John A. Furlong, Bar No. 018356
General Counsel
STATE BAR OF ARIZONA
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6288
Telephone: (602) 252-4804
John.Furlong@staff.azbar.org

IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(f), ARIZONA RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-10-0035 **Comment of the State Bar of Arizona Regarding Petition to Amend Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure**

With only a few exceptions, the State Bar of Arizona supports the petitioner's proposed amendments to the Arizona Rules of Evidence (the "Arizona Rules") and Rule 17.4(f) of the Arizona Rules of Criminal Procedure:

(a) Most of the proposed amendments do not change the rules substantively, but merely incorporate the currently proposed stylistic revisions to the Federal Rules of Evidence (the "Federal Rules"). With one exception noted below, the State Bar believes these changes should be adopted because they would make the Arizona Rules easier to understand and foster uniformity with the Federal Rules.

(b) The State Bar also agrees with most of the proposed substantive changes to the Arizona Rules. Most are minor, and would resolve some nagging ambiguities in the current state rules or incorporate worthwhile modifications that have already been adopted at the federal level. For the reasons stated below,

however, the State Bar disagrees with a few of the proposed amendments, particularly with respect to the treatment under the hearsay rule of former testimony and prior inconsistent statements.

(c) The State Bar welcomes the discussion of whether to amend Arizona Rule 702 regarding the admissibility of expert testimony. Because its members hold strongly divergent views on this issue, the State Bar is unable to take a position as to whether Federal Rule 702 should be incorporated into our state rules. It does, however, recommend against the adoption of the "hybrid" alternative, which appears unlikely to satisfy the substantive concerns of either the critics or proponents of the current rule.

(d) If certain changes are made, the State Bar also agrees with the proposed modifications to Arizona Rule 410 and Rule 17.4(f) of the Arizona Rules of Criminal Procedure. Adopting the proposed amendments would replace two rules with one, fostering uniformity of decisions applying the parallel subject matter of these rules.

(e) Lastly, the State Bar supports petitioner's recommendation that a standing committee be created to review the Arizona Rules periodically to see if changes are needed. Among other things, it should monitor changes in the Federal Rules, initiate (if appropriate) rule petitions to adopt such changes in Arizona, and comment on petitions seeking to amend the Arizona Rules.

I. Proposed Amendments to Arizona Rules of Evidence

A. Rationale Supporting Amendments to Incorporate Proposed Stylistic Changes to Federal Rules

As the petition notes, proposed amendments to restyle the Federal Rules have been transmitted to the United States Supreme Court with a recommendation that

they be approved and transmitted to Congress for adoption in December 2011. *See* petition at 2. These proposed amendments are not intended to change the substance of any of the Federal Rules, but instead represent an effort to make the rules easier to understand through stylistic revision. Among other things, the amendments include certain formatting changes to make it less difficult to identify each rule's component parts. Additionally, the proposed amendments reduce the use of archaic, redundant, and ambiguous language. For example, the word "shall" would be replaced throughout the rules with the word "must," "should," or "may," depending on the context and intent of the rule.

With one exception addressed below, the State Bar endorses petitioner's proposed amendments that merely incorporate the proposed stylistic changes to the Federal Rules and do not involve any substantive changes to the Arizona Rules. The proposed federal amendments do make the Federal Rules easier to understand, and practitioners would benefit if corresponding changes were made in our state rules where they do not affect the state rules' substantive content. Where a state rule is intended to say the same thing as a corresponding federal rule, incorporating the stylistic amendments into the Arizona Rules also would save practitioners from having to parse linguistic differences between the Arizona Rules and the restyled Federal Rules to see if any substantive state law differences were intended. Moreover, to the extent the Arizona Rules and Federal Rules use the same language, it would allow practitioners and the courts to continue to rely upon and refer to developing federal case law interpreting the Federal Rules in determining evidentiary issues in the Arizona courts. *See State v. Green*, 200 Ariz. 496, 499, 29 P.3d 271, 273 (2001) ("When interpreting an evidentiary rule that predominantly echoes its federal counterpart, we often look to the latter for guidance.").

