

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

David J. Euchner, SB#021768

33 N. Stone Ave., 21st Floor, Tucson, AZ 85701

TEL: (520) 724-6800

E-Mail: david.euchner@pima.gov

Attorney for Arizona Attorneys for Criminal Justice

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-23-0002

)

) **COMMENT OF ARIZONA**

Petition to Amend Arizona Rule of
Evidence 106

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE (AACJ) IN SUPPORT OF**

) **PETITION TO AMEND ARIZONA**

) **RULE OF EVIDENCE 106**

)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Arizona Rule of Evidence 106.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ supports the proposal to amend Rule 106 for the reasons stated in the petition. To the extent possible, our procedural rules should be as accurate a statement of the law as possible. There should be no conflict between the current version of the rules and the current state of case law. The current text of Rule 106 applies only to written or recorded statements, but the case law and treatises cited by Petitioners demonstrates that the rule of completeness also applies to oral statements. Petition at 6-7. While it may be impractical in most cases to have a procedural rule embody the whole body of case law interpreting that rule, the first part of the change actually omits seven words and offsets the addition of a ten-word sentence.

Although it should be obvious that Rule 106 modifies the hearsay rule and permits a party to introduce a hearsay statement in a limited circumstance—essentially converting the statement into nonhearsay—the Petition cites one example where a conviction was reversed based on misapplication of Rule 106. AACJ is aware of a case pending in the court of appeals where a trial court made a similar error. In *State v. Collins-Percival*, Court of Appeals No. 2 CA-CR 2022-0104, a complaining witness accused the defendant, her ex-boyfriend, of various crimes and testified as to statements he made on the night of the alleged offenses. On cross-examination, defense counsel sought to elicit other related statements made by the

defendant to give proper context to the statements already in evidence. Because defense counsel made no offer of proof as to what the question and answer would be, the issue will not be raised on appeal.¹ It is possible that there are many other cases with a similar error but the issue was not litigated on appeal because of a failure to make an offer of proof or because the defendant was acquitted. Clarifying that evidence admissible under Rule 106 survives a hearsay objection is important.

AACJ also agrees that the rule change should not be accompanied by a corresponding comment. The meaning of the rule should be clear from the text of the rule. Wherever possible, this Court should remove existing comments, and it should add new comments only in extraordinary circumstances where it is absolutely necessary. Furthermore, many practitioners (not to mention *pro se* litigants) do not have handy access to a book that publishes the comments; even this Court's website links to rules published by Thomson-Reuters that does not include access to comments. For this reason, AACJ hopes that the Advisory Committee on Rules of Evidence will look for opportunities to delete comments in the future.

//

//

¹ See [Appellant's Opening Brief](#) ep 13 & n.3 (citing [R.T. 06/15/2022](#) ep 103-04).

Conclusion

For these reasons, AACJ requests this Court grant the petition to amend Rule 106.

DATED (electronically filed): May 1, 2023.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ David J. Euchner
David J. Euchner

Comment electronically mailed to:

Hons. Sara Agne & Maria Elena Cruz
Advisory Committee on Rules of Evidence