

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

Friday, September 8, 2017

Arizona Courts Building

1501 W. Washington, Conference Room 230

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)

The Honorable Pamela Gates

Mr. Milton Hathaway

The Honorable Statia Hendrix

The Honorable Wallace Hoggatt (via telephone)

The Honorable Paul Julien (via telephone)

Mr. William Klain

The Honorable Doug Metcalf

Mr. Carl Piccarreta (via telephone)

Ms. Patricia Refo (via telephone)

Members Not Present:

Mr. Timothy Eckstein

The Honorable Sam Thumma, Co-Chair

Quorum:

Yes

1. Call to Order—Judge Armstrong

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

2. Approval of Minutes from Meeting of May 19, 2017—Judge Armstrong and All

Upon a motion and a second, the minutes were unanimously approved as circulated.

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

Judge Armstrong summarized the Committee’s proposed amendments and reported that the Arizona Supreme Court has adopted the proposed amendments as modified, effective January 1, 2018. The amendments were modified to include the State Bar of Arizona’s proposed additions to the comments to Rule 902(13) and (14).

Judge Armstrong also 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.

4. R-17-0004—Petition to Amend Ariz. R. 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). Although the Arizona Supreme Court denied these proposed comments as unnecessary, the Court did abrogate Criminal Rule 19.3 and adopt the comment thereto as proposed by the Committee.

5. Report on Supreme Court’s August Rules Agenda—Judge Armstrong and All

Judge Armstrong handed out the minutes of the agenda and discussed the rule changes adopted by the Arizona Supreme Court at its August 2017 Rules Agenda.

6. Report of Workgroup on Uniform Standard for Certain Limited Jurisdiction Cases — Judge Julien, Chair

Judge Julien reported on the potential adoption of a uniform standard for proceedings at which the rules of evidence are relaxed, particularly in limited jurisdiction courts. He further reported that Judges Jill Davis – Mohave County JP; Gerald Williams – Maricopa County JP; Kristin McManus – San Luis City Magistrate, and Ken Kung Scottsdale Asst. Court Administrator, have agreed to join Judge Hendrix and Judge Thumma on the Workgroup.

Judge Armstrong has previously 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.

Judge Thumma has previously stated that the Workgroup will identify the rule sets implicated, vet any proposal, and draft a rule change petition if deemed appropriate.

7. Rules 16 and 45, Arizona Rules of Civil Procedure, and Subpoena Form—Bill Klain

Mr. Klain reported on the background of this issue, which began with the question of whether to amend Rule 615 to account for social media and other evolving technology. He noted we have been waiting to see if the federal courts were going to address this issue, and while they have studied it, they have made no proposals for change. Therefore, at least for now, the Committee is not proposing a change to Rule 615.

Mr. Klain further reported that a model Rule 615-like admonition has been added to the bench book, and that the State Bar Civil Practice and Procedure Committee believes the best approach, rather than amending Civil Rule 16, would be to presume that “the rule” is invoked and amend the subpoena form accordingly. Mr. Klain has agreed to prepare a rule petition for consideration at the October meeting of the Civil Practice and Procedure Committee. He will circulate the petition to our Committee as well. If changes to the civil rules are ultimately proposed, other practice areas may follow suit.

Judge Gates discussed the subpoena process in criminal cases and agreed to look into whether other related changes were made to the bench book.

8. Report of Subcommittee on Forensic Science—Tim Eckstein and All

This continuing item was deferred in Mr. Eckstein’s absence.

9. Other Items for Discussion, including CLE by the Sea and the latest Agenda Book, Federal Advisory Committee on Evidence Rules (<http://www.uscourts.gov/rules-policies>)--Judge Armstrong and All

Judge Armstrong handed out the Preliminary Draft of the proposed amendment of Federal Rule of Evidence 807, which was prepared by the federal Committee on Rules of Practice and Procedure. All written comments are due by February 15, 2018. The proposal was precipitated by four primary concerns with the current rule. First, the requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Second, there is no requirement that courts consider corroborating evidence in the current rule. It is thought that adding a requirement that the court consider

corroboration would be an improvement to the rule independent of any decision to expand the residual exception. Third, the requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. Fourth, the notice requirement in the current rule has been problematic and can be improved by, among other things, requiring that the notice be in writing.

The Committee agreed to create a subcommittee to study the issue and recommend whether to petition to amend our Rule 807. Judge Armstrong reminded the Committee it is guided by the principle that we will follow the federal rules unless there is good cause to deviate. Judge Gates agreed to chair the subcommittee, and Ms. Agne agreed to serve as the subcommittee’s reporter. Messrs. Ahler and Eckstein agreed to serve as members of the subcommittee. Judge Armstrong asked the subcommittee to research Arizona case law on Rule 807 and to keep abreast of comments to the federal proposal, as well as any changes to the federal proposal. He noted there has been four comments to date, three in favor and one opposed; and he asked the subcommittee to condense the proposed federal note into a proposed Comment to 2019 Amendment in the event the subcommittee decides to recommend a rule change. Finally, Judge Armstrong emphasized that if the subcommittee recommends a rule change, the Committee will need to act on the subcommittee’s proposal at our next meeting so that a rule petition may be filed by January 10, 2018.

Judge Armstrong also 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, and 801(d)(1)(A). The Committee previously 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 previously 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>.

Finally, the Committee discussed the prospect of presenting at the next CLE by the Sea, which will take place July 22-25, 2018. The Committee agreed that it would prefer to present a three-to-four-hour session in conjunction with one or more tracks rather than attempting to create a stand-alone 12-hour evidence track. The deadline for submitting a proposal is September 29, although Mr. Klain indicated the organizers are flexible. Ms. Refo agreed to contact Shannon Henrie at the State Bar to gather more information, after which she will reach out to the Committee for volunteers as appropriate. There appears to be sufficient interest in making a proposal, and with that in mind, Judge Armstrong asked Committee members to each prepare five hypotheticals and proposed answers for use at CLE by the Sea and other continuing education opportunities. All Committee members present agreed to do so. Judge Armstrong will circulate examples of hypotheticals and proposed answers.

10. Next Meeting—Judge Armstrong

Judge Armstrong reminded Committee members that our next meeting will be held on December 8 in room 330, and that the agenda will include reports on the proposed amendment of Rule 807 and CLE by the Sea, items that need to be finalized at that meeting.

11 and 12. Call to the Public/Adjournment—Judge Thumma

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

The meeting adjourned at approximately 11:35 a.m.