The single instance where the State Bar believes that a proposed stylistic revision should not be made is in Arizona Rule 605, which presently provides that "[t]he judge presiding at the trial may not testify in that trial as a witness." Consistent with the proposed federal stylistic revisions, petitioner proposes replacing the phrase "judge presiding at trial" with the words "presiding judge." *See* petition at Appendix A (Rule 605). In Arizona, however, a "presiding judge" is generally understood to mean a judge who performs administrative functions within the Superior Court; and the phrase is used with that meaning in the Arizona Rules of Civil Procedure. *See, e.g.*, Rule 42(f)(1)(A). As such, the use of that phrase in Arizona Rule 605 might cause needless confusion as to which judicial officer is barred from testifying as a witness at trial. Accordingly, the State Bar recommends that this Court adopt petitioner's proposed revisions to Arizona Rule 605 but, in doing so, retain the phrase "judge presiding at trial" currently found in the rule rather than replacing it with "presiding judge."

B. Most of the Proposed Substantive Changes Are Minor and Would Improve the Arizona Rules.

The petition also urges the adoption of a small number of proposed substantive changes to the existing Arizona Rules. Most are minor, and most reflect Federal Rules amendments that were adopted after Arizona incorporated the Federal Rules in 1977 as the basic model for Arizona's evidentiary rules. The State Bar supports the majority of these proposed changes because they either help clarify existing ambiguities in the Arizona Rules or provide useful procedural mechanisms to assist in implementing those rules.

For example, as proposed by petitioner, Arizona Rule 103(b) would provide that "[o]nce the court rules definitively on the record – either before or during trial – a party need not renew an objection or offer proof to preserve a claim of error for

appeal." This language complements the comment to Rule 7.2 of the Arizona Rules of Civil Procedure governing motions *in limine* and explicitly codifies in a rule the case law noted in the comment holding that "[w]here a sufficiently specific motion *in limine* is made and ruled upon on the merits, the objection raised in that motion is preserved for appeal, without the need for specific objection at trial." *See* Comment to Ariz. R. Civ. P. 7.2 (citing *State v. Burton*, 144 Ariz. 248, 697 P.2d 331 (1985)).

Similarly, by adding a reference to existing Arizona Rule 902(12) in Arizona Rule 803(6), the amendments would expand the business records exception to the hearsay rule to allow the use of a custodian's declaration not only to authenticate foreign records (as is now provided in Arizona Rule 902(12)), but also to bring such records within the hearsay exception. This expansion of the business records exception is consistent with the increasingly globalized nature of Arizona's economy, advances the interests of Arizona litigants whose matters involve transnational business activities, and provides the Arizona courts with a tool to deal efficiently with questions of authenticity and hearsay arising in such actions.

Another worthwhile change is set forth in the proposed amendment to Arizona Rule 608(b), governing character testimony. Current Arizona Rule 608(b) (like its Federal Rule counterpart before amendment in 2003) generally bars the use of extrinsic evidence "in attacking or supporting the witness' credibility." The petitioner recommends adopting the restyled version of Federal Rule 608(b), which limits the bar to precluding extrinsic evidence relating to a witness's "character for truthfulness" rather than his or her "credibility." The incorporation of the federal rule amendment would help clarify the Arizona rule, eliminating arguments that the

rule bars the use of extrinsic evidence to prove bias, competence or contradiction. *See* Fed. R. Evid. 608, Advisory Committee's Note, 2003 Amendments.

