

Mark W. Armstrong
Co-Chair, Advisory Committee on Rules of Evidence
Staff Attorney, Arizona Supreme Court
Superior Court Judge (Ret.)
1501 W. Washington, Suite 415
Phoenix, AZ 85007-3231
Telephone: (602) 452-3387
Facsimile: (602) 452-3482

Samuel A. Thumma
Co-Chair, Advisory Committee on Rules of Evidence
Vice Chief Judge, Arizona Court of Appeals
Division One
State Courts Building
1501 West Washington
Phoenix, Arizona 85007
Telephone: (602) 542-6790

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of	)	
	)	Arizona Supreme Court No. R-17-____
	)	
ARIZONA RULES OF	)	
EVIDENCE 801 AND 804	)	
	)	PETITION TO AMEND ARIZONA
	)	RULES OF EVIDENCE 801 AND 804
	)	
	)	
_____	)	

PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, Mark W. Armstrong and Samuel A. Thumma, petitions the Court to amend Arizona Rules of Evidence 801 and 804 by adding comments thereto as reflected in the attachment hereto, effective January 1, 2018.

I. INTRODUCTION

Arizona Supreme Court Administrative Order No. 2012-43, dated June 11, 2012, established the Advisory Committee on Rules of Evidence 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. The Advisory Committee has met regularly since September 28, 2012.

At its regular meeting on December 8, 2016, the Advisory Committee unanimously recommended that Arizona Rules of Evidence 801 and 804 be amended by adding comments thereto in light of the concurrent abrogation of Ariz.

R. Crim. P. 19.3, as proposed by the Court's Task Force on the Arizona Rules of Criminal Procedure.

II. SUMMARY AND BACKGROUND OF THE PROPOSED AMENDMENTS TO ARIZONA RULES OF EVIDENCE 801 AND 804

Rule 801 defines hearsay and provides certain hearsay exemptions, including an exemption for prior inconsistent statements of a witness. Rule 804 provides certain exceptions to the rule against hearsay, including former testimony in a criminal case.

Ariz. R. Crim. P. 19.3(b) and (c) include overlapping provisions concerning the admissibility of prior inconsistent statements and former testimony. These provisions trace back to Arizona Rules of Criminal Procedure in place before the Arizona Rules of Evidence became effective in 1977. In 2016, the Court's Task Force on the Arizona Rules of Criminal Procedure undertook to identify possible changes to conform to modern usage and to clarify and simplify language of those rules, with the goal of promoting the just resolution of cases without unnecessary delay or complexity. *See* Ariz. Supreme Court Admin. Order 2015-123. In the course of its work, the Task Force determined that Arizona Rule of Criminal Procedure 19.3, rather than being restyled, should be abrogated as unnecessary, given its consistency with the Arizona Rules of Evidence.

Specifically, Rule 19.3(a), which also traces back to an Arizona Rule of Criminal Procedure in place before the Arizona Rules of Evidence became effective

in 1977, provides that the “law of evidence relating to civil actions shall apply to criminal proceedings, except as otherwise provided.” Rule 19.3(b) then sets forth the rule on prior inconsistent statements that appears in Arizona Rule of Evidence 801(d)(1)(A), but in slightly different form: “No prior statement of a witness may be admitted for the purpose of impeachment unless it varies materially from the witness’ testimony at trial.”

A comment to Rule 19.3(b) provides that the “actual standard embodied in the rule is theoretically no different from the one used at present. See M. Udall, Arizona Law of Evidence § 63; 3A J. Wigmore, Evidence § 1040 (Chadbourn rev. 1970).” Rather, the provision was included in the criminal rules to “encourage the trial court to use its power to control the use of prior statements,” according to the comment.

Arizona case law confirms that the criminal and civil standards for prior inconsistent statements are identical. See *State v. Fierro*, 108 Ariz. 268, 269, 496 P.2d 129, 130 (1972) (“[F]or a prior statement to be admitted for impeachment purposes, it must be directly, substantially and materially contradictory to the testimony in issue.”) (citing M. Udall, Arizona Law of Evidence § 63 (1960)); *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 909 P.2d 486 (App. 1995) (testimony “directly contrary” to prior inconsistent statement satisfies Arizona Rule of Evidence 801(d)(1)(A)); see also *State v.*

Hernandez, 232 Ariz. 313, 322, 305 P.3d 378, 387 (2013) (Before admitting a prior inconsistent statement for impeachment purposes, “[a]s a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent.”).

The Advisory Committee on Rules of Evidence notes that, in the criminal context, it is important to keep in mind that the court must still evaluate whether Rules 102 and 403 necessitate the inadmissibility of an impeaching statement otherwise admissible under Rule 801(d)(1)(A). *See State v. Allred*, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982).

Finally, the language of Rule 19.3(c), regarding prior recorded testimony, had already been incorporated into Arizona Rule of Evidence 804(b)(1) in 2012, leaving only Rule 19.3(b) to be fully assimilated into the Arizona Rules of Evidence.

The Court’s Advisory Committee on Rules of Evidence concurs with the Criminal Rules Task Force that Ariz. R. Crim. P. 19.3 should be abrogated as unnecessary in light of Arizona Rules of Evidence 801(d)(1)(A) and 804(b)(1). The Advisory Committee proposes that comments be added to these evidence rules accordingly.

CONCLUSION

Petitioners respectfully request that the Court consider this petition and proposed rule changes at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2017, and that the

Court adopt the proposed rules as they currently appear, or as modified in light of comments received from the public, with an effective date of January 1, 2018.

DATED this ____ day of December, 2016.

Mark W. Armstrong
Co-Chair, Advisory Committee on Rules of Evidence

Samuel A. Thumma
Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT¹

ARIZONA RULES OF EVIDENCE

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

* * * * *

Comment to 2018 Amendment to Ariz. R. Crim. P. 19.3

Arizona Rule of Criminal Procedure 19.3 has been abrogated as unnecessary in light of Rules 801(d)(1)(A) and 804(b)(1) of these Rules.

* * * * *

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness

* * * * *

Comment to 2018 Amendment to Ariz. R. Crim. P. 19.3

Arizona Rule of Criminal Procedure 19.3 has been abrogated as unnecessary in light of Rules 801(d)(1)(A) and 804(b)(1) of these Rules.

* * * * *

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.