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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-24-____
)
ARIZONA RULE OF)
EVIDENCE 613(b))
) PETITION TO AMEND ARIZONA
) RULE OF EVIDENCE 613(b)
)
_____)

**PETITION TO AMEND RULE 613(b) OF THE
ARIZONA RULES OF EVIDENCE**

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, the Honorable Sara Agne and the

Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 613, as reflected in the Attachment hereto, effective January 1, 2025.

INTRODUCTION AND BACKGROUND

In 2012, by administrative order, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence with the following purpose:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

At its regular meeting on September 15, 2023, the Advisory Committee unanimously recommended that Arizona Rule of Evidence 613(b) be amended consistent with the proposed amendments to Federal Rule of Evidence 613(b), which are expected to become effective December 1, 2024. At its December 1, 2023, meeting, our committee unanimously approved this Petition for filing to accomplish the same.

SUMMARY OF THE PROPOSED AMENDMENTS

Arizona Rule of Evidence 613 and Federal Rule of Evidence 613 state that extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness "is given an opportunity to explain or deny the statement and an adverse

party is given an opportunity to cross examine the witness about it, or if justice so requires.” The rule is silent on *when* the opportunities for the witness to explain or deny the statement and for the adverse party to cross examine must occur. The proposed amendments are intended to conform Arizona Rule of Evidence 613(b) to the proposed Federal Rule of Evidence 613(b).

In proposing an amendment to Federal Rule of Evidence 613(b), the federal Advisory Committee on Evidence Rules noted that the common law required that—*before* a witness could be impeached with extrinsic evidence of a prior statement—the adverse party was required to give the witness an opportunity to explain or deny the statement. The present federal rule, like Arizona’s present rule, omits the “prior presentation” requirement and allows the extrinsic evidence first, provided there is an opportunity to explain or deny the statement at some point during the hearing or trial. The federal Advisory Committee concluded that, in practice, most courts have retained the prior presentation requirement. The federal Advisory Committee also concluded that a prior presentation requirement saves time, because a witness will often concede they made the statement, and that the prior presentation requirement avoids the practical difficulty and probable delay of calling a witness back to the stand if extrinsic evidence has been admitted without that opportunity being first afforded.

Accordingly, the federal body determined that the prior presentation requirement is the better rule, with the trial court having discretion to allow a later opportunity if such opportunity becomes appropriate based on the presentation of evidence. Proposed amended Federal Rule of Evidence 613(b) thus incorporates the prior presentation requirement.¹

SPECIFICS OF THE PROPOSED AMENDMENTS TO ARIZ. R. EVID. 613

Consistent with the proposed amendments to the federal rules, the proposed Arizona amendments would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. The amendment would also give trial courts discretion to dispense with the requirement if the trial court deems it appropriate. As amended, the revised Arizona Rule of Evidence 613(b) would track the proposed amended Federal Rule of Evidence 613(b).

In addition to serving the objective of keeping Arizona's Rule 613(b) consistent with its federal counterpart, the proposed amendment will provide a clear rule regarding the timing of the witness's opportunity to explain or deny and set clear guidelines for a party seeking to admit extrinsic evidence of a prior inconsistent statement. As the federal Advisory Committee noted, the prior presentation

¹ The federal proposal is available in the rules package for the U.S. Supreme Court: https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at page 01085.

requirement often saves time because many witnesses will concede making the prior inconsistent statement. Finally, the requirement avoids the practical issues related to recalling witnesses who are not given an opportunity to explain or deny a statement before extrinsic evidence is admitted.

In recommending that Arizona adopt the proposed federal rule amendment to Arizona Rule of Evidence 613(b), the Arizona Advisory Committee on Rules of Evidence recognizes that the proposed amendments to Federal Rule of Evidence 613(b) have not been finally adopted. The United States Supreme Court, and ultimately Congress must still assent. Thus, the Advisory Committee conditions its recommendation on the final adoption of the proposed federal rule in its current form.

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CONCLUSION

Petitioners respectfully request that this Court consider this Petition and proposed rule change at its earliest convenience. Petitioners additionally request that the Petition be circulated for public comment until May 1, 2024, and that the Court

adopt the proposed rule as presented, or as modified in light of comments received from the public and any replies, with an effective date of January 1, 2025.

DATED this __9th__ day of January, 2024.

/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

ATTACHMENT²

ARIZONA RULE OF EVIDENCE 613

Rule 613. Witness's Prior Statement

(a) no change

(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Unless the court orders otherwise, ~~Extrinsic evidence of a witness's prior inconsistent statement is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, ~~or if justice so requires.~~ This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

² Additions to rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.