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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

PETITION TO AMEND THE
ARIZONA RULES OF EVIDENCE
TO ADD RULE 807.01

Arizona Supreme Court No. R-25-0004

COMMENT OF THE ARIZONA
SUPREME COURT ADVISORY
COMMITTEE ON RULES OF
EVIDENCE OPPOSING THE
PETITION

The Advisory Committee on Rules of Evidence (the “Committee”) reviews proposals to amend the Arizona Rules of Evidence. Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012. The Committee has reviewed the petition filed by the Maricopa County Attorney’s Office and Arizona Voice for Crime Victims, Inc. (“Petitioners”) to amend the Arizona Rules by adopting new Rule 807.01 to add a hearsay exception to cover statements made by children to forensic interviewers. The Committee unanimously opposes the petition. The proposed rule is unnecessary, lengthy and confusing, logically inconsistent, potentially unconstitutional, out of step with the Federal Rules of Evidence, and not necessary to bring Arizona into alignment with other states’ evidence rules.

I. Proposed Rule 807.01 is Unnecessary Because Currently Existing Hearsay Exceptions and Exemptions Permit the Admission of Many Statements Made During a Child’s Forensic Interview.

A variety of hearsay exceptions and exemptions already permit the introduction of reliable and necessary hearsay statements. If the statements made to forensic interviewers do not fall within the extant exceptions and exemptions, then the statements are not sufficiently reliable or needed and should be excluded.

Arizona Rule 807, the “Residual Exception,” permits the admission of a statement that “is supported by sufficient guarantees of trustworthiness” and “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” ARIZ. R. EVID. 807(a). If a child’s statements to forensic interviewers are reliable and probative, then Rule 807 already permits their introduction at trial. Petitioners cite no Arizona cases where a court concluded that a child’s statements were inadmissible under Rule 807, but where the statements would be admissible under the proposed rule.

Under the Petitioners’ proposed rule, the child must testify at trial and be subject to cross-examination.¹ Proposed ARIZ. R. EVID. 807.01(a)(2). In such a scenario, the child’s out-of-court statements are unnecessary. The child can repeat

¹ Alternatively, the proposal states that if the child is unavailable, the statements will be admissible if “the child has provided prior sworn testimony deemed admissible pursuant to Rule 804(b)(1).” Proposed ARIZ. R. EVID. 807.01(a)(2). But if the statements are already admissible under Rule 804(b)(1), then proposed Rule 807.01 is unnecessary and duplicative.

the statements live, in court, in front of the factfinder—the preferred way to offer evidence.² In the alternative, if the child cannot or will not repeat the statements, the prior statement is admissible under Arizona Rule 801(d)(1)(A) as a statement “inconsistent with the declarant’s testimony.”³ Petitioners do not cite any Arizona cases where a child was unable or unwilling to repeat allegations in court, and yet the judge refused to admit the statements from the forensic interview under Rule 801(d)(1)(A). In sum, because the child is testifying at trial, the child can either

² It is possible that the Petitioners fear the following situation: The child testifies at trial and repeats the same statements the child made in the forensic interview, but the child is impeached at trial. If, at trial, the child is impeached with the suggestion that the child recently fabricated the accusation against the defendant, the interview statements are admissible under Rule 801(d)(1)(B)(i) to rebut the implication.

Similarly, if, at trial, the child’s *credibility* as a witness is impeached, then the interview statements are admissible under Rule 801(d)(1)(B)(ii) to rehabilitate the child’s credibility. In that scenario, the proposal is unnecessary because the statements are already admissible.

If, however, the child testifies at trial consistently with the forensic interview, and the child’s credibility is not impeached and the child is not accused of recent fabrication—but, instead, the child’s case-linked testimony is impeached in some other way—Rule 801(d)(1)(B) would *not* permit admission of the interview statements. The Committee believes that this is the proper result. Regular, case-linked impeachment does not require corroborating statements to be admissible for their truth outside of the situations covered by Rule 801(d)(1)(B). In other situations, the factfinder has all the information needed by virtue of the live testimony.

³ Arizona Rule 801(d)(1)(A) differs from Federal Rule 801(d)(1)(A) because the Arizona Rule does not require that the inconsistent statement be given under penalty of perjury or at a proceeding. The statement need only be “inconsistent” with trial testimony. A forensic interview would not be a “proceeding” for purposes of the Federal Rule. But that would not preclude admission under the Arizona Rule.

repeat the statements at trial or the statements can be admitted for their truth under Rule 801(d)(1)(A). Under either scenario, the new rule is unnecessary.

Other hearsay exceptions may also permit the admission of some statements made during a child forensic interview. For example, some statements may be admissible as excited utterances, statements made for medical diagnosis or treatment, or as recorded recollections, among others. *See* ARIZ. R. EVID. 803. Petitioners fail to cite any Arizona cases considering the application of the Rule 803 exceptions to child forensic interview statements.

