

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

Friday, September 6, 2019

Arizona Courts Building

1501 W. Washington Street, Conf. Room 230

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

**Members Present:**

Hon. Sara Agne  
Hon. Maria Elena Cruz  
Hon. Karl Eppich  
Mr. Bill Hughes  
Hon. John Napper  
Mr. Andrew Becke  
Prof. Jessica Berch  
Mr. George Krauja  
Hon. Kellie Johnson  
Hon. Doug Metcalf  
Mr. Randall Papetti  
Mr. Mikel Steinfeld (present telephonically)  
Hon. Statia Hendrix  
Hon. Danielle Viola

**Members Not Present:**

None

**Quorum:**

Yes

**1. Call to Order**

Judge Cruz called the meeting of the Committee (“ARE” or “the Committee”) to order at 10:00 a.m.

**2. Welcome of New Members and Introductions**

Judge Agne noted the six new members of the Committee, all ARE members introduced themselves, and all welcomed the new members.

**3. Approval of Minutes from Meeting of April 5, 2019**

The minutes were approved by unanimous vote, with the correction on the second page, third sentence, that the word “by” be changed to “be,” so the phrase would read “no change be made to the rule”.

#### **4. Update re Workgroup on Uniform Standard for Certain Limited Jurisdiction Cases**

The report and materials of the previous workgroup on this issue were discussed, including that the standard was first 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 was extended through June 30, 2019 in Admin. Order 2018-104, and expanded to certain Justice Court cases in that same Order. 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. Judge Agne discussed that the Arizona Supreme Court adopted the standard nearly verbatim in its Order on R-18-0021, which adopted the Arizona Rules of Small Claims Procedure, effective 1/1/2020. The standard appears in Rule 12(e) of those forthcoming rules, which will apply to cases under the jurisdictional limit of \$3,500 (applicable to both claims and counterclaims). Judge Metcalf asked how the new rules would affect cases subject to the Arizona Justice Court Rules of Civil Procedure. Judge Agne discussed that while they had had the concurrent pilot program for certain cases in the civil divisions of the justice courts, Rule 137(a), Justice Ct. R. Civ. P., provides that the Arizona Rules of Evidence apply to cases under those rules.

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

Judge Cruz discussed the reviews by both the federal Advisory Committee on the Rules of Evidence (“federal ARE”) and the federal Committee on Rules of Practice and Procedure (“Standing Committee”) of Rule 615. Judge Cruz noted that pages 282–286 of the most recent federal ARE agenda book (May 2019) explain how several other states have addressed—via rules changes—the impact of rule-of-exclusion court orders outside the courtroom and include a discussion of First Amendment issues implicated. Pages 287–289 of that same book have the federal Reporter’s drafting alternatives for the federal ARE’s consideration. Judge Cruz noted that, ultimately, the federal ARE decided to report to the Standing Committee that any change to Rule 615 addressing its scope would be discretionary for trial court judges—and not mandatory. Judge Agne mentioned Arizona’s ARE’s history on Rule 615, including a change made to the trial court benchbooks, as well as consideration, in conjunction with the State Bar’s Civil Practice and Procedure Committee, of potential amendments to Rule 45, Ariz. R. Civ. P., and its accompanying Form 9 to deal with Rule 615 admonitions that might extend beyond the courtroom. This Committee will continue to monitor the issue, and—as the federal bodies are contemplating—continue to consider how changes to Rule 615 might account for counsels’ need to prepare witnesses during the course of trials.

#### **6. Update re Rule 408 Subcommittee**

Subcommittee Chair, Judge Agne, presented on behalf of the subcommittee based on the subcommittee’s previous memorandum, dated April 5, 2019, Justice Bolick’s December 2018 presentation to the ARE, and a new proposed draft comment based on Judge Armstrong’s suggestion at the April 5, 2019, meeting. The subcommittee previously 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. (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. There was a considered dissent by Justice Bolick.)

Substantial discussion ensued with some members suggesting that a revised comment might be helpful. Professor Berch 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. Judge Eppich caught a typo in the pincite at the end of the draft comment, and Judge Agne took note to fix it. Mr. Papetti asked whether the word "Agreements" might be added to the title of Rule 408 to make clear that the rule is intended to apply to completed compromises, and not just "Compromise Offers and Negotiations," as the titles of both ARE 408 and FRE 408 currently read. Mr. Becke noted that the case of *Miller v. Kelly* from the Arizona Court of Appeals and a quote from it might be helpful to include in any proposed comment. Judge Eppich moved and Mr. Becke seconded to have Judges Cruz and Agne reach out to the new Chief Justice to discuss the Court's reception of comments added to rulebooks and to have the Rule 408 subcommittee prepare a rule change petition and redrafted comment for the Committee's consideration at its December meeting. In light of the latter, Judge Johnson volunteered to be added to the Rule 408 Subcommittee's ranks, which already include Judge Agne, Judge Metcalf, and Mr. Krauja. The motion passed unanimously.

## **7. Standards for Admissibility of Evidence in Arizona Subject Matter Procedural Rules, Given Changes to Arizona Rules of Protective Order Procedure ("ARPOP") and Arizona Rules of Probate Procedure**

Judges Cruz, Hendrix, and Agne discussed the ongoing 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 Hendrix addressed the work of the Committee on the Impact of Domestic Violence and the Courts, which successfully petitioned, in R-19-0009, for amendments to the ARPOP that will take effect January 1, 2020. One such amendment is that to Rule 36, which includes an aligned evidentiary standard. Judge Cruz also discussed recently effective Rule 2 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 references the Rules of Evidence expressly. Judge Agne discussed new Probate Rule 4(a)(2), which also contains a unified standard, and will be effective January 1, 2020, as part of the adoption of R-18-0044.

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

Judge Agne projected the proposed federal rule change on the screen and thanked Judge Viola and Bill Hughes for agreeing to replace Judge Gates and Paul Ahler (who rotated off the ARE) on the Rule 404(b) Subcommittee. Subcommittee Chair, Professor Berch, presented on behalf of the subcommittee, first explaining the nature of the proposed federal rule change, and then explaining the draft rule change petition and proposed Arizona language. The primary change

would require the government to provide reasonable notice and articulate in the notice the non-propensity, i.e., permitted, 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, unless the trial court excuses lack of pretrial notice for good cause. Prof. Berch discussed Arizona Rule of Evidence 404(c)—unique to this state—and the ways in which its language impacted the changes the Committee could make to conform to the forthcoming Federal Rule of Evidence 404(b) revisions.

Significant discussion ensued. Judge Napper noted that the proposed changes would give direction to litigants and the trial court and prevent awkward oral arguments where parties attempt to talk around what may be propensity purposes. Judge Johnson noted the import of cases like *State v. Terrazas* and *State v. Fish* to these issues, as well as how Rule 404(c) evidence can arise in juvenile delinquency proceedings. Mr. Papetti expressed that Rule 404 evidence may appear more often in severance trials than typically meets the eye, and Judge Johnson expressed that the issues should be raised to the newly appointed Task Force on the Rules of Procedure for the Juvenile Court. Judge Eppich noted that our Committee’s petition would do well to note other areas of Rule 404 that the Committee believes may be ripe for amendment. Professor Berch and Judge Agne summed up that those included Rule 404’s import in civil litigation, parallelism for Rule 15 disclosures by criminal defendants, and ways to more fully address that it is not just criminal defendants’ other acts that are at issue.

Judge Agne explained 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. Judge Cruz moved and Bill Hughes seconded that this Committee propose conforming changes to Rule 404(b) in a rule change petition to be filed with the Arizona Supreme Court by January 10, 2020. The motion passed unanimously.

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

Judge Cruz reported that Judge Thumma and Judge Armstrong filed this petition, on behalf of the Committee, on December 18, 2018. No comments were filed. The Court adopted the petition in full at its August 2019 Rules Agenda, to allow clarification to the comment to Rule 807 that it was amended effective January 1, 2019, to conform to changes to the federal rule that become effective on December 1, 2019.

## **10. Other Items for Discussion, including the latest Agenda Books of the Committee on Rules of Practice and Procedure (June 2019) [https://www.uscourts.gov/sites/default/files/2019-06\\_standing\\_agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2019-06_standing_agenda_book_0.pdf), and the Advisory Committee on Rules of Evidence: (May 2019) <https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf>**

Judge Agne announced a couple of the Committee’s initiatives, including a listing/listserv of counterpart evidence committees in other states (so far the Committee’s listing includes those in Colorado, Connecticut, Delaware, Maryland, New Jersey, and Vermont), and maintaining the Evidence Law Update for use in educational programming like Limited Jurisdiction New Judge Orientation, General Jurisdiction New Judge Orientation, and the State Bar Convention. Judge

Agne thanked Prof. Berch for agreeing to summarize the recent *Griffith* case dealing with social media evidence. Judge Agne also advised Committee members that lists of the counterpart groups and cases needing summarizing would be forwarded soon for all to consider adding to them.

Judge Agne next related the following proposals that remain under consideration 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, pursuant to Rule 104; and (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.

Judge Agne further observed that the Agenda Book includes extensive reports on each agenda item by the committee reporter, Fordham Law Professor Capra. Prof. Berch is the Committee's present liaison to Prof. Capra. (The Agenda Book also includes a comprehensive section on all federal cases interpreting the Confrontation Clause since the *Crawford* case was decided.)

## **11. Next Meeting**

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

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

Judge Cruz made a call to the public. No members of the public were present who wished to speak. The meeting was adjourned at approximately 11:35 a.m.