The proposed amendments also include a number of other changes borrowed from the Federal Rules that are worth including in the Arizona Rules, including but not limited to the following:

(a) Drawing a distinction between civil and criminal actions in instructing a jury whether it must accept a judicially noticed fact as conclusive [proposed Arizona Rule 201(g)];

(b) Adopting the federal rule regarding the effect of an evidentiary presumption on the parties' respective burdens of proof [proposed Arizona Rule 301];

(c) Consistent with existing Arizona case law, clarifying that the bar on evidence of subsequent remedial measures does not include the time period between an act of alleged negligence and an injury [proposed Arizona Rule 407];

(d) Clarifying that in an inquiry as to the validity of a jury verdict, a juror may testify about whether "a mistake was made in entering the verdict in the verdict form" [proposed Arizona Rule 606(b)(2)(C)];

(e) Clarifying that a court has the authority to establish the fee of a court-appointed expert [proposed Arizona Rule 706(c)]; and

(f) Clarifying that in applying the exception to the hearsay rule regarding statements made under an opposing party's authority or by an opposing party's agent/employee or co-conspirator, the declarant's statement must be considered but is not enough by itself to establish the declarant's authority, the existence of the agency/employee relationship, or the existence or participation in a conspiracy [proposed Arizona Rule 801(d)(2)].

C. Certain Proposed Amendments Should be Revised or Rejected.

Although most of the proposed substantive amendments would be worthwhile additions to the Arizona Rules, the State Bar disagrees with three sets of changes proposed by the petitioner.

1. Rule 1002

The first area of disagreement may merely involve a typographical error. Current Arizona Rule 1002, setting forth the requirement of an original writing, recording, or photograph to prove its contents, contains an exception that applies when "otherwise provided in [the Arizona Rules of Evidence] or by applicable statute or rule." The language proposed by petitioner retains this exception, but appears to have inadvertently included the restyled Federal Rule 1002's reference to a "federal" statute. *See* petition at Appendix A. The State Bar recommends that the word "federal" be deleted to ensure that the rule's exception extends to modifications authorized by Arizona statutes.

2. Former Testimony Under Rules 803 and 804

The State Bar's second area of disagreement centers on the proposed amendments' treatment of former testimony under the hearsay rule. The petition first proposes to abrogate Arizona Rule 803(25). Adopted in 1994, that rule has no counterpart in the Federal Rules. It provides that in a civil action, if certain conditions are met, the hearsay rule does not bar the admission of a declarant's prior testimony at a hearing or deposition, irrespective of the declarant's current "unavailability"[1] to testify at a trial or hearing. Ariz. R. Evid. 803(25). The petition reasons that this rule may be deleted because it is "unnecessary in light of the 2012

[1] "Unavailability" is a defined term in the Arizona Rules (and in the Federal Rules) describing a number of particular circumstances where a witness is deemed not to be available to testify at a trial or hearing. *See* Ariz. R. Evid. 804(a); Fed. R. Evid. 804(a).

amendment to Rule 801(d)(1)(A)." Petition at 12; *see also* August 20, 2010 Minutes of the Ad Hoc Committee on Rules of Evidence at 3. However, proposed Federal Rule 801(d)(1)(A) (like the existing Federal Rule and current Arizona Rule 801(d)(1)(A)) applies only if the witness testifies at the trial or hearing in which the former testimony is offered and only if the former testimony is inconsistent with the testimony that the witness has offered at the trial or hearing. *Compare* petition at Appendix A (proposed Rule 801(d)(1)(A)) *with* Fed. R. Evid. 801(d)(1)(A) *and* Ariz. R. Evid. 801(d)(1)(A). Neither of those limitations exists in current Arizona Rule 803(25).

Former testimony also could be excepted pursuant to the hearsay rule under proposed amended Rule 804(b)(1), which (like the current Federal Rule 804(b)(1) but unlike current Arizona Rule 804(b)(1)) would except former testimony from the hearsay rule but only if, among other conditions, the declarant is "unavailable." *Compare* petition at Appendix A (proposed Rule 804(b)(1)) *with* Fed. R. Evid. 804(b)(1) *and* Ariz. R. Evid. 804(b)(1). Again, that proposed rule would impose an "unavailability" requirement not found in current Arizona Rule 803(25). It also would implicitly abrogate Rule 32(a) of the Arizona Rules of Civil Procedure and Rule 59(a) of the Arizona Rules of Family Law Procedure, both of which explicitly allow the use of a prior deposition of a declarant in a hearing or at trial "without proof of the deponent's unavailability to testify." Ariz. R. Civ. P. 32(a); Ariz. R. Family Law P. 59(a).