Rules 801, 803, and 807 all provide opportunities to admit some or all of a child's statements made during a forensic interview. Petitioners do not cite any cases showing that the current evidence rules are inappropriately keeping reliable and necessary hearsay from the factfinder.

II. Proposed Rule 807.01 is Unwieldy and Confusing.

The Rules of Evidence should be user-friendly, including for self-represented litigants. Proposed Rule 807.01 is lengthy and confusing, in stark contrast to the other Arizona Rules of Evidence.

The proposal spans three pages and includes provisions that minutely guide some procedural components of the admission process, and yet the proposal fails to offer any guidance on some of its key terms and requirements. Two examples of the proposal's unwieldy complexity follow.

First, for forensic interview statements to be admissible, proposed Rule 807.01(a)(2) requires that the child testify at trial and be subject to cross-examination *or* that the child be unavailable to testify but provided prior sworn testimony admissible under Rule 804(b)(1). Proposed ARIZ. R. EVID. 807.01(a)(2). The Petitioners do not explain why those are the only two predicates permitting admission of forensic interview statements. As previously noted, the residual exception should also permit such statements under certain circumstances, as might a variety of exceptions under Arizona Rule 803. Why does the proposal engage with Rule 804(b)(1) only? The rule is silent on this matter, as is the petition. What will lawyers (not to mention nonlawyers) make of this? Will they presume that the other hearsay exceptions are inapplicable because one is specifically deemed applicable? Lawyers and judges reading the plain text of our rules may reach just that conclusion. Under the General/Specific canon of construction, “If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalialia specialibus non derogant*).” Antonin Scalia & Bryan Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 183 (2012). This may lead lawyers and judges to believe proposed Rule 807.01 alone governs the admissibility of child forensic interviews.

Second, proposed Rule 807.01(c) provides that a trial court may hold a hearing to determine the admissibility of the child’s forensic interview statements. That

provision details that there is a rebuttable presumption that the child not be required to testify at that hearing and states that the presumption can be overcome by a showing of “extraordinary circumstances.” The Comment notes that “all of the circumstances” must be considered, with special emphasis on the adverse effects on the child, the need for the child to testify, whether there are alternative means of obtaining the evidence needed for the hearing, and to the mandate that victims be treated with fairness, dignity, and respect. Proposed ARIZ. R. EVID. 807.01, Comment to Rule. But the Comment—indeed, even the full petition—fails to explain how a court should determine whether the adverse effects on this child are greater than usual, what sorts of circumstances show a need for the child to testify, and what other evidence might be used in the alternative.

III. Proposed Rule 807.01 is Logically Flawed.

Proposed Rule 807.01 is logically flawed in at least two significant respects.

First, a major premise of the proposal is that “exposing children to confrontation or courtroom stress in order to get a conviction is not a system that is working well.” (Pet’n, at 8:11–12.) Yet, the proposal requires the child to testify at trial and be subject to cross-examination. Proposed ARIZ. R. EVID. 807.01(a)(2). If the point of the proposal is to shield the child from testifying to protect the child, the proposed rule does nothing to accomplish that. The policy of the rule contradicts the application of the rule.

Second, the proposal provides that the age of the child at the time of the trial is “immaterial as to admission of statements pursuant to this rule.” Proposed ARIZ. R. EVID. 807.01(d). But if the proposal is motivated by protecting *children* from the stress of the courtroom, then the age of the child at the time of the trial *is material*. Once again, the policy of the rule contradicts the application of the rule.

The proposal is flawed in other respects, including but not limited to the following:

- Rule 807.01(a)(3) uses the term “forensic interview” (indeed, the entire petition is about forensic interviews), but the proposed rule does not define that term. That term may require certain protections (such as the use of a forensic interviewer who is not merely an adjunct police officer and the use of open-ended or nonleading questions)—but there are no guarantees that these protections will remain in place. It is possible that, in the future, police officers may conduct forensic interviews, or that leading questions may be used, or that the child may be manipulated into making accusatory statements. Key terms like this should be defined.
- Rule 807.01(e) provides a presumption that the entire forensic interview is admissible, unless it is in the “interest of justice” to remove some questions and corresponding answers. The “interest of justice” standard is out of step with the usual standard provided in evidentiary rules—the familiar Rule 403 balancing of probative value against unfair prejudice and that rule’s other material considerations.
- Rule 807.01(a)(2) permits a child’s forensic interview statements to be admissible if the child testifies or if the testimony is admissible under the former testimony exception of Rule 804(b)(1). Does that suggest that if the statements would be admissible under the residual exception or any of the Rule 803 exceptions, the statements are now *inadmissible* unless the child testifies? That is how the rule reads, but that cannot be the result that the Petitioners desire.

