

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

Friday, April 19, 2013

Arizona Courts Building

1501 W. Washington, Conference Room 230

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

Members Present:

The Honorable Samuel Thumma, Co- Chair

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

Mr. Paul Ahler (via telephone)

The Honorable George Anagnost (via
telephone)

Professor Dave Cole (via telephone)

Mr. Timothy Eckstein

The Honorable Pamela Gates

Mr. Milton Hathaway

Mr. William Klain

Ms. Shirley McAuliffe

The Honorable Michael Miller

Mr. Carl Piccarreta

Members Not Present:

The Honorable Paul Julien

Ms. Patricia Refo

The Honorable James Soto

Quorum:

Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order shortly after 10:00 a.m., welcomed members, and thanked them for their participation on the committee. Judge Thumma reminded committee members of the next two meetings scheduled for June 14 and October 18, 2013. He indicated the June meeting might be cancelled if there are not sufficient agenda items to warrant a summer meeting.

2. Approval of Minutes from Meetings of September 28, 2012 and January 18, 2013—Judge Thumma

The minutes of both meetings were approved by acclamation.

3. Petition to Amend Rule 803(10) (R-12-0034)—Judge Armstrong

Judge Armstrong advised the committee that no comments have been received to date but the comment period extends until May 20, 2013.

Judge Armstrong reminded the committee that the petition was conditioned on approval of the proposed federal rule amendment, which has now been approved by the Judicial Conference and is pending before the U.S. Supreme Court. The final step in the federal rule-making process is approval by Congress. It is expected that if the amendment is approved by Congress the effective date of the amendment will be December 1, 2013.

4. Proposed Amendments to Fed. R. Evid. 801(d)(1)(B) and 803(6)—(8)—Judge Armstrong

Judge Armstrong reminded the committee that the proposed amendment to Rule 801(d)(1)(B)—defining certain prior consistent statements as not being hearsay—would provide that prior consistent statements are admissible as non-hearsay whenever they would otherwise be admissible to rehabilitate the witness’s credibility. The other three proposals would amend Rules 803(6)-(8)—the hearsay exceptions for records, absence of business records, and public records—to eliminate an ambiguity uncovered during the federal restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

Judge Armstrong reported that the federal comment period expired February 15, 2013, for these proposals. Six comments have been filed. There is no real opposition to the proposed changes to Rule 803. However, all six comments were in varying degrees of opposition to the proposed change to Rule 801. Generally, the comments expressed that the change is unnecessary, that it would engulf the remainder of the rule, or that it would be inconsistent with the remainder of the rule.

In the next step of the federal rule-making process, the Evidence Advisory Committee will consider the comments and decide whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure. At this time, the Committee on Rules of Practice and Procedure has not approved these proposed changes except to authorize their publication for

comment. The proposed amendments have not been submitted to or considered by the Judicial Conference or the Supreme Court.

The proposed federal amendments would become effective on December 1, 2014, if they are approved, with or without revision, by the Advisory Committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court, and if Congress does not act to defer, modify, or reject them.

Judge Armstrong reminded the committee that the subcommittee recommended that the committee approve the proposed federal rule amendments if they are ultimately approved by the Supreme Court and Congress. The committee will continue to follow the progress of the proposed federal amendments. Until the proposed federal amendments are approved by the Committee on Rules of Practice and Procedure, it would be premature for the committee to vote on the proposals.

5. Report of Subcommittee on Ariz. R. Evid. 615 and Social Media—Bill Klain and All

Mr. Klain reported on behalf of his subcommittee in accordance with the draft Memorandum from this committee to the Supreme Court's Wireless Committee, dated April 15, 2013. After considerable discussion, the committee asked Mr. Klain to prepare a revised memorandum reflecting the committee's discussion and consensus.

The committee reached consensus that the issue raised by the Wireless Committee is a significant one and that it would be helpful to provide guidance to judges on a proper admonition to witnesses. Judge Gates recommended a "best practices" admonition. The committee does not believe, however, that a change to Rule 615, or its comment, is warranted at this time. Rather, the committee believes guidance should be provided through other means, such as jury instructions, pretrial orders or subpoenas. At least one committee member suggested that the issue would more appropriately be addressed through changes to rules of procedure rather than rules of evidence.

Judge Miller suggested as an alternative a comment to Rule 611 expressly noting judges have the authority to control information available to witnesses. The comment might be amended, for instance, to authorize judges to admonish witnesses to avoid learning about the trial through social media or from other sources. However, Judge Miller would like to get a national perspective on this issue before proceeding with such an amendment.

Generally, the committee approved the proposed admonition contained in the subcommittee's draft Memorandum with the following changes: (1) insert "during trial" after "courtroom" on line 5, and (2) bracket the remaining language after "testify" on line 6, and include a note that the bracketed language may need to be changed as technology evolves. Judge Gates suggested that the admonition include a requirement that lawyers would be responsible for communicating any judicially-imposed restrictions to the lawyers' witnesses.

The committee will follow the progress of the federal Evidence Advisory Committee, which will be holding a symposium on this issue in the fall.

Mr. Klain agreed to revise the draft Memorandum for recirculation to the committee. Judge Thumma agreed to follow up regarding the appropriate recipient for such a Memorandum, if the committee did not decide to file a Petition seeking to amend the Arizona Rules of Evidence.

6. Report of Subcommittee on Proposed Amendment of Rule 412 (R-12-0039)—Milt Hathaway and All

Mr. Hathaway reported on behalf of his subcommittee as reflected in the Subcommittee's Recommendations, dated April 16, 2013. Mr. Piccarreta noted that the committee found some merit to Mr. Levine's proposed rule but that the proposed rule goes too far. The committee reached consensus that it should file a comment in opposition to the proposal largely for the reasons advanced by the State Bar Civil Practice and Procedure Committee, whose proposed comment will be considered by the Board of Governors on April 26. Following the Board of Governors meeting, Mr. Hathaway will prepare a draft comment for the committee's consideration.

7. California Evidence Code § 1109—Judge Thumma and All

This agenda item was continued until the next meeting.

8. Other Items for Discussion—Judge Armstrong and All

No other items for discussion were raised.

9.-10. Call to the Public/Adjournment—Judge Thumma

A call was then made to the public. No members of the public were present.

Following the call to the public, the meeting was adjourned at approximately 12:10 p.m.