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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of	)	
	)	Arizona Supreme Court No. R-23-_____
	)	
ARIZONA RULE OF	)	
EVIDENCE 106	)	
	)	PETITION TO AMEND ARIZONA
	)	RULE OF EVIDENCE 106
	)	
_____	)	

**PETITION TO AMEND RULE 106,
OF 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, the Honorable Sara J. Agne and

the Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 106, as reflected in the attachment hereto, effective January 1, 2024.

I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

In June 2012, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence (“the Committee”) 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.

Pursuant to that charge, the Committee has decided that there are multiple valid reasons for this particular proposed federal rule change to become part of Arizona Rule of Evidence 106.

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II. FEDERAL ACTION TO AMEND RULE 106

A. Procedural History

After studying the issue for five years, the federal Advisory Committee on Evidence Rules proposed an amendment to Rule 106 of the Federal Rules of Evidence. The Committee on the Rules of Practice and Procedure of the U.S. Judicial Conference (known as the Standing Committee) met on June 7, 2022, approved the Advisory Committee's proposed amendment, and forwarded its recommendation to the U.S. Judicial Conference for its consideration. The Judicial Conference approved the amendment at its September 20, 2022, session and transmitted the proposed amendment to the U.S. Supreme Court. If the Court prescribes the amendment, it must transmit the proposed amendment to Congress by May 1, 2023. Congress then has seven months to act on the proposed rule amendment. If Congress does not enact legislation to reject, modify, or defer the rule amendment, it takes effect on December 1, 2023.

B. Proposed Amendment To Federal Rule of Evidence 106

The federal Advisory Committee on Evidence Rules recommended two amendments to Rule 106, colloquially described as the "rule of completeness." The Standing Committee explained the proposed rule changes to the U.S. Judicial Conference as follows:

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay

objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

Report of the Standing Committee, September 2022, at 22, available at https://www.uscourts.gov/sites/default/files/sept_2022_jcus_rules_report_final_for_website.pdf (“Report”).

The proposed amendments to Federal Rule of Evidence 106 are as follows, with deletions shown as ~~strikethroughs~~ and additions shown as underlined.

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Id. at Appendix E-1.

The proposed federal rule amendment includes a lengthy committee note, which explains the history of the rule of completeness. *See id.* at App’x E-1–E-5.

III. THE COMMITTEE RECOMMENDS ADOPTION OF THE FEDERAL RULE AMENDMENT.

The Arizona Advisory Committee on the Rules of Evidence met several times, including on December 9, 2022, to discuss amending Arizona Rule of Evidence 106

to conform to the proposed federal rule change. The current Arizona rule is identical to the current federal rule.

As noted above, Rule 106 has been described as a rule of completeness. *State v. Steinle*, 239 Ariz. 415, 418, ¶8 (2016). It has also been described as a “rule of inclusion rather than exclusion.” *Id.* at ¶10. Thus, under Rule 106, “if one party introduces part of a recorded statement, an adverse party may require the concurrent introduction of other parts when fairness demands, thereby securing for the tribunal a complete understanding of the total tenor and effect of the utterance.” *Id.* (internal punctuation omitted).

At the same time, “[t]he rule of completeness does not always require the admission of the entire statement. Instead, it requires the admission of those portions of the statement that are necessary to qualify, explain or place into context the portion already introduced.” *State v. Prasertphong*, 210 Ariz. 496, 499, ¶15 (2005) (internal punctuation omitted). The rule of completeness does not require the admission of an entirely separate conversation. *See State v. Champagne*, 247 Ariz. 116, 134 ¶44 (2019).

A. The Hearsay Question

A question that may arise when allowing the remainder of a statement to be admitted under the rule of completeness is whether a hearsay objection to the remainder of the statement can thwart its admission. For example, assume a police

officer testifies that the defendant told him “I shot the victim.” The defense attorney objects and asks the court to order the police officer to testify to the defendant’s whole statement, which was: “I shot the victim because he came at me with a knife.” The prosecutor objects to the remainder of the statement—“because he came at me with a knife”—being admitted as it is an out-of-court statement offered for the truth of the matter asserted.

The proposed amendment eliminates that hearsay objection to the rule of completeness. If the hearsay objection were allowed to stand, the admitted portion of the statement would be susceptible to being taken out of context. In the words of the federal Advisory Committee on Evidence Rules, “[s]imple notions of fairness, already embodied in Rule 106, dictate that a misleading presentation cannot stand un rebutted.” Report, at App’x E-17.

This Court, quoting the *McCormick on Evidence* treatise, has held that “when the other passage of the writing or statement is so closely connected to the part the proponent contemplates introducing that it furnishes integral context for that part, the passage is admissible on a nonhearsay theory.” *State v. Prasertphong*, 210 Ariz. at 501 ¶22 (citing *McCormick on Evidence* § 56 at 250-52 (5th Ed.1999)).

Citing *Prasertphong*, our Court of Appeals has reversed and remanded a criminal conviction because the trial judge precluded the defendants from eliciting completing statements they had made to a detective during an interrogation while

allowing the detective to testify about incriminating statements they had made. *State v. Reed*, 1 CA-CR 08-0097, 2009 WL 1025572, ¶¶10-19 at **3-4 (App. Apr. 16, 2009) (mem.) (“Evidence otherwise inadmissible on hearsay grounds may be admissible under the rule of completeness.”) (cited only pursuant to Ariz. R. Supreme Ct. 111(c)(1)(B) to assist this Court in its consideration of this Petition).

Thus, the proposed rule change to allow the admission of the remainder of a statement over a hearsay objection pursuant to the rule of completeness would be consistent with current Arizona caselaw.

B. Applicability to All Forms of Statements

The second proposed change to Rule 106 is to make it applicable to all statements, not just written or recorded ones. This would include, for example, oral statements, those made in sign language, and nonverbal conduct intended as an assertion.

Under current Arizona caselaw, the remaining portion of an oral statement can be admitted under Rule 106 notwithstanding a hearsay objection. *See State v. Ellison*, 213 Ariz. 116, 131 n.9 (2006). Thus, the proposal to eliminate the current restriction in Rule 106 to written or recorded statements would be consistent with current Arizona caselaw.

As a final note, the proposed amendment to Federal Rule of Evidence 106 does include a new, lengthy, committee note explaining the changes. Our committee

does not recommend adopting the committee note as the proposed rule language is clear on its face, and is consistent with current Arizona law in this area. Further, a practitioner or jurist could always consult with the federal committee note as needed. And the proposed amendment to Rule 106 also does not change the central requirement of the rule that the additional portion of a statement sought to be introduced must qualify, explain, or place into context the portion already introduced.

CONCLUSION

Petitioners respectfully request that the Court consider this Petition and proposed rule change at its earliest convenience. Petitioners additionally request that the Petition be circulated for public comment until May 1, 2023, and that the Court adopt the proposed rule as presented, or as modified in light of comments received from the public and any replies, with an effective date of January 1, 2024.

DATED this 3rd day of January, 2023.

/s/ Sara J. Agne _____

Sara J. Agne

Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/ permission _____

Maria Elena Cruz

Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT¹

ARIZONA RULE OF EVIDENCE 106

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any ~~other writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

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