

Sara J. Agne
Co-Chair
Advisory Committee on Rules of Evidence
Judge, Arizona Superior Court
101 W. Jefferson Street, Suite 912
Phoenix, AZ 85003
Telephone: 602-506-8288
Facsimile: 602-372-5817

Maria Elena Cruz
Co-Chair
Advisory Committee on Rules of Evidence
Judge, Arizona Court of Appeals
Division One
State Courts Building
1501 West Washington
Phoenix, Arizona 85007
Telephone: 602-452-6740
Facsimile: 602-452-3228

IN THE ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE 611,
ARIZONA RULES OF EVIDENCE

Supreme Court No. R-23-0025

COMMENT OF THE ADVISORY
COMMITTEE ON THE ARIZONA
RULES OF EVIDENCE PROPOSING
ALTERNATIVE PLACEMENT OF THE
AMENDMENT

**COMMENT OF THE ADVISORY
COMMITTEE ON THE ARIZONA RULES OF
EVIDENCE TO PLACE THE AMENDMENT
SOUGHT IN ARIZONA SUPREME COURT
RULE 124 OR A SIMILAR RULE OF THIS
COURT**

The Advisory Committee on Rules of Evidence (“Committee”) applauds and supports the work of this Court’s Fentanyl and Toxic Evidence Task Force (“Task Force”), and files this comment supporting the rule amendment but respectfully proposing more optimal placement of the same.

INTRODUCTION

The Task Force’s Petition, filed January 10, 2023, proposes to amend Rule 611 of the Arizona Rules of Evidence (entitled, “Mode and Order of Examining Witnesses and Presenting Evidence”) ‘to adopt a new subpart (d) governing the handling of hazardous evidence in the courtroom.’ After review, discussion, and vote at its public meeting on March 3, 2023, this Court’s Advisory Committee on Rules of Evidence proposes that Arizona Supreme Court Rule 124 (“Rule 124”) would be a more appropriate placement for the rule change for at least four reasons.

First, Rule 124 is within a set of others that govern items in a courtroom or courthouse that may pose security risks (i.e., recording devices and portable electronic devices). Second, other jurisdictions have rules governing hazardous evidence located in their generally applicable rules, which operate and govern similarly to the way the rules of this Court do in Arizona. Third, the proposed rule amendment contains procedural elements not commonly found in the Arizona Rules of Evidence. And finally, this Committee expects the Federal Rules of Evidence to

likely be amended effective January 1, 2025, to add a Rule 611(d) governing illustrative aids. Placing a Rule 611(d) on hazardous evidence in Arizona's rules instead would mean significant organizational differences with the federal rules, which this Committee and this Court have generally sought to avoid.

THE COMMITTEE'S PROPOSAL FOR PLACEMENT IN RULE 124

The Committee's proposed placement for this rule amendment would fill a presently blank rule that was abrogated effective January 1, 2012, and reserved to await any new rule of this Court on Electronic Filing, Delivery and Service of Documents. (In the interim, administrative orders of this Court are designated to govern those functions.¹) More than a decade has passed without need for a new rule in that space, but the blank reserved rule is within a subset that also includes rules on Use of Recording Devices in a Courtroom (Rule 122, providing a written-or-electronic-request procedure, as well as other procedures for promoting the safety, dignity, and integrity of court proceedings, all participants in them, as well as the administration of justice); Use of Portable Electronic Devices in a Courthouse (Rule 122.1); and Access to Judicial Records (Rule 123, which includes section (i)(2)

¹ See Order on R-11-0012, filed September 1, 2011, adding a comment to that 2012 Amendment, available at <https://www.azcourts.gov/Portals/20/R110012.pdf>.

already briefly referencing “physical objects admitted into evidence” and the need to secure them appropriately).

The Committee submits that a rule governing the handling of hazardous evidence in the courtroom would be in good and like company in the 122 *et seq.* series of this Court’s rules. Judge John Napper, as a member, and Judge Agne, as one of the co-chairs, of the Committee were pleased to be invited by the Task Force’s Chair, Mr. Jerry G. Landau, to speak to the Task Force at its March 21, 2023 meeting. One of the points discussed there was a potential concern for a Rule 124 on hazardous evidence not being sufficiently noticed in that set of the Arizona Supreme Court rules. Judges Napper and Agne, as well as members of the Task Force themselves, however, discussed past press coverage of the ‘cameras-in-the-courtroom’ (Rule 122) and ‘cameras-in-the-courthouse’ (Rule 122.1) rules and their related administrative orders (Admin. Order No. 2019-142). Public education, whether through web resources² or seminars, would also help ameliorate concerns about a Rule 124 on hazardous evidence becoming lost in the rulesets.

