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IN THE ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE 902
OF THE ARIZONA RULES OF
EVIDENCE

Supreme Court No. R-23-0015

**COMMENT BY THE ADVISORY
COMMITTEE ON THE ARIZONA
RULES OF EVIDENCE IN SUPPORT
OF PETITION R-23-0015 TO AMEND
RULE 902 OF THE ARIZONA RULES
OF EVIDENCE**

The Advisory Committee on Rules of Evidence (“Committee”) files this comment supporting Petition R-23-0015, which proposes to Amend Rule 902(1)(A) of the Arizona Rules of Evidence to allow the trial court to recognize documents

sealed and signed by a federally recognized Indian Tribe or Nation as self-authenticating.

INTRODUCTION

The Arizona State, Tribal and Federal Court Forum (“The Forum”) filed a petition on January 9, 2023, to amend Rule 902(1)(A) of the Arizona Rules of Evidence to add federally recognized American Indian Tribes and Nations to the list of governmental entities whose sealed and signed documents are self-authenticating.

ARIZONA’S CURRENT SELF-AUTHENTICATION RULE

For an item of evidence to be admitted, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Ariz. R. Evid. 901(a). This standard can be met by the use of extrinsic evidence under Rule 901, or by offering an item that is self-authenticating under Rule 902. Among the documents that are self-authenticating are those signed and sealed by a governmental entity. This rule of self-authentication is based on the notion that:

[P]ublic documents have long been deemed entitled to relaxed standards for authentication due to the perceived unlikelihood that public officials would falsify public records for court proceedings, and because of the disruption in the conduct of public business that might result from requiring public officials or employees to appear personally and testify to the authenticity of such records.

Ariz. Prac., Law of Evidence § 902:1 (4th ed.).

The Wright and Miller treatise also counsels that extrinsic evidence is not needed to authenticate public documents because “the type of writings described by Rule 902 are almost always exactly what they seem to be.” 31 *Fed. Prac. & Proc. Evid.* § 7132 (2d ed.).

Currently, public documents from the following governmental entities, including their political subdivisions, departments, agencies, or officers, can be self-authenticating under Rule 902(1)(A), Ariz. R. Evid.:

- The United States;
- Any state, district, commonwealth, territory, or insular possession of the United States;
- The former Panama Canal Zone; and
- The Trust Territory of the Pacific Islands.

Indian Tribes and Nations are presently omitted from this list.

THE FEDERAL RULE DOES NOT ALLOW PUBLIC DOCUMENTS FROM INDIAN TRIBES AND NATIONS TO BE SELF-AUTHENTICATED

It is worth noting that Rule 902(1)(A) of the Federal Rules of Evidence, which uses the same language as Arizona Rule of Evidence 902(1)(A), does not include federally recognized American Indian Tribes and Nations in the list of governmental entities whose public documents are self-authenticating.

Prompted by a then-recent appellate ruling, Ninth Circuit Court of Appeals Judge Andrew Hurwitz¹ had contacted the Reporter for the federal Advisory Committee on Evidence Rules to suggest that Federal Rule of Evidence 902 be amended to add federally recognized Indian tribes to the list of government entities that can issue self-authenticating public documents. The ruling was in the case of *United States v. Alvirez*, which held that documents bearing the seal of the Colorado River Indian Tribes, a federally recognized Indian tribe, were not self-authenticating under Rule 902(1) because Indian Tribes were not included in the list of governmental entities that could sign and seal public documents. *United States v. Alvirez*, 831 F.3d 1115, 1122 (9th Cir. 2016).

“Following a wide-ranging discussion,” the federal Advisory Committee on Evidence Rules “concluded that it should not proceed . . . to consider an amendment to Rule 902 . . . because the treatment of Indian tribal documents raises questions that potentially impact rules other than the Evidence Rules.”²

¹ Judge Hurwitz—when he served as Justice Hurwitz on the Court—chaired the Committee’s predecessor, the Ad Hoc Committee on Rules of Evidence, after appointment by this Court’s Admin. Order 2010-42.

² Report of the Advisory Committee on Evidence Rules, May 7, 2013, at 5, available at https://www.uscourts.gov/sites/default/files/fr_import/EV05-2013.pdf.

After considered discussion itself, our Committee voted unanimously to file this Comment supporting the Petition for the change here, and the Committee does not harbor concerns that the rule change will negatively impact other Arizona rules or pose difficulties by slightly differing from the federal rule. Indeed, a neighboring state has had this particular change in its rules for more than a decade without any noted ill effects.

THE FORUM’S PETITION

In its petition, the Forum points out that the New Mexico Supreme Court in 2012 added “Federally Recognized American Indian Tribe or Nation” to the list of government seals that would make a document self-authenticating under Paragraph (1)(a) of its Rule 11-902. The Forum further suggests that “[t]he proposed amendment [to the Arizona rule] would ensure consistency across cases and across the jurisdictional boundaries of the neighboring states of New Mexico and Arizona, which include the Navajo Nation, a federally recognized tribe that straddles the New Mexico and Arizona border. Amending the rule would be efficient, promote fairness, and eliminate unjustifiable expense and delay.” (Pet’n, at 3.)

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THE SUPREME COURT SHOULD APPROVE THE PETITION

Arizona is home to 22 federally recognized Indian Tribes or Nations.³ Consequently, from time to time, Arizona courts are asked to determine whether public documents from Indian Tribes and Nations are admissible. For example, in a child dependency case, when determining whether the federal Indian Child Welfare Act applies, the juvenile court must determine whether the child is an “Indian child.” 25 U.S.C. § 1903(3) and (4). To make that determination, juvenile courts rely on information provided by the Indian Tribe or Nation. 25 C.F.R. § 23.108. Tribes and Nations may provide Tribal enrollment documentation to show enrollment. *Id.*

This type of enrollment documentation provided by an Indian Tribe or Nation is the evidence the Ninth Circuit said was not self-authenticating because Indian Tribes and Nations are not presently included on the list of government entities in

³ 1. Ak-Chin Indian Community, 2. Cocopah Indian Tribe, 3. Colorado River Indian Tribes, 4. Fort McDowell Yavapai Nation, 5. Fort Mojave Indian Tribe, 6. Fort Yuma Quechan Tribe, 7. Gila River Indian Community, 8. Havasupai Tribe, 9. Hopi Tribe, 10. Hualapai Tribe, 11. Kaibab Band of Paiute Indians, 12. Navajo Nation, 13. Pascua Yaqui Tribe, 14. Pueblo of Zuni, 15. Salt River Pima-Maricopa Indian Community, 16. San Carlos Apache Tribe, 17. San Juan Southern Paiute Tribe, 18. Tohono O’odham Nation, 19. Tonto Apache Tribe, 20. White Mountain Apache Tribe, 21. Yavapai-Apache Tribe, and 22. Yavapai-Prescott Indian Tribe. See Arizona State Museum list of federally recognized Native Nations in Arizona, available at <https://statemuseum.arizona.edu/programs/american-indian-relations/tribes-arizona>

Federal Rule of Evidence 902(1)(A) whose public documents are self-authenticating. Specifically, the Ninth Circuit overruled the trial judge's ruling admitting as self-authenticating a certificate of Indian blood the Colorado River Indian Tribes issued showing that the defendant was a member of that Tribe.

Given that courts must generally accept evidence issued by an Indian Tribe or Nation identifying a person as an enrolled member,⁴ it makes common sense that such documentation should be self-authenticating. If an actual dispute arose as to whether a signed and sealed tribal document was authentic, the trial court could still consider and/or admit contrary evidence contesting that. *Cf.* Ariz. R. Evid. 803(8)(B) (allowing for the opponent to the admission of a public record to challenge its trustworthiness).

Finally, "Arizona courts have generally recognized tribal court judgments as a matter of comity." *Beltran v. Harrah's Arizona Corp.*, 220 Ariz. 29, 33, ¶ 11 (App. 2008). Comity would also generally suggest that Arizona courts should recognize tribal documents as self-authenticating as well.

⁴ See 25 C.F.R. § 23.108(b) ("The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.").

CONCLUSION

The Committee supports the Forum’s petition to amend Rule 902(1)(A), Arizona Rule of Evidence, to add the phrase “a Federally Recognized American Indian Tribe or Nation” to the list of governmental entities whose documents can be self-authenticating.

DATED this 30th day of April, 2023.

/s/ Sara J. Agne

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Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/ permission

Maria Elena Cruz

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