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

9 In the Matter of:

Supreme Court No. R-24-0017

10 **PETITION TO AMEND RULE 1006**
11 **OF THE ARIZONA RULES OF**
12 **EVIDENCE AND ADD NEW RULE**
13 **107**

COMMENT OF
THE STATE BAR OF ARIZONA

14 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona (“State Bar”)
15 submits the following comment with respect to Petition R-24-0017 (the “Petition”)
16 filed by the Honorable Sara Agne and the Honorable Maria Elena Cruz on behalf
17 of the Advisory Committee on Rules of Evidence (the “Committee”).

18 The Petition seeks to add a new rule of evidence, designated as Rule 107,
19 concerning illustrative aids, and to amend Rule 1006, concerning summaries of
20 voluminous materials, effective January 1, 2025. These changes are consistent with
21 a federal action to add Rule 107 and amend Rule 1006 of the Federal Rules of
22 Evidence. Having reviewed the Petition, the State Bar recommends that Rule 107

1 be adopted as proposed, and Rule 1006 be adopted as proposed with the addition of
2 a comment explaining the new changes.

3 **DISCUSSION**

4 The current Petition parallels a federal action filed April 28, 2023, to adopt a
5 new rule of evidence and amend an existing rule, with minor changes.¹ Because the
6 Arizona Rules of Evidence largely mirror the federal rules, a brief discussion of the
7 federal action will provide useful context. *See State v. Winegardner*, 243 Ariz. 482,
8 485 (2018) (“When an Arizona evidentiary rule mirrors the corresponding federal
9 rule, we look to federal law for guidance.”).

11 **I. CONFUSION IN FEDERAL COURTS.**

12 **A. Ambiguity surrounding “illustrative aids” without federal** 13 **guidance.**

14 The distinction between “demonstrative” evidence (substantive evidence
15 used to prove disputed issues at trial) and “illustrative” aids (not substantive
16 evidence but rather solely used to assist the trier of fact in understanding other
17 evidence) has been a tenuous one for courts to draw. Despite the widespread use of
18 illustrative aids at trial, the Federal Rules of Evidence historically lacked a rule
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21 ¹ The Summary of Proposed New and Amended Federal Rules of Procedure, can
22 be found here:

https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf.

1 governing the use of illustrative aids in court. Instead, judges evaluated illustrative
2 aids under Rule 611(a).²

3 Without clear guidance, federal circuit courts have rendered conflicting
4 opinions on a variety of issues, including whether illustrative aids constitute
5 substantive evidence, whether a jury can use an illustrative aid in its deliberations,
6 and whether such aids must be accompanied by a limiting instruction. *Compare*
7 *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 257–58 (6th Cir.
8 1986) (explaining that an illustrative aid is not substantive evidence) *with United*
9 *States v. Bray*, 139 F.3d 1104, 1111–12 (6th Cir. 1998) (reasoning that an
10 illustrative aid “may also be admitted into evidence even though not within the
11 specific scope of Rule 1006”).

12
13 **B. Rule 1006: Distinguishing “Summaries” from “Illustrative Aids.”**

14 Conflicting interpretations of Rule 1006 also led to a variety of federal circuit
15 splits. First, courts were split as to whether a Rule 1006 summary is considered
16 substantive evidence such that it can be used in jury deliberations. Second, courts
17 were unsure as to whether the underlying voluminous records *must* be admitted into
18 evidence before a Rule 1006 summary is used. Third, courts have been inconsistent
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21 ² Rule 611(a) provides: “The court should exercise reasonable control over the mode
22 and order of examining witnesses and presenting evidence...” Fed. R. Evid. 611(a);
see also Ariz. R. Evid. 611(a) (stating the same).

1 as to whether a Rule 1006 summary may contain evidence that is not part of the
2 voluminous records, but is based on the records. Lastly, courts were split as to
3 whether a witness could present a Rule 1006 summary by oral testimony.³

4 **II. THE FEDERAL ACTION: RULE 107 AND RULE 1006.**

5 **A. Federal Rule 107.**

6 The Federal Advisory Committee on Rules of Practice and Procedure (the
7 “Federal Committee”) proposed adding Rule 107 to the Federal Rules of Evidence
8 with the goal of resolving the aforementioned ambiguities. Federal Rule of
9 Evidence 107 is modeled after Maine Rule of Evidence 616, which provides in part:
10

- 11 (a) Otherwise inadmissible objects or depictions may be used
12 to illustrate witness testimony or counsel’s arguments.
13 (b) The court may limit or prohibit the use of illustrative aids
14 as necessary to avoid unfair prejudice, surