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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-24-0020

10 **PETITION TO AMEND RULE 801**
11 **OF THE ARIZONA RULES OF**
12 **EVIDENCE**

STATE BAR OF ARIZONA
COMMENT

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition.

16
17 **I. CURRENT ARIZONA RULE 801(d)(2) AND THE PROPOSED**
18 **AMENDMENT TO ENSURE CONFORMITY WITH AN**
19 **ANTICIPATED AMENDMENT TO ITS FEDERAL ANALOGUE**

20 Under Arizona Rule of Evidence 801(d)(2), a party’s statement is not hearsay
21 when offered against that party if it meets one of five conditions that generally
22 address the relationship between the declarant and the party. However, the rules do
23 not address the situation where a statement is offered against a successor-in-interest
24 to the declarant.
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1 Currently, Arizona Rule 801(d)(2) is the same as Federal Rule 801(d)(2).

2 The federal Advisory Committee on Evidence Rules noted there is split of
3 authority among the federal circuit courts as to whether a statement can be admitted
4 against a party who is a successor-in-interest to the declarant. Consequently, it
5 recommended amending the federal rule to make clear that a statement can be
6 admitted against a party who is the successor-in-interest to the declarant. The federal
7 amendment is expected to go into effect on December 1, 2024, assuming the U.S.
8 Supreme Court approves the amendment, and then forwards it to Congress by May
9 1, 2024, which, in turn, does not enact legislation to reject, modify, or defer the
10 amendment.
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13 **II. PROPOSED AMENDMENT TO THE ARIZONA RULE**

14 In its Petition, the Arizona Advisory Committee on the Rules of Evidence
15 recommends that Arizona adopt the proposed amendment to Federal Rule 801(d)(2).
16 The proposed amendment would be added as a second unnumbered paragraph in
17 Arizona Rule 801(d)(2). The proposed language is as follows:
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21 If a party's claim, defense, or potential liability is directly derived from
22 a declarant or the declarant's principal, a statement that would be
23 admissible against the declarant or the principal under this rule is also
24 admissible against the party.
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1 The proposed federal rule amendment includes a lengthy committee note
2 explaining the amendment. The Petition does not include, nor address, the proposed
3 federal committee note amendment.
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5 **III. THE STATE BAR SUPPORTS THE PETITION**

6 The State Bar supports the proposed amendment to Arizona Rule 801(d)(2)
7 for several reasons. First, amending the Arizona Rule to adopt the contemplated
8 federal rule amendment will ensure continued conformity with the federal rule. Such
9 uniformity would eliminate the need for practitioners and litigants to learn differing
10 rules depending upon whether their matters are pending in the Arizona or federal
11 courts, lessen the possibility of inadvertent mistakes arising from a difference
12 between the rules, and eliminate forum shopping motivated solely by the potential
13 admissibility or inadmissibility of evidence in each court arising from inconsistent
14 rules.
15

16 Second, the amendment provides desirable clarity as currently there appears
17 to be no Arizona authority addressing the issue and federal circuit courts are split on
18 it. Moreover, adoption of the proposed conforming amendment will ensure the
19 continued utility of federal decisions interpreting the Rule federal counterpart as
20 persuasive authority in Arizona. Third, Arizona generally does not include lengthy
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1 federal committee notes to the rules of evidence, as practitioners and judges can
2 always refer to the federal committee note if needed.

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4 Fourth, the State Bar does not believe the amendment would conflict with any
5 Arizona specific policy, practice, or tradition that might support an intentional
6 divergence between Arizona and federal evidentiary law on this issue.

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8 **IV. CONCLUSION**

9 Accordingly, the State Bar supports the Petition to amend Arizona Rule of
10 Evidence 801(d)(2).

11 RESPECTFULLY SUBMITTED this 1st day of May 2024.

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14 Lisa M. Panahi
15 General Counsel

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17 Electronic copy filed with the
18 Clerk of the Supreme Court of Arizona
19 this 1st day of May 2024.

20 by: PSequin