

MEMORANDUM

TO: Ad Hoc Committee on Rules of Evidence
FROM: Workgroup on Undesignated Rules in Articles I - IV
DATE: May 14, 2010
RE: Recommended Action

I. BACKGROUND

At the committee's first meeting on April 16, 2010, Justice Hurwitz assigned Rules 404, 407-408, and Rule 410 to subcommittees. Justice Hurwitz assigned all undesignated rules to an ad hoc workgroup consisting of himself, Trish Refo and Mark Armstrong. A review of the undesignated rules revealed significant differences between the Arizona and federal rules only with respect to Rules 103(a), 103(d), 104(b), 201(g) and 301. In reviewing these rules, which are individually addressed below, the workgroup was mindful of the committee's apparent preference to make the rules consistent absent "good reason."

II. RULE 103(a)

This subsection of Rule 103 governs objections and offers of proof. The Arizona rule has not been amended since its adoption. The federal rule was amended in 2000 by adding the following paragraph:

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

The 2000 amendment is addressed at length in the Committee Notes of Rules – 2000 Amendment, which were previously distributed to committee members. According to the notes, “[t]he amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a).” Because the federal rule language is generally consistent with Arizona law and there is no “good reason” not to adopt the federal language, the workgroup recommends adoption of the federal rule language quoted above. *See, e.g., Padilla v. Southern Pac. Transp. Co.*, 131 Ariz. 533, 535, 642 P.2d 878, 880 (App. 1982) (“Where an objection to a certain class of evidence is distinctly made and overruled, objection need not be repeated to the same class of evidence subsequently received. . .”).

III. RULE 103(d)

This subsection of the Arizona rule is entitled “Fundamental Error,” while the comparable federal subsection is entitled “Plain Error.” Because Arizona and federal courts have long used different terminology, the workgroup does not recommend amending the Arizona rule to be consistent with the federal rule at this time. *See State v. Soliz*, 223 Ariz. 116, 119 ¶ 10, 219 P.3d 1045, 1048 (2009) (discussing differences between structural, harmless and fundamental error).

IV. RULE 104(b)

There is a minor difference between the two rules, neither of which have been amended since their adoption. The workgroup sees no “good reason” for the variation and recommends that the Arizona rule be amended to mirror its federal counterpart. See attached Side-by-Side Comparison with Proposed Revisions to Arizona Rules of Evidence

V. RULE 201(g)

This subsection, entitled “Instructing jury,” differs in that the Arizona rule applies generally to all cases while the federal rule distinguishes between civil and criminal cases. The Arizona rule provides that “[t]he court shall instruct the jury to accept as conclusive any fact judicially noticed,” while the federal rule provides as follows:

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

The Arizona rule generally follows civil case law holding that facts judicially noticed are “indisputable.” See *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 198, 203 P.2d 633, 641 (1949); *Bade v. Drachman*, 4 Ariz. App. 55, 68-69, 417 P.2d 689, 702-03 (1966). The federal rule, on the other hand, distinguishes between civil and criminal cases because requiring a mandatory instruction in a criminal case would be “contrary to the spirit of the Sixth Amendment right to a jury trial.” Notes of Committee on the Judiciary, House Report No. 93-650. The federal rule is also generally consistent with RAJI Preliminary Criminal 4, which advises the jury that it “must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.”

Again, because we see no “good reason” for the difference between the Arizona and federal rules, the workgroup recommends amending the Arizona rule to make it consistent with its federal counterpart.

VI. RULE 301

This is perhaps the most controversial rule if only because Arizona decided at the beginning not to adopt Federal Rule 301, which provides as follows:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

However, the workgroup has a strong preference for the federal approach; and the restyled rule makes the point even more clearly—presumptions meet the burden of production, but not the burden of persuasion and do not shift the latter burden. And, the federal approach applies only to presumptions created by case law. We recognize, however, that our cases are all over the lot on this subject. *See, e.g., Lee v. State*, 218 Ariz. 235, 182 P.3d 1169 (2008) (holding that mail delivery rule establishes receipt absent contrary evidence, but that if defendant rebuts, the presumption “disappears” and mailing is simply treated as an evidentiary fact).

Perhaps the best single source of analysis of this issue appears in McAuliffe and Wahl’s *Law of Evidence* § 301.5 (Rev. 4th ed.), a copy of which is attached. They note that our case law has not necessarily been consistent and recommend “two modest suggestions that can be made with a view toward promoting clarity and predictability: (1) That the Arizona courts, in recognizing new presumptions, should be careful to

specify their effects on the burdens of persuasion and production; and (2) that the Supreme Court of Arizona should promulgate a Rule of Evidence—the number 301 is conveniently available—which provides that when the Legislature creates a presumption but fails to specify its effects, that presumption will have the effect of imposing on the party against whom it is directed the burden of producing evidence to rebut it, without shifting to that party the burden of persuasion.”

In the end, the workgroup recommends amending Arizona Rule 301 to be consistent with the federal approach, recognizing that we will thereby be overturning some case law (but not any statute providing for a different approach). Nevertheless, we submit to the committee the following additional options:

1. Adopt FRE 301 but state that it will apply only if the Arizona Supreme Court has not made a contrary ruling.
2. Adopt the Wahl/McAuliffe suggestion, and apply the new rule only to legislatively created presumptions.
3. Decline to adopt the federal rule.

VII. RECOMMENDATION

Based on the foregoing discussion, the workgroup recommends amending Arizona Rules 103(a), 104(b), 201(g) and 301 to be consistent with their federal counterparts, as reflected in the attached side-by-side comparison.

Atch:

1. McAuliffe and Wahl’s *Law of Evidence* § 301.5 (Rev. 4th ed.)
2. Side-by-Side Comparison with Proposed Revisions to Arizona Rules of Evidence