

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

Friday, December 12, 2014

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  
Professor Dave Cole (via telephone)  
Mr. Timothy Eckstein  
The Honorable Pamela Gates  
The Honorable Wallace Hoggatt (via  
telephone)  
Mr. Milton Hathaway  
The Honorable Paul Julien  
Mr. William Klain  
Ms. Shirley McAuliffe  
The Honorable Michael Miller (via  
telephone)  
Ms. Patricia Refo

**Members Not Present:**

Mr. Paul Ahler  
The Honorable George Anagnost  
Mr. Carl Piccarreta

**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 September 12, 2014—Judge Armstrong**

The minutes were approved by acclamation.

### **3. Future Meeting Schedule—Judges Armstrong and Thumma**

Judges Armstrong and Thumma asked committee members to calendar the following dates for next year's meetings: February 13, April 24, September 11 and December 11. All meetings will be held in Room 230 beginning at 10:00 a.m.

### **4. Ariz. R. Evid. 615 and 611(a)—Judge Thumma, Bill Klain, Trish Refo (concerning April 4, 2014 federal technology symposium) and All**

Judge Thumma reported on proposed changes to the 2015 bench books concerning the rule of exclusion of witnesses. Judge Thumma will follow-up with the appropriate State Bar committee with respect to comparable changes to the RAJIs. Mr. Klain advised that the State Bar Civil Practice and Procedure Committee will likely consider comparable changes to the subpoena form at a future meeting.

The judges present explained that bench books are generally available only to judicial officers and staff. Judges Armstrong and Julien agreed to present on Wendell (an intranet cite available to judicial officers and staff) and the bench books at the next committee meeting.

Ms. Refo reported briefly on the federal technology symposium held April 4, 2014.

### **5. Report of Subcommittee on Varying Evidentiary Standards in Subject-Matter Rules—Judges Thumma, Armstrong and All**

Judges Thumma and Armstrong reported on proposed changes to the family, protective order and probate evidentiary rules. The proposed changes to Ariz. R. Fam. Law P. 2(B) are restyling only. The proposed changes to Ariz. R. Prot. Order. P. 5(A), which are patterned after the restyled family law rule, are both restyling and substantive. The proposed changes to Ariz. R. Prob. P. 3(D) make the rule consistent with Ariz. R. Evid. 403.

The proposed changes to the family law rule have been run through the State Bar Family Practice and Procedure Committee without objection. The proposed changes to the probate rule are supported by the State Bar Probate Council. The proposed changes to the protective order rules will be pursued by the Supreme Court's Committee on the Impact of Domestic Violence and the Courts, which has approved this committee's proposal.

The committee voted unanimously to file separate petitions to amend the family law and protective order rules. Judges Thumma and Armstrong will attempt to prepare and circulate draft petitions prior to the rule filing deadline of January 10, 2015.

Judge Julien raised the issue of whether proposed rule amendments need to be presented to and/or approved by affected Supreme Court committees. Historically, petitions by this committee have not been formally presented to such committees, although the committee has sought input from various Supreme Court and State Bar committees as deemed appropriate. Members of the committee generally voiced approval for such an ad hoc approach. Judge Thumma agreed to follow-up on this issue with the Chief Justice.

Judge Thumma discussed the concept of a one-sentence, unified standard for limited jurisdiction court proceedings that have no clearly applicable evidentiary standard. The committee agreed this issue deserves deliberate consideration.

#### **6. Report on April 4, 2014 Meeting of Federal Advisory Committee on Evidence Rules— Judge Armstrong, Trish Refo and All**

Judge Armstrong and Trish Refo discussed this meeting as well as the technology symposium held the same day. No federal rule changes are imminent. The federal Advisory Committee on Evidence Rules met most recently on October 24, 2014, and discussed the following items from the most recent Agenda Book, which has been distributed to the committee:

**Possible Amendment to Rule 803(16):** The agenda book contains a memo on consideration of a possible amendment to Rule 803(16), the hearsay exception for ancient documents. The question addressed is whether the exception needs to be altered or abrogated in light of the fact that electronically stored information is widespread, does not degrade, and can be fairly easily stored for 20 years.

**Possible Addition of Hearsay Exceptions for Recent Perceptions:** The agenda book contains a memo on consideration of a possible amendment that would add two new hearsay exceptions for statements of recent perception. The proposal was made by Professor Jeffrey Bellin at the Electronic Evidence Symposium. The proposal is a modification of the exception that was adopted by the original Advisory Committee but rejected by Congress. The primary goal of the proposal is to lift the hearsay bar from electronic communications such as texts and tweets, but only where the declarant is either unavailable or testifying.

Please note that Professor Bellin's support for his proposal is found in two law review articles — one in *Minnesota Law Review* and the other to be published in *Fordham Law Review*, in response to comments made at the Symposium. Both these articles are attached to the Reporter's memorandum and provide important background information and context for the Reporter's analysis.

**Possible Amendment to Provide Specific Grounds for Authenticating Certain Electronic Evidence:** The agenda book contains a memo evaluating drafts of rules that would provide specific guidelines for authenticating emails, texts, and website information. These rules were prepared for discussion purposes by Greg Joseph and presented by Greg at the Electronic Evidence Symposium.

**Possible Amendments for Certifying Authenticity of Certain Electronic Evidence:** The agenda book contains a memo on consideration of two possible amendments to the authenticity rules as related to certain electronic evidence. Both these proposals were presented by John Haried at the Electronic Evidence Symposium. The first proposal is a rule that would permit a certification of authenticity of machine-generated evidence, similar to that already allowed for business records under Rule 902(11). The second proposal is to permit a certification to authenticate an electronic device, media, or file by its “hash value” or some other reliable method.

**Crawford Outline:** The agenda book contains the Reporter’s updated outline on cases applying the Supreme Court’s Confrontation Clause jurisprudence.

#### **7. Amendment of Rule 1101(c)—Judge Armstrong**

Judge Armstrong reported that the amendment of Rule 1101(c), approved by the committee at its last meeting, was approved by West as a technical amendment, effective January 1, 2015.

#### **8. Other Items for Discussion—Judges Thumma and Armstrong**

Judge Armstrong advised that the proposed changes to Fed. R. Evid. 801(d)(1)(B) and 803(6)-(8) took effect December 1, 2014, and that the comparable changes to the Arizona Rules of Evidence will be effective January 1, 2015.

Judge Thumma reported that members of the committee will present on evidence at the 2015 State Bar Convention and it is anticipated they may present at the 2015 Judicial Conference.

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

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

Following the call to the public, the meeting adjourned at approximately 11:30 a.m.