These examples suffice to highlight the logical problems with the proposal.

IV. Proposed Rule 807.01 Violates the Sixth Amendment’s Confrontation Clause and Separation of Powers.

The Confrontation Clause guarantees criminal defendants the right to cross-examine their accusers about testimonial statements. U.S. CONST. amend. VI. Many statements made during a child’s forensic interview may qualify as testimonial because their primary purpose is to establish facts potentially relevant to a criminal prosecution. *E.g., Davis v. Washington*, 547 U.S. 813, 822 (2006). To the extent that the proposal seeks to admit such statements, even in situations where the child is unavailable at trial, the proposal thus runs afoul of the Constitution. To the extent that the child does testify, as noted above in Part I, the proposal is unnecessary because the child can either testify to those same facts or, if the child testifies inconsistently with the prior statements, the prior statements may be admitted under Rule 801(d)(1)(A). Neither alternative—an unconstitutional rule or an unnecessary one—is appealing.

In addition, proposed section (g) creates separation of powers concerns. *See* ARIZ. CONST. art. 3. Proposed Rule 807.01(g) states, “If the definitions above are altered by future legislation, this rule is automatically deemed to conform to the changes in the law once those changes go into effect.” This automatic conformance could allow the legislature to unilaterally alter a court rule without input from the appropriate branch and governing bodies, including this Committee and the Arizona Supreme Court. The proposed rule could contravene the express requirement that no

department “shall exercise the powers properly belonging to either of the others.”

ARIZ. CONST. art. 3.

V. Proposed Rule 807.01 Would Bring Arizona Out of Alignment with the Federal Rules of Evidence.

The Arizona Rules of Evidence are modeled on the Federal Rules of Evidence, and it is the preference of the Committee to keep the Arizona Rules in line with the Federal Rules unless there is a need to depart. *See* Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012. The Federal Rules do not contain an exception like the one proposed here, and the Federal Advisory Committee, whose work the Committee monitors, is not contemplating such an addition. The Arizona Rules are currently aligned with the Federal Rules on this topic, and the Petitioners do not explain why the Arizona Rules of Evidence should be amended *to depart from* the Federal Rules.

VI. Arizona’s Rules of Evidence Are Not Out of Step with the Rules of Other States.

Petitioners claim that Arizona “is currently in a small minority of states that does not allow the admission of a child forensic interview.” (Pet’n, at 11: 22-23.) But the Petitioners’ citations do not necessarily support that statement.

For example, the Petitioners note that Michigan permits a child’s forensic interview statements to be admitted if the statements “meet the requirements of an

excited utterance.” (Pet’n, at 11 n.4.) Arizona would permit admission under those circumstances as well. *See* ARIZ. R. EVID. 803(2).

Several of the other citations provided by the Petitioners require the child to be *unavailable* before their forensic interview statements are admissible. (Pet’n, at 11 n.4.) Yet, the Petitioners’ proposal does not require the child to be unavailable, and the petition does not explain why the proposed rule does not follow the unavailability requirement of these other states.

More than that, one of the most consistent requirements—not present in the proposed rule—is reliability.

- Alaska and Utah require a judicial finding that the statement “is sufficiently reliable and trustworthy and that the interests of justice are best served” by admitting the recorded statement. ALASKA R. EVID. 801(D)(3)(H); UTAH R. CRIM. P. 15.5(a)(8).
- California, Pennsylvania, South Dakota, and Washington require a judicial finding “that the time, content, and circumstances of the statement provide sufficient indicia of reliability.” CAL. EVID. CODE § 1360(A)(2); 42 PA. STAT. AND CONS. STAT. ANN. § 5985.1(A)(1)(I); S.D. CODIFIED LAWS § 19-19-806.1(1); WASH. REV. CODE ANN. § 9A.44.120(1)(B). Minnesota, Mississippi, Missouri, Oregon, and Texas have similar requirements. MINN. STAT. ANN. § 595.02 SUBD. 3(A); M.R.E. RULE 803(25)(A); V.A.M.S. 491.075(1)(1); OR. REV. STAT. ANN. § 40.460, RULE 803(18A)(B); TEX. CODE CRIM. PROC. ANN. ART. 38.072 § 2(3)(B)(2).
- Colorado, Florida, and Illinois allow this evidence only if the court finds in a pretrial hearing “that the time, content, and circumstances of the statement provide sufficient safeguards of reliability.” COLO. REV. STAT. ANN. § 13-25-129(5)(A); FLA. STAT. ANN. § 90.803(23)(A)(1); 725 ILL. COMP. STAT. ANN. 5/115-10(B)(1).

- Nevada requires a court finding, after a hearing, “that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness” NEV. REV. STAT. ANN. § 51.385(1)(A). New Jersey, North Dakota, Vermont, and Wisconsin have similar requirements. N.J. R. EVID. 803(27)(B); N.D. R. EV. RULE 803(24)(A); VT. R. EVID. 804A(A)(4); WIS. STAT. ANN. § 908.08(3)(D).
- South Carolina requires a judicial finding “that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.” S.C. CODE ANN. § 17-23-175(A)(4). Tennessee also requires “particularized guarantees of trustworthiness.” TENN. CODE ANN. § 24-7-123(B)(2).
- Virginia allows such evidence if the court, after a hearing, rules “that the time, content, and totality of circumstances surrounding the statement provide sufficient indicia of reliability so as to render it inherently trustworthy.” VA. CODE ANN. § 19.2-268.3(B)(1).

Most of these jurisdictions require a pretrial hearing. From the jurisdictions discussed above, Alaska, California, Colorado, Florida, Illinois, Minnesota, Missouri, Nevada, New Jersey, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin all require pretrial hearings.

But this reliability requirement is missing from Proposed Evidence Rule 807.01. And the hearing is discretionary—and carries a rebuttable presumption that the child witness will not be called.

Instead, the proposed rule requires only a finding that the interview was recorded, the recording is accurate, the interview was conducted in a nonleading manner, the interviewer is available, and the opposing party can view the recording.

(Pet'n, at 4-5.) A finding that a recording was not altered, or that an interviewer did not ask leading questions, is relevant to, but may not be sufficient for, a finding of reliability.

Compare this to the list of factors “the court may consider, but is not limited to,” in South Carolina:

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a detailed account of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. CODE ANN. § 17-23-175(B).

Or the list in Tennessee:

- (A) The mental and physical age and maturity of the child;
- (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
- (C) The timing of the child's statement;
- (D) The nature and duration of the alleged abuse;
- (E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
- (F) Whether the statement is spontaneous or directly responsive to questions;

- (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;
- (H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
- (I) The relationship of the child to the offender;
- (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
- (K) Any other factor deemed appropriate by the court

TENN. CODE ANN. § 24-7-123(2); *see also* VA. CODE ANN. § 19.2-268.3(B)(1).

Two observations emerge. First, the lists of considerations in South Carolina and Tennessee are far more related to assessing whether the recorded statement is reliable and trustworthy—the key inquiry. The proposed rule would mandate that Arizona courts admit a recorded statement regardless of reliability or trustworthiness, so long as the video was not tampered with, the questioning was not leading, the interviewer will be subject to cross-examination, and the opposing party can view the recording. Never mind internal coherence, sufficiency of details, or motive to lie. Second, the lists in South Carolina and Tennessee are inclusive, not exclusive. The judge may consider any other factor they deem appropriate. But the rule proposed in the petition strips judges of any ability to consider unlisted factors—factors that may militate against reliability and trustworthiness.

Petitioners acknowledge that interviewing techniques have developed to the current model “to promote more accurate and reliable information” (Pet’n, at 8.) Yet nothing in the proposed rule empowers the judge to exclude evidence if the information is not accurate and reliable. The proposed rule mandates admission if foundational factors are met.

Under Rule 807(a), a party can already admit this sort of statement, as long as it “is supported by sufficient guarantees of trustworthiness” and “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” ARIZ. R. EVID. 807(a).

If a party cannot prove “sufficient guarantees of trustworthiness,” it shouldn’t matter that a recording is accurate, that the interviewer didn’t ask leading questions, or that the interviewer will be subject to cross-examination. Yes, these factors may help a court assess whether there are sufficient guarantees of trustworthiness. *See* TENN. CODE ANN. § 24-7-123(2). But they are not a replacement for that finding.

Evidence Rule 807(a) already embraces the key factual finding that underscores almost every rule the petition relies upon—trustworthiness. A factor the proposed Rule omits.⁴

⁴ The petition argues that Arizona is in a “small minority of states” without a specific rule authorizing the admission of child forensic interviews. But adding the proposed rule would place Arizona in an even smaller minority of jurisdictions that do not require a finding of reliability or trustworthiness before the admission of such evidence. The twelve states that have no such rule secure that finding through Rule

VII. Conclusion

In sum, the proposed rule is unnecessary, confusing, potentially unconstitutional, and logically flawed. It is not clear that the proposal solves any problem unaddressed by the existing rules.

The Committee respectfully requests that the Court deny the petition to add Rule 807.01 to the Arizona Rules of Evidence.

DATED this 1st day of May, 2025.

/s/ Erik Thorson
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Chair, Advisory Committee on Rules of Evidence

807 or similar rules. And the overwhelming majority of jurisdictions cited in the petition require an express finding of reliability or trustworthiness before admission—if not a more exacting standard.