The State Bar opposes the petition's proposed abrogation of Rule 803(25). Currently, witness testimony is frequently admitted at trials and hearings in our state courts by use of a deposition transcript without having to prove that a witness is unavailable or that the former testimony is inconsistent with a witness's in-court

testimony. The State Bar believes that this practice renders trials and hearings more efficient, lowers litigation costs, and reduces the burdens imposed upon witnesses who otherwise may have to offer the same testimony twice or more in a civil case. The current rule works well, and the State Bar sees no reason to replace it with Federal Rule 804(b)(1).

The State Bar also disagrees with the petition's proposed treatment of former testimony in criminal cases. The proposed amendments would abrogate Arizona Rule 804(b)(1) and replace it with a restyled version of current Federal Rule 804(b)(1). Like Arizona Rule 803(25), Arizona Rule 804(b)(1) was adopted in 1994 and provides simply that, in a criminal action, the admissibility of former testimony is governed by Rule 19.3(c) of the Arizona Rules of Criminal Procedure. Rule 19.3(c), in turn, is different from Fed. R. Evid. 804(b)(1). Among other things, it provides that former testimony is admissible not only if the declarant is "unavailable" but also if the declarant is present at the proceeding and is available for cross-examination. Additionally, the former testimony may not be admitted if the defendant was not represented by counsel at the proceeding where the former testimony was given.

The State Bar sees no reason to abrogate current Arizona Rule 804(b)(1) or implicitly abrogate Rule 19.3(c) of the Arizona Rules of Criminal Procedure. It is evident from a review of the current rules that in 1994, this Court made a deliberate departure from the federal version of Rule 804(b)(1) to better tailor the former testimony exception to criminal cases, both to protect the rights of the accused and to promote the interests of justice. The State Bar believes that this Court struck the right balance when it adopted those rules and that they should be retained as currently written.

3. Prior Inconsistent Statements Under Rule 801(d)(1)(A)

The State Bar's third area of disagreement concerns the proposed amendments' treatment of prior inconsistent statements under Rule 801(d)(1)(A) of the hearsay rule. Under the current Arizona rule, a witness's prior inconsistent statement not only may be offered for impeachment purposes, but also may avoid the bar of the hearsay rule and be admitted into evidence if (1) the witness is present and available for cross-examination and (2) the statement is "inconsistent with the declarant's testimony." Proposed amended Rule 801(d)(1)(A) incorporates those requirements, but (like its federal counterpart) also requires that the prior statement be "given under penalty of perjury at trial, hearing or other proceeding or in a deposition." *See* petition, Appendix A (Rule 804(d)(1)(A)).

This amendment would have little impact on Arizona civil matters, as witnesses are often deposed before trial. But the amendment would have a major effect on Arizona criminal matters, where witnesses are seldom deposed before trial. Indeed, a witness cannot be required to testify in a deposition unless he or she refuses to submit to a pretrial interview and, even then, a court order is required to authorize it. *See* Ariz. R. Crim. P. 15.3(a). And other sworn testimony is seldom available, because witnesses are rarely called to testify under oath before trial. For example, unsworn hearsay statements of witnesses are admissible before a grand jury or during probable cause hearings before a magistrate. Similarly, they also are admissible in hearings held to determine whether a defendant is constitutionally entitled to bond. *See Simpson v. Owens*, 207 Ariz. 261, 275, 85 P.3d 478, 492 (App. 2004).

In the absence of sworn pretrial testimony or statements, criminal prosecutors and defense counsel depend heavily on unsworn pretrial witness interviews, which

are often transcribed or videotaped. Unlike the federal system (where there is limited pretrial discovery), Arizona has an extensive set of pretrial disclosure requirements built around the use of these pretrial interviews. Under Rules 15.1 and 15.2 of the Arizona Rules of Criminal Procedure, the parties must specifically identify potential trial witnesses and disclose all written or recorded witness statements, irrespective of whether they were made under oath.