This Court’s rules cover a wide variety of subjects generally applicable to govern court proceedings of all types in Arizona,³ whereas the Arizona Rules of

² *E.g.*, <https://www.phoenix.gov/court/courtroom-media-coverage-guidelines> (City of Phoenix Court Media Coverage Guidelines).

³ ARIZ. CONST. art. 6, §5 (“The supreme court shall have . . . Power to make rules

Evidence at times do not apply at all or apply only in select parts. *See, e.g.*, Ariz. R. Evid. 1101; Ariz. R. Fam. L.P. 2. A rule setting forth procedures for handling hazardous evidence should apply in the broadest possible sense to court proceedings where that may become an issue, regardless if the particular proceeding was originally considered “evidentiary” and regardless of whether the Arizona Rules of Evidence formally apply or have been invoked.

Members of the Advisory Committee on Rules of Evidence frequently examine evidentiary rules in other jurisdictions for lessons and knowledge that might apply in Arizona and during the pandemic convened a cross-jurisdictional group of evidence committee members in various states for a symposium on receiving evidence in remote hearings. The Committee’s approach to proposed placement here is no different, and research revealed Washington General Rule 20, in that state’s rules of general application to all courts, that addresses “Security in Handling Court Exhibits.” The rule⁴ includes procedures for hazardous exhibits, as well as controlled substances. Wash. GR 20(a), (b). Other jurisdictions address such material by policy

relative to all procedural matters in any court.”)

⁴ *Available at*

https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_20_00_00.pdf.

statement, administrative order, or local rule.⁵ The Committee did not find any other jurisdiction’s rules of evidence to address hazardous evidence.

In addition, the proposed rule amendment contains procedural elements—the making of a motion, directions regarding the Clerk of Court and deputy clerks—that the Arizona Rules of Evidence typically do not contain. The sole instance where the words “motion” and “clerk” are used in the Arizona Rules of Evidence is in Rule 706, regarding procedures for court-appointed expert witnesses, which are themselves typically rare. The Arizona Supreme Court rules, in contrast, contain nearly 40 references to motions and 50 references to the word “clerk.”

Finally, on August 15, 2022, the federal Judicial Conference Advisory Committee on Evidence Rules released for public comment (accepted through February 16, 2023) a draft Rule 611(d) of its own, for the Federal Rules of Evidence.⁶ This Court’s Advisory Committee on Rules of Evidence has for several months had a Rule 611(d) subcommittee working on monitoring the federal

⁵ *See, e.g.,*

https://www.mncourts.gov/Documents/10/Public/Court_Administration/Weapons_and_Potentially_Hazardous_Exhibit_Procedures_1.9.12.pdf;
https://www.mncourts.gov/mncourtsgov/media/second_district/documents/Orders_and_Policies/P15-03-Handling-of-Potentially-Hazardous-Exhibits-Policy-Approved-2-20-2019.pdf.

⁶ Available at <https://www.regulations.gov/document/USC-RULES-EV-2022-0004-0001> (pages 286-87 of 320).

proceedings regarding that rule—which is to address and be titled “Illustrative Aids”—and will likely petition this Court in the future to amend Arizona Rule of Evidence 611 to add a Rule 611(d) on Illustrative Aids. While Arizona Rules of Evidence can certainly have different subheadings and organizational styles than the federal ruleset, the Committee’s general charge is not to differ from the federal rule text absent compelling reason.⁷ That is the final reason the Committee urges this Court to adopt the Task Force’s good work in a rule amendment, but only in Arizona Supreme Court Rule 124 or in another appropriate rule of the Court.

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⁷ See Admin. Order No. 2012-43 (establishing the Committee and seeking input on changes to conform the Arizona Rules of Evidence to the Federal Rules of Evidence).

CONCLUSION

Given the Committee's support of the Task Force's work, including support of the rule language itself *verbatim* as proposed, the Committee comments in support of the proposed rule change, but only as placed in Arizona Supreme Court Rule 124 or a similar rule of this Court as selected by the Court.

DATED this 30th day of April, 2023.

/s/ Sara J. Agne _____
Sara J. Agne
Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/permission _____
Maria Elena Cruz
Co-Chair, Advisory Committee on Rules of Evidence