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IN THE SUPREME COURT OF THE STATE OF ARIZONA

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IN THE MATTER OF: PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(f) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE.	R-10-0035 ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL'S COMMENTS TO PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(f) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits comments to the Petition to Amend the Arizona Rules of Evidence and Rule 17.4(f) of the Arizona Rules of Criminal Procedure.

Respectfully submitted this 20th day of May, 2011,

ELIZABETH ORTIZ, EXECUTIVE DIRECTOR
APAAC

BY: _____
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Preface

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) hereby submits its comments in opposition to portions of the R10-0035 Petition to Amend the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure which would amend the Arizona Rules of Evidence, as appropriate, to conform to the Federal Rules of Evidence and implement a conforming change to Arizona Rule of Criminal Procedure 17.4(f).

APAAC, a statutory council, is populated by representatives of the various criminal prosecution offices at every level of Arizona government: state, county and municipal. The content of this comment is a consensus of the member organizations. As such it may not include all the observations or concerns that may be held by any single member. Nevertheless, this comprehensive comment should be imputed with the weight of the general prosecuting community which is tasked with promoting justice while ensuring public safety throughout Arizona.

I. General Observations Regarding the Rule Making

> A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. Ralph Waldo Emerson **(1803 - 1882)**, *Self-Reliance*

Through its petition, the Ad Hoc Committee on the Rules of Evidence seeks to standardize the evidentiary rules in Arizona to those in use at the federal level. See, e.g.:

> "The federal restyling is intended to update the language of the rules and make them more easily understood. No substantive changes are intended by the restyling…" Petition, p. 2.

> "There is no intent in the restyling to change any result in any ruling on evidence admissibility." Petition at Appendix A.

While a *prima facie* case might be made for the desirability of achieving simplicity via conformity among the various jurisdictions, in the view of APAAC that aim should not supersede the specific concerns of the individual jurisdiction. Moreover, assuming that an amendment is superficial can create the danger that in unconsidered contexts it may indeed have a substantive implication, thereby setting up the operation of the dreaded law of unintended consequences. With all due respect to the drafters and proponents, it turns out that there are a number of incongruities between the Arizona and federal procedures that prohibit promoting standardization of these rules and APAAC therefore opposes doing so.

While in general agreement with the comments submitted by the individual prosecutorial jurisdictions, APAAC's comments focus on the two proposals that are particularly disquieting to the prosecuting community: Arizona Rules of Evidence (ARE) 702 and 801(d)(1)(A). The proposed changes will dramatically affect the processing of cases and obviate the rich interpretive history that guides the current implementation of these two rules. In the view of APAAC the proposed changes are more substantive than not and at best unnecessary.

II. ARE 702, "Daubert v. Frye"

The proposal to conform ARE 702 to the standards emanating from the *Daubert/Joiner/Kumho* ("*Daubert*")[1] cases creates some genuine consequences. To be sure, the methodology and efficacy of offered "scientific/technical/expert" evidence should be objectively verifiable to be considered. APAAC believes that standard is met in Arizona through implementation of the *Frye*[2] standard, post *Logerquist v. McVey,* 196 Ariz. 470, 1 P.3d 113 (2000). In addition, the process is supplemented by ARE 403 which preserves a judicial role for excluding even relevant evidence if it fails the balancing test of unfair prejudice, *inter alia*, versus probative value.

The stated goal of the *Daubert* approach is to minimize the risk of the admission of unreliable material. Rather than allow the jury to make the call, the *Daubert* solution enlists only the judge to ferret out what is reliable despite the fact that it is unlikely that a judge is any more scientifically or technically prepared than a panel of jurors to master the unlimited range of expertise that may arise. APAAC is unaware of any conclusive, scientifically reliable analysis of whether the federal "gatekeeper" judge using the *Daubert* approach is any more effective than Arizona juries in assuring mistakes are not made in convictions. As pointed out by the comment from Barbara LaWall, Pima County Attorney, experience shows, however, that decisions of this nature can vary from judge to judge. This simply means that *Daubert* may very well result in merely trading one type of "unreliability" for another.

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 151-52 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

It is not a stretch to suppose that a jury made up of 8 to 12 non-experts would be statistically more apt at deciding how to apply the evidence than a single judge; especially considering the jury has the advantage of hearing cross-examination and contrary evidence and is instructed on the burden of proof. In Arizona the judge acts as a backstop rather than working the gate. If the jury misapplies the standards, the judge may intervene through ARE 403 or by issuing a judgment notwithstanding the verdict. Notably the latter recourse is unavailable at the federal level. Furthermore, an Arizona ruling is reviewable *de novo* on appeal, whereas the *Daubert* approach would be subject to the abuse of discretion standard.

That said, perhaps the strongest reason for rejecting this proposal is constitutional. The Arizona Constitution specifies that factual matters belong in the purview of the jury:

> Article 6 § 27. Charge to juries; reversal of causes for technical error
>
> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.

Daubert is directly at odds with this state-based mandate. Making the judge a "gatekeeper" requires the judge to make the factual determination on technical evidence for the jury, rather than only declaring the law. This is a major departure from the federal system.