And, under those rules (and in contrast to the federal system), Arizona criminal procedure authorizes pretrial interviews of anticipated witnesses, unless the witness is a "crime victim" under Arizona statute or the Victim's Bill of Rights. These interviews are so vital to the integrity of the criminal process that state courts have held that under certain circumstances, the failure to conduct them may constitute ineffective assistance of counsel. *See State v. Radjenovich*, 138 Ariz. 270, 274-75, 674 P.2d 333, 337-38 (App. 1983) ("We have no hesitancy in holding that, except in the most unusual circumstances, it offends basic notions of minimal competence of representation for defense counsel to fail to interview any state witness prior to a major felony trial.").

Under the current Arizona rule, unsworn statements made by trial witnesses during pretrial interviews are routinely admitted into evidence where they are inconsistent with the witness's trial testimony. In the State Bar's view, that practice fosters the truth-seeking process at trial without placing a witness or the parties at an unfair advantage, as the witness can be thoroughly examined by both sides of the litigation regarding any inconsistencies between the witness's trial testimony and statements made in a pretrial interview. And adopting the federal version of the rule may require criminal counsel to more often ask for judicial authority to take depositions or to seek to modify the existing criminal rules to allow greater use of

pretrial depositions, which would inevitably result in increased cost and greater delay in an already overburdened criminal justice system.

Adoption of the federal rule also would preclude the admissibility of other types of prior inconsistent statements that are now excluded from the hearsay rule, including: (1) statements made during interviews conducted by police and later recorded in police reports; (2) statements made by a co-defendant during "free talks"; and (3) statements by a witness regarding the criminal offense(s) at issue that were made to others before the witness's in-court testimony. Excluding such statements from evidence would harm the truth-seeking process at trial and deprive the jury of evidence that is undoubtedly relevant and probative of the issues at trial.

In light of these considerations, the State Bar respectfully recommends that, if the Court adopts the proposed amended Rule 801(d)(1)(A), it delete the clause "and was given under penalty of perjury at trial, hearing or other proceeding or in a deposition."

D. The Options With Respect to Rule 702

The petition proposes three alternatives for the Court's consideration with respect to Arizona Rule 702: (1) retain current Arizona Rule 702 (and presumably continue Arizona's adherence to *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000) ("the *Logerquist/Frye* Approach")); (2) adopt the restyled Federal Rule 702 (and presumably reject the *Logerquist/Frye* Approach in favor of the U. S. Supreme Court's interpretation of Federal Rule 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 525 U.S. 137 (1999) ("the *Daubert* Approach")); or (3) adopt a "hybrid" of the *Logerquist/Frye* and *Daubert* Approaches ("the Hybrid Approach") by amending Arizona Rule 702 to incorporate the restyled Federal Rule 702 with

the exception of the rule's last subpart, which requires an expert to have "reliably applied the principles and methods to the facts of the case." *See* petition at 11 and Appendix A.

Since the day it was decided, *Logerquist* has sparked a lively debate among judges and practitioners about whether the admissibility of expert testimony should be governed by *Logerquist/Frye*'s principles or by *Daubert*'s. Strong arguments can be marshaled in support of both approaches; but, as is illustrated by the Ad Hoc Committee's vote on the issue, there is certainly no consensus about which alternative is the best choice. *See* petition at 11 (noting three members in favor of the *Logerquist/Frye* Approach, three members in favor of the *Daubert* Approach, and two members supporting the Hybrid Approach). A consensus also does not exist within the State Bar over this issue, which precludes it from endorsing either approach.

