduction of New Members—Judge Thumma**

Judge Thumma called the meeting to order at 10:03 a.m. and welcomed newly appointed members to the Committee. Judge Agne volunteered to take the minutes of the meeting.

All in the room and on the phone introduced themselves, and Judge Thumma discussed the history and purposes of the Committee. He also noted that original intent for the Committee was to have members staggered in two groups, with members serving about two three-year terms before rotating off. Judge Thumma noted that this meant half of the original founding Committee members had just rotated off in June, and he thanked them for their service. He also noted that the remaining half of the original founding members were then due to rotate off in June 2019.

Judge Thumma discussed both the review-of-rules and educational functions of the Committee, including the Committee's recent expansion into programming at the State Bar of Arizona's CLE

By the Sea annual program in Coronado, California. Judge Agne reported on this year's CLE By the Sea presentation that Judge Cole, Judge Gates, and Judge Agne gave in July 2018, and Ms. Refo volunteered to follow up with the State Bar of Arizona regarding programming from the Committee next year at that event.

## **2. Approval of Minutes from Meeting of April 6, 2018**

The minutes were approved by acclamation as circulated.

## **3. Petition to Amend Rule 807 (R-18-0003 and Final Order)**

Judges Thumma and Agne discussed the Arizona Supreme Court's adoption of changes to the residual hearsay exception rule to match changes in process to the federal counterpart rule. Discussion was held on the small ways in which Arizona's rule—effective 1/1/19—will differ from the incoming federal rule—to be effective 12/1/19, and on the fact that the differences were in part a result of a comment from the State Bar of Arizona on R-18-0003.

## **4. 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. Judge Thumma pointed out that the standard appears on page 8 of the administrative order. Ms. Berch discussed the use of the phrase “of consequence” in Rule 403, Ariz. R. Evid., versus “at issue” in the standard appearing in the administrative order. Mr. Krauja discussed that the more common phrasing of “at issue” may be preferable for the venue for the standard. Mr. Papetti queried whether the Committee's aim was to expand application of the standard beyond the venue in the administrative order. Judge Thumma responded that the plan is to have it available for possible use in other court venues, including non-judicial branch adjudications, where helpful.

## **5. Rules 16 and 45, Arizona Rules of Civil Procedure, and Subpoena Form**

Judge Thumma discussed that this has been a standing agenda item, with the Committee examining whether to integrate Rule 615 language into the applicable civil rules and accompanying subpoena form. He noted that the Civil Practice and Procedure Committee has also contemplated examining this issue. Judge Thumma stated that the Advisory Committee on the Rules of Evidence had previously decided against suggesting any changes to Rules 611 or 615, or their comments, based on this issue, but that it would continue to remain a standing agenda item for future updates and possible action.

## **6. Petition by Task Force on Court Management of Digital Evidence (R-18-0008 and Final Order)**

Judge Thumma recounted some of the history of this Committee's input on this issue and noted that the addition of the words “video” and “videos,” along with accompanying stylistic changes and definitional text, was adopted effective 1/1/19 into Rules 1001, 1002, 1004, and 1006

through 1008. Judge Thumma added that the Arizona Supreme Court adopted the change suggested by the Committee's comment—which had noted a plural-singular issue in Rule 1006.

### **7. Rule 408 in light of *Phillips v. O'Neil*, 243 Ariz. 299 (2017)**

Judge Thumma discussed Justice Bolick's dissent in the above case, which noted the Committee and its charge. Judge Thumma noted that the April minutes indicate that Justice Bolick would be contacted to see if he had input for the Committee and that the Committee would await word based on that contact. Judge Agne noted that any change to Rule 408 would deviate Arizona's rule from the federal rule. Ms. Refo noted that the *Phillips* majority opinion cited federal case law in support of its holding. Mr. Krauja noted that a rule change dictating that consent judgments *could* be used as evidence would be a significant departure from the current rule and established case law.

Judge Thumma noted that the *Phillips* decision seems to give explanatory guidance to courts and parties. Ms. Refo asked that the Committee plan to advise Justice Bolick that it had considered the issues raised by the dissent, once the Committee had fully considered them.

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

Judge Thumma discussed his memo of August 31, 2018, with the Committee and included the history of how Committee input and petition efforts had previously assisted in aligning the evidentiary standards applicable in family, probate, and order-of-protection proceedings when the formal rules of evidence are not invoked. Judge Thumma also discussed new Rule 2(b) from the Family Law Task Force's work, which will be effective January 1, 2019.

Mr. Steinfeld noted that work of an Arizona Rules of Probate Procedure Task Force is ongoing, and Judge Thumma agreed that the Committee should coordinate with that group. Ms. Refo, Mr. Papetti, Ms. Berch, Mr. Krauja, Judge Thumma, and Mr. Ahler discussed various points of the different standards under the different rule sets. Judge Hendrix noted that the Committee on the Impact of Domestic Violence and the Courts was examining the Arizona Rules of Protective Order Procedure and that that group's next meeting was in November 2018.

Judge Thumma offered to make the first attempt at drafting language to integrate the standards and to plan to circulate it to the Committee. Judges Thumma and Agne discussed that any changes proposed by the Committee would need to be finalized and filed in petition form by January 10, 2019.

### **9. Proposal to Amend FRE 404(b); Creation of Subcommittee**

Judge Thumma mentioned that page 419 of 502 of the recent federal committee's agenda book delineates proposed changes to Rule 404(b) recently released for public comment. Ms. Refo pointed out that if the changes were just released for comment, it would be some time before they near finalization. Judge Thumma called for a subcommittee to track the issue as the federal rules bodies approach finalization. Ms. Berch volunteered to serve and accepted service as Chair

of the subcommittee. The subcommittee's other volunteer members include Mr. Ahler, Mr. Steinfeld, Judge Cruz, and Judge Gates.

Judge Thumma pointed out that Arizona has Rule 404(c), while the federal rules do not. Ms. Berch discussed that federal rules 413 through 415 include some provisions similar to Arizona's 404(c).

#### **10. Other Items for Discussion, including latest Report of the Federal Committee on the Rules of Evidence (May 2018)**

Ms. Refo discussed Judge Grimm's seminal opinion from the District of Maryland on Rule 106. Ms. Berch discussed that the Ninth Circuit's view of the rule of completeness is that it is not a hearsay exception, but involves a question of timing. Judge Thumma referenced *State v. Steinle ex rel. Moran*, from Division One on July 23, 2015, and its implications for the rule of completeness in the State.

Ms. Refo also discussed that there is no real interest from the federal committee to change Rule 702, as it was a very involved process the first time, and, separately, that Confrontation Clause jurisprudence would continue to grow through case law.

#### **11. Next Meeting**

Judge Thumma discussed that the next meeting would likely occur before the end of 2018, to allow the Committee to file any rule change petitions before the January 10, 2019, deadline, but that the Committee co-chairs would circulate proposed dates for the next meeting, as well as for 2019, via email soon.

#### **12. Call to the Public—Judge Thumma**

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

#### **13. Adjournment—Judge Thumma**

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

/s/ Hon. Sara J. Agne, Judicial Member  
September 15, 2018