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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

ARIZONA RULE OF EVIDENCE 801

Arizona Supreme Court No. R-24-_____

PETITION TO AMEND ARIZONA
RULE OF EVIDENCE 801

PETITION TO AMEND ARIZONA RULE OF EVIDENCE 801

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Advisory Committee on Rules of Evidence (the “Committee”), 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 801, as reflected in the Attachment hereto, effective January 1, 2025.

I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

In June 2012, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence (“the Committee”) 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.

Given this directive, the Committee has reviewed Arizona Rule of Evidence 801 in light of proposed amendments to Federal Rule of Evidence 801. The Committee has decided that there are multiple valid reasons for this particular proposed federal rule change to become part of Arizona Rule of Evidence 801.

II. FEDERAL ACTION TO AMEND RULE 801

Evidence Rule 801 defines what is and is not considered hearsay. One class of statements that is not considered hearsay is an opposing party's statement. Fed. R. Evid. 801(d)(2).

But federal courts have inconsistently addressed a specific situation: “a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.” [Report to the Standing Committee, Advisory Committee on Evidence Rules](#), pg. 6 (May 10, 2023).¹ One example provided by the federal committee in its proposed committee note is when “an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate.”² Some circuits permitted the statement in this situation, others did not. [Report to the Standing Committee, Advisory Committee on Evidence Rules](#), pg. 6 (May 10, 2023).

¹ Available at https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_may_2023_0.pdf.

² Available at https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at page 01089.

The federal advisory committee decided to resolve this split by rule amendment. The committee “unanimously determined that the appropriate result should be that a hearsay statement would be admissible against the successor-in-interest.” *Id.* They “reasoned that admissibility was fair when the successor-in-interest is standing in the shoes of the declarant—because the declarant is in substance the party-opponent.” *Id.* A contrary rule, on the other hand, “results in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement.” *Id.*

Public comments favored the federal committee’s resolution.

The committee thus proposed an additional paragraph at the end of Rule 801(d)(2):

If a party’s claim, defense, or potential liability is directly derived from a declarant or the declarant’s principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.³

It is expected this modification will go into effect on December 1, 2024.

III. COMMITTEE RECOMMENDS ADOPTION OF FEDERAL RULE AMENDMENT LANGUAGE TO ARIZONA’S RULE

The Arizona Advisory Committee on the Rules of Evidence met several times, including December 1, 2023, to discuss amending Arizona Rule 801(d)(2) to

³ *See* https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at 01088.

conform to the proposed federal rule change. Current Arizona Rule 801(d)(2) is identical to its federal counterpart.

On an initial look, there do not appear to be any Arizona cases on this topic. As a result, nothing in Arizona’s jurisprudence would prevent implementing the proposed change. Moreover, the Committee has found the reasoning of the federal advisory committee persuasive.

By a majority vote, the Committee thus proposes that this Court modify Arizona Rule of Evidence 801 to be consistent with the expected change to Federal Rule 801:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay.

* * * * *

- (2) *An Opposing Party’s Statement.* The statement is offered against an opposing party and:
 - (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make the statement on the subject;

- (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a party’s claim, defense, or potential liability is directly derived from a declarant or the declarant’s principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

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

ATTACHMENT⁴

ARIZONA RULE OF EVIDENCE 801

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

- (a)-(c) [No change]
- (d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay.
- (1) [No change]
 - (2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:
 - (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make the statement on the subject;
 - (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
 - (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the

⁴ Additions to rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

existence of the conspiracy or participation in it under (E).

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Comment to 2025 Amendment

Subsection (d)(2) was amended by adding the last sentence to conform to the 2024 amendment to Federal Rule of Evidence 801(d)(2). The federal Committee Note to the 2024 amendment includes examples that may be helpful to understanding the amendment.