The theme running through APAAC's objection to this rule change is that it really is not simply an exercise in standardization with no substantive implications as argued by the proponents.

Clearly these are substantive impediments to the rationale for these changes. Other than this desire for standardization, no clear articulation of what problem this proposal seeks to solve has been offered.

As noted, the Arizona process has worked well in the decade since the *Logerquist* decision which was decided after Daubert, nearly two decades ago. APAAC found instructive the observation of former Arizona Supreme Court Justice Feldman, the *Logerquist* author, at the October 15, 2010, meeting of the Ad Hoc Committee that while it is true that occasionally judges and jurors make mistakes it is also true that adding more rules will not necessarily ensure that they don't.[3]

Finally, the prosecuting community is acutely aware of diminishing budgets in these challenging economic times. Because the administration of justice is our ultimate goal, it is with some reluctance that we bring up the practical financial implications. Nonetheless it is important to consider that the *Daubert* approach would increase the cost of prosecutions by adding the hearings to facilitate the gatekeeper function. Even a back of a cocktail napkin cost/benefit analysis would not pencil out in favor of this approach. As Arizona has consistently shown, the twin goals of justice and public safety just do not require a costly change in Arizona.

[3] Justice Feldman also noted that while he did not agree with the assertions of the social science witness that was the subject of the *Logerquist* expert testimony, there was only one place in the entire country where the man could not be heard--the courtroom. That would be the case if the proposed ARE 702 became the procedure. As our goal is to seek justice which requires finding the truth, it would stand to reason that the system should err on the side of inclusion.

III. Hearsay Rule-Prior Inconsistent Statements ARE 801(d)(1)(A)

> It is thus with most of us; we are what other people say we are. We know ourselves chiefly by hearsay. Eric Hoffer **(1902 – 1983)**

Without explanation or editorial comment, the Petition seeks to amend Rule 801(d)(1)(A) "to require that a prior inconsistent statement be made under penalty of perjury in order to be considered non-hearsay under this rule." As with ARE 702, the disparity between the federal and state jurisdictions is the basis for our discontent with this proposal. From the state prosecution perspective this is a major substantive change in the guise of purely procedural exercise. Oddly, as pointed out in the comment from Maricopa County Attorney Bill Montgomery, the federal rule is not the product of a purely court driven process. The rule promoted by the U.S. Supreme Court, which mirrored the Arizona rule, was overlooked in favor of the current federal rule. This fact certainly impeaches the credibility of the proposed rule for state applicability.

Again, there is a history of court review of this rule that circumscribes the boundaries of its application; some of that is described in the comment to this Petition filed by the Arizona State Bar, who also opposes the proposed rule. As noted by the Maricopa County Attorney's comment, the Arizona Supreme Court has even addressed the challenge of expecting a jury to compartmentalize this sort of testimony into impeachment evidence rather than fact evidence, where the previous approach disallowed the latter application by the jury. See, *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973).

Requiring the out of court statement offered for impeachment to be taken under oath guts the usefulness of this rule in establishing the reliability of testimony. Essentially, the difficulty this presents is a practical one. The proposed rule would prohibit the use of cross-examination of a witness on the stand as the means of establishing the reliability of current testimony that is in conflict with statements the witness previously made outside of court, defaulting instead to the status of the original statements as a means of assessing their credibility. Without a deposition, preliminary hearing or grand jury inquiry the prior statement simply will not be available for impeachment purposes, thereby depriving the jury of the totality of the information it needs to assess the witness's credibility.

Assuming one is prescient enough to even ascertain, at the time they are made, which statements the witness may later recant, it is a costly proposition to record such statements under oath as it would require a deposition, grand jury testimony, preliminary hearing testimony or something of that nature. Some or none of these options may be called for in a given case, but if the proposed rule were adopted it would require more regular use of these processes on the chance that a prior inconsistent statement situation might arise. This would in turn result in a greater expenditure of resources and may create practical implications in exercising prosecutorial discretion if the process became too burdensome.

More importantly, it could complicate cases that are amenable to witness tampering. There are many reasons that victims/witnesses frequently recant statements made in close proximity to the events when they later testify at trial, the most obvious being the power balance in the relationships that are often the core factual element in the case, especially in domestic violence

and gang-related matters where witness intimidation is, sadly, almost standard operating procedure for defendants. If those early statements were no longer admissible and subject to cross-examination, the net effect is almost a carte blanche to tamper.

The federal courts obviously deal with far fewer domestic violence cases and probably to a lesser extent gang-related crime than at the state level. APAAC submits that once again the state experience is so distinguishable from the federal that mirroring the federal rule would prove the undoing of many cases, implicating public safety and the administration of justice if adopted in Arizona.

IV. Conclusion

APAAC certainly favors standardization and simplification in the legal system wherever possible. However, in the context of this proposed rule amendment, APAAC believes the distinctions between the two levels of the legal system are such that we cannot support this measure.

APAAC respectfully submits these comments together with those of the individual commenting prosecution agencies in an effort to shed the needed light on the true, but clearly unintended, implications of the specified portions of this proposal and encourages rejection thereof.

Respectfully submitted this 20th day of May, 2011,

ELIZABETH ORTIZ, EXECUTIVE DIRECTOR
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