

Sara J. Agne
Co-Chair, Advisory Committee on Rules of Evidence
Judge, Arizona Superior Court
101 West Jefferson
Phoenix, Arizona 85003
Telephone: 602-506-8288
Facsimile: 602-372-5817

Maria Elena Cruz
Co-Chair, Advisory Committee on Rules of Evidence
Judge, Arizona Court of Appeals
Division One
State Courts Building
1501 West Washington
Phoenix, Arizona 85007
Telephone: 602-452-6740
Facsimile: 602-452-3228

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-24-____
ARIZONA RULES OF)
EVIDENCE 107 AND 1006) **PETITION TO ADD ARIZONA**
) **RULE OF EVIDENCE 107 AND**
) **AMEND ARIZONA RULE OF**
) **EVIDENCE 1006**
_____)

**PETITION TO ADD RULE 107 TO THE ARIZONA RULES OF
EVIDENCE AND AMEND ARIZONA RULE OF EVIDENCE 1006**

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 Agne and the Honorable Maria Elena Cruz (“our committee”), petitions the Court to add a new

rule of evidence, designated as Rule 107, concerning illustrative aids, and to amend Rule 1006, concerning summaries of voluminous materials, effective January 1, 2025.

I. INTRODUCTION AND BACKGROUND

This Court first adopted the Arizona Rules of Evidence in September 1977, basing them on the Federal Rules of Evidence, adopted in 1975. In the more than forty-six years since this Court adopted 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 our committee with the purpose to:

[P]eriodically 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.

Ariz. Sup. Ct. Admin. Order 2012-43 (June 11, 2012).

II. FEDERAL ACTION TO ADD RULE 107 AND AMEND RULE 1006

A. Procedural History

At its April 28, 2023 meeting, and after publishing notice in the federal register and receiving comments, the federal Advisory Committee on Evidence Rules voted

to propose both a new rule of evidence, designated as Rule 107, to address the use of illustrative aids at trial, and to amend Rule 1006, concerning summaries of voluminous materials. The Committee on the Rules of Practice and Procedure of the U.S. Judicial Conference met on June 6, 2023, approved the Advisory Committee's proposed amendments, and forwarded its recommendation to the U.S. Judicial Conference, which in turn, approved the amendments at its September 12, 2023, session and transmitted the proposed amendments to the U.S. Supreme Court in October 2023. If the Court approves the amendments, it must transmit them to Congress by May 1, 2024. Congress then has seven months to act on the proposed amendments. If Congress does not enact legislation to reject, modify, or defer the amendments, they will become effective on December 1, 2024.

B. Federal Advisory Committee on Evidence Rules Recommended Adding Federal Rule of Evidence 107, Amending Federal Rule of Evidence 1006

The federal Advisory Committee on Evidence Rules recommended adding a new rule of evidence to address the use of illustrative aids at trial. The original proposal would have designated the new rule as Rule 611(d). However, after receiving feedback during the comment period, the federal committee decided to designate the new rule as Rule 107. Also, as originally proposed, the rule included a notice provision. Because the comments to the notice provision were

overwhelmingly negative, the federal committee dropped it from the final proposed rule.

The federal committee also proposed amending Rule 1006 to better distinguish a summary of voluminous material, which Rule 1006 governs—and which is itself admissible—from an illustrative aid, which is designed to help the trier of fact understand argument or admissible evidence, but is not itself evidence.

The federal committee explained the need for proposed Rule 107 as follows:

The Committee unanimously approved a proposal to add a new rule to regulate the use of illustrative aids at trial. The distinction between “demonstrative evidence” (admitted into evidence and used substantively to prove disputed issues at trial) and “illustrative aids” (not admitted into evidence but used solely to assist the trier of fact in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. Similar confusion exists in distinguishing a summary of voluminous evidence, covered by Rule 1006, and a summary that is not evidence but rather presented to assist the trier of fact in understanding evidence. In addition, the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards.

The federal committee also explained the amendment to Rule 1006 as follows:

Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and much of the problem is that some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). Some courts have stated that summaries admissible under Rule 1006 are “not evidence,” which is incorrect. Other courts have stated that all of the underlying evidence must be admitted before the summary can be admitted; that, too, is

incorrect. Still other courts state that the summary is inadmissible if any of the underlying evidence has been admitted; that is also wrong. After extensive research and discussion, the Committee unanimously approved an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposal to amend Rule 1006 dovetails with the proposal to establish a rule on illustrative aids, discussed above. These two rules serve to distinguish a summary of voluminous evidence (which is itself evidence and governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

C. Text of Proposed Federal Rule of Evidence 107

Proposed Federal Rule of Evidence 107 is as follows:

Rule 107. Illustrative Aids

(a) Permitted Uses. *The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.*

(b) Use in Jury Deliberations. *An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:*

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Proposed Federal Rule of Evidence 107 includes a lengthy committee note, which is discussed below.

D. Text of Proposed Amendment to Federal Rule of Evidence 1006

The proposed amendment to Federal Rule of Evidence 1006 is as follows, with deletions shown as ~~strikethroughs~~ and additions shown as underlined.

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. *The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.*

(b) Procedures. *The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other*

parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. *A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.*

Like proposed Federal Rule of Evidence 107, the amendment to Rule 1006 includes a lengthy committee note. That committee note is also discussed below.

III. PETITIONER RECOMMENDS ADOPTING A RULE OF EVIDENCE 107 AND ADOPTING IN ARIZONA'S RULE 1006 THE EXPECTED AMENDMENT TO FEDERAL RULE 1006

Our committee met several times, including on December 1, 2023, to discuss adding Federal Rule 107 to the Arizona rules and amending Arizona Rule of Evidence 1006 to conform to the proposed federal rule changes. Arizona's current Rule 1006 is identical to the current federal rule. And as previously mentioned, there is no current Arizona or federal rule that addresses illustrative aids.

Litigants use illustrative aids in nearly every trial. Sketches of an intersection, a layout of rooms in a house, or an easel-displayed computation of damages handwritten in marker are a few examples of commonly used illustrative aids.

Demonstrative exhibits are commonly admitted at trial and may include the weapon used to commit a crime, a photograph of a crime scene, or a surveyor's map showing the location of an easement on a parcel of property.

Examples of a summary of voluminous materials offered as an exhibit at trial include a spreadsheet of checks payable to a party, location data from a cellular telephone download, or a document with relevant text messages or emails copied and pasted into it in chronological order.

Yet, despite the fact that illustrative aids and demonstrative exhibits are used during nearly every trial, no rule of evidence addresses those uses. Likewise, it can be hard to distinguish an illustrative aid from a demonstrative exhibit, and either of those from a summary of voluminous materials exhibit.

The *Arizona Law of Evidence* treatise, which both lawyers and judges turn to when analyzing evidentiary issues, does address this topic, albeit generally. The treatise explains that “[d]emonstrative evidence is divided between real evidence, the actual thing in issue, and illustrative evidence, things used only to illustrate the testimony of a witness.” 1 *Ariz. Prac., Law Of Evidence*, § 402:3 (4th ed.). It gives a knife used in an assault as an example of admissible demonstrative evidence. *Id.*

As to illustrative aids, the treatise explains:

The trial court has discretion, routinely favorably exercised, where it will assist the jury to understand the testimony to permit witnesses to illustrate their testimony by use of sketches or diagrams. These need not be to scale or precisely accurate so long as they are helpful. Witnesses may also use for these purposes models, photographs, physical objects, skeletons, and the like. Such testimonial aids are not necessarily admissible as exhibits in the case.

Id.

The *Arizona Law of Evidence* treatise briefly discusses Rule 1006, but does not do so in depth or compare and contrast its ambit to demonstrative exhibits or illustrative aids.

Because demonstrative evidence, illustrative aids, and summary exhibits are commonly used at trial, and the boundaries of each are not clearly defined in the current rules of evidence, with two being admissible while the other is not, our committee recommends the Supreme Court adopt both Rule 107 (as amended in the discussion below) (included as Appendix A) and the amendment to Rule 1006 (included as Appendix B), to provide much needed guidance to litigants and judges.

IV. BOTH PROPOSED FEDERAL RULES CONTAIN LENGTHY COMMITTEE NOTES THAT ARE NOT NECESSARY TO ARIZONA'S RULES

A. Rule 107 Committee Note

The committee note to proposed Federal Rule of Evidence 107 is four pages long.¹ This is much longer than most comments to the Arizona Rules of Evidence. Its purpose is to explain the difference between a demonstrative exhibit and an illustrative aid. Our committee believes that most of a comment can be eliminated if the definition of illustrative aid is moved from the committee note to the rule itself as a new subsection (e). This Petition proposes to do that, along with retaining a

¹ The proposed committee note is *available at* https://www.uscourts.gov/sites/default/files/2023_sctus_package_final_0.pdf at pages 01065 to 01068.

compressed, edited version of the committee note that explains the difference between an illustrative aid and a demonstrative exhibit.

To that end, our committee proposes moving the definition of “illustrative aid” from the committee note to the rule as subsection (e), which is shown here with an underline, and then shortening and editing the committee note, which is also shown with an underline:

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid’s utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

- (1) all parties consent; or
- (2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

(e) Definition of Illustrative Aid. An “illustrative aid” is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument.

Comment to 2025 Amendment

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. An illustrative aid is to be distinguished

from “demonstrative evidence,” which is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact. Usually, the jury is permitted to take demonstrative evidence to the jury room during deliberations and use it to help determine the disputed facts. The category covered by this rule is information offered for the narrow purpose of helping the trier of fact understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations.

B. Rule 1006 Committee Note

The proposed committee note to Federal Rule 1006, which is also quite lengthy, explains why the rule is being amended.² However, the rule, as amended, is clear, and does not need an explanation as to its terms. Therefore, our committee recommends not including it.

CONCLUSION

Our committee, as Petitioner, respectfully request that the Court consider this Petition and proposed rule changes at its earliest convenience. We additionally request that the Court circulate the petition for public comment until May 1, 2024, and then adopt the proposed rules as presented, or as modified in light of comments received from the public, with an effective date of January 1, 2025.

DATED this ____9th____ day of __January__, 2024__.

_____/s/ Sara J. Agne_____

² That proposed committee note is *available at* https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at pages 01077 to 01079.

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

Appendix A

Proposed Arizona Rule of Evidence 107

Rule 107. Illustrative Aids

- (a) **Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.
- (b) **Use in Jury Deliberations.** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:
- (1) all parties consent; or
 - (2) the court, for good cause, orders otherwise.
- (c) **Record.** When practicable, an illustrative aid used at trial must be entered into the record.
- (d) **Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.
- (e) **Definition of Illustrative Aid.** An "illustrative aid" is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument.

Comment to 2025 Amendment

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. An illustrative aid is to be distinguished from "demonstrative evidence," which is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact. Usually, the jury is permitted to take demonstrative evidence to the jury room during deliberations and use it to help determine the disputed facts. The category covered by this rule is information offered for the narrow purpose of helping the trier of fact understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations.

Appendix B³

Proposed Amendment to Arizona Rule of Evidence 1006

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence.

The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, photographs, or videos that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

³ Additions to rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.