Fortunately, this Court is not without informed discussion about this issue. The arguments of both sides are well stated in both the majority and dissenting opinions in *Logerquist*, as well as in the minutes of the Ad Hoc Committee, the Advisory Committee's Note to current Federal Rule 702, and the Court of Appeals' decision in *Lohmeier v. Hammer*, 214 Ariz. 57, 70-71, 148 P.3d 101, 114-115 (App. 2006). Taken together, the arguments set forth in these sources (which have been often repeated elsewhere) can help guide the Court in determining which approach best serves Arizona's litigants and best defines the appropriate roles of a trial court and jury with respect to the admissibility of expert testimony.

Although the State Bar takes no position on whether to follow *Logerquist/Frye* or *Daubert*, it does recommend against adopting the Hybrid Approach, which would allow a court to evaluate whether "the testimony is the

product of reliable principles and methods," but not whether "the expert has reliably applied the principles and methods to the facts of the case." Petition, Appendix A (Rule 702, Option C). The crux of the debate between the *Logerquist/Frye* and *Daubert* Approaches is whether, in a case not involving novel scientific theories, a trial court may make a determination that the principles and means an expert uses to reach an opinion are so unreliable that a jury should not consider the expert's testimony. The Hybrid Approach is unlikely to satisfy either side in the debate over this issue. Given that the "principles and methods" followed by an expert are often inextricably interwoven with how he or she applies them to the facts, it is difficult to fashion a principled argument allowing a trial court to assess the reliability of an expert's "principles and methods," but not the reliability of the expert's application of those "principles and methods" to the facts. It also would be a hard distinction for courts to apply in practice, as the Hybrid Approach is likely to spark dispute over whether an opinion was the result of an expert's "methods" (which a court could assess) or was merely the expert's fact application (which a court could not assess).

While it is always tempting to try to reach a compromise between opposing viewpoints, the State Bar believes that the wiser course in this case is to choose between the other two alternatives and either stay with the *Logerquist/Frye* Approach (and keep the current rule) or move toward the *Daubert* Approach (and incorporate Federal Rule 702 into Arizona Rule 702).

II. Proposed Amendments to Arizona Rule of Evidence 410 and Rule 17.4, Ariz. R. Crim. P.

With several modifications designed to preserve an Arizona-specific provision and to resolve an unsettled area of law, the petition proposes that this

Court adopt Federal Rule of Evidence 410 and amend Rule 17.4(f), Ariz. R. Crim. P. ("Rule 17.4"). *See* petition at 6, 15 and Appendix A (Rules 410 & 17.4).

Similar to its federal counterpart (Rule 11(f) of the Federal Rules of Criminal Procedure), the proposed amendment to Rule 17.4 would defer questions of admissibility of pleas, plea discussions and related statements to the mechanisms of proposed Arizona Rule of Evidence 410. The amendment would eliminate the risk that two independent, competing rules governing the same subject matter might be applied in such a fashion as to lead to inconsistent results and relieve attorneys and judges from "master[ing] the interactions among cases and two sets of federal rule amendments." *See* Memorandum for the Ad Hoc Committee on the Arizona Rules of Evidence, Rule 410 Subcommittee Report ["Subcommittee Report"], at 2 and 6.

Petitioner also proposes amending Arizona Rule 410 so that it generally conforms with the language set forth in the restyled Federal Rule 410. However, proposed Arizona Rule 410 would differ from its federal counterpart in its addition of subsection (a)(3), providing that statements against a defendant are inadmissible if made in connection with a withdrawn guilty plea or a *nolo contendere* plea under Ariz. R. Crim. P. 17.4 or a comparable federal procedure. It also should be noted that proposed subsection (b)(2), which mirrors language in restyled Federal Rule 410, would render statements described in subsection (a)(3) or (4) of the rule admissible in criminal proceedings for perjury or false statement under certain conditions, a question presently unsettled under Arizona law. *See* Subcommittee Report at 8 (citing *State v. Campoy*, 220 Ariz. 539, 548, 207 P.3d 792 (App. 2009)).

The State Bar generally supports petitioner's proposed amendments to Arizona Rules 410 and 17.4 because they would likely eliminate confusion caused by the competing provisions of the current rules, largely ensure continued

uniformity with their federal counterparts, and provide guidance in an unsettled area of Arizona evidentiary law. But there are three respects in which the State Bar disagrees with the proposed amendments.

First, the proposed amendments would eliminate the portion of current Arizona Rule 410 that extends the rule's protection not only to criminal and civil actions, but also to administrative proceedings. One of the Ad Hoc Committee's subcommittees recognized that this would be a substantial departure from the existing rule, yet the petition does not explain why this change was proposed. *Compare* Subcommittee Report at 7 and 8 *with* petition at 6. In the State Bar's view, the existing provision should be retained because there does not appear to be any principled reason to draw a distinction in the rule between administrative proceedings and judicial actions.

Second, the proposed amendments would delete the introductory clause currently in Arizona Rule 410 that makes its provisions subject to federal or state statutory exceptions. In evaluating this issue, one of the Ad Hoc Committee's subcommittees recognized that there are currently Arizona statutes that may affect the admissibility of *nolo contendere* pleas. *See* Subcommittee Report at 7 (discussing A.R.S. § 13-807's classification of a no contest plea as the functional equivalent of a guilty verdict and its potential interplay with various professional and occupational licensing statutes). Given that, the State Bar believes that an introductory clause should be inserted at the beginning of the proposed Arizona Rule 410 that says: "Except as otherwise provided by statute, . . ."

Third, proposed Rule 410(a)(1) is ambiguous and does not appear to fully incorporate the provisions of Rule 17.4(f) of the Rules of Criminal Procedure. Rule 17.4 (which would be abrogated) refers to "plea agreements," while proposed

Rule 410(a)(1) refers to a "guilty plea." While the two are related, they are not the same thing. Additionally, Rule 17.4(f) not only includes plea agreements that are withdrawn, but also those that are "revoked" or "rejected by the court." A recent report by the Federal Advisory Committee on Evidence Rules also notes that there have been concerns about whether the restyled Federal Rule 410's reference to a "guilty plea that is later withdrawn" also includes guilty pleas "that are rejected or vacated by the court." Report of the Advisory Committee on Evidence Rules at 4 (Nov. 3, 2010). To avoid making a substantive change in the current rules and to clarify the scope of proposed Arizona Rule 410(a)(1), the State Bar recommends that the subsection say "a guilty plea that was later vacated, rejected by the court or withdrawn, or a plea agreement that was later revoked, rejected by the court or withdrawn,". (Additions shown by underscoring).

III. Proposed Standing Committee

The State Bar endorses the petition's proposal to create a standing committee to periodically review the Arizona Rules to see if substantive changes are needed. As the petition notes, parts of the Federal Rules are amended virtually on an annual basis. While the State Bar has standing committees that review those changes, those committees tend to focus on particular practice areas and are not likely to ask the Bar to consider initiating a petition pertaining to an amendment to the Federal Rules unless it specifically affects their area of practice. Additionally, there are federal rule changes, such as the amendments to Federal Rule 702 adopting the *Daubert* Approach, for which the State Bar is not likely to initiate a rule petition because its members disagree about whether it should be incorporated into the Arizona Rules. To ensure that this Court has the opportunity to consider whether federal rule amendments should be adopted in Arizona, it would be worthwhile to

have a standing committee affiliated with the Court that, at a minimum, monitors those changes and makes recommendations to the Court a whether similar modifications should be made in the Arizona Rules.

IV. Conclusion.

The State Bar of Arizona respectfully requests that the Court adopt the petitioner's proposed rule amendments, with the modifications and exceptions noted in this comment. It also supports the creation of a standing committee to periodically review the Arizona Rules to determine whether this Court should consider rule amendments to take into account recent amendments to the Federal Rules.

RESPECTFULLY SUBMITTED THIS 3RD day of May, 2011.

John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 3rd day of May, 2011,

By: Kathleen A. Lundgren

A copy was mailed to:
The Honorable Mark W. Armstrong
Ad Hoc Committee on Rules of Evidence
Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85007-3231

this 3rd day of May, 2011,

By: Kathleen A. Lundgren