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

| In the Matter of: | Supreme Court No. R-18-0003 |
|---|---|
| **PETITION TO AMEND ARIZONA RULE OF EVIDENCE 807** | **COMMENT OF THE STATE BAR OF ARIZONA** |

## I. Background:

The standing committee on the Rules of Evidence submitted Petition R-18-0003 to conform Rule 807 (residual exception to the hearsay rule) to the proposed Rule 807 of the Federal Rules of Evidence. The State Bar is in agreement with most of the proposed amendments. However, the Notice provision raises concerns. Rather than oppose the Petition outright, the State Bar believes it can be improved with amendments to the proposed Notice Provision.

## I. Discussion and Analysis:

The concern of the State Bar, and focus of this comment, is with the Notice provision of proposed subsection (b). Rule 102 of the Arizona Rules of Evidence

states that the purpose of the rules is that they be "construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, to promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." Thus, the Rules of Evidence are designed to permit only the introduction of reliable evidence in a manner that avoids surprise and unfairness to the opposing party.

The Notice provision is too general and likely to give rise to surprise and dispute. The proposed Notice provision has two requirements: 1) that the proponent give "reasonable notice of the intent to offer the [hearsay] statement including its substance and declarant's name"; and 2) "the notice be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice."

Unlike the Federal Rules of Criminal Procedure—which do not provide for reciprocal pre-trial discovery—the Arizona Rules of Criminal Procedure demand that each party disclose to the other the evidence anticipated to be introduced at trial. Depending on the type of case, disclosure may be thousands of pages and transcripts from interviews have the potential to add hundreds if not thousands of additional pages. Notes by investigators or expert witnesses may be hand-written and difficult to read.

This leads to the question: What constitutes "reasonable notice" of the statement "provided in writing?" Does a statement buried within pre-trial disclosure constitute "reasonable notice . . . provided in writing?"

The State Bar submits that if a party intends to utilize a statement under Rule 807, then Rule 807 should provide that the precise hearsay statement(s) and the declarant's name be asserted in a filing, filed with the court prior to the trial or hearing, similar to the requirement under Rule 404 of the Rules of Evidence. Therefore, the State Bar proposes that the notice provision set forth in Rule 807(b) should read:

> The statement is admissible only if the proponent give an adverse party reasonable notice of the statement, including its substance and declarant's name, so that the party has a fair opportunity to meet it. The notice must be provided in a filing, filed with the court before the trial or hearing—or in a filing during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Requiring the proponent to file a notice-filing specifically identifying the substance of the statement and the declarant's name will ensure that any debate over its admissibility under the components of Rule 807(a) are satisfied *prior to* trial or hearing and thus, before an attempted introduction of the statement. Such a procedure serves to avoid surprise and further the fairness and just determination of the case, consistent with Rule 102 of the Rules of Evidence.

**III. Conclusion.**

The State Bar of Arizona supports the Petition conditioned upon improving the proposed notice requirement, as set forth in this Comment.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 21st day of May, 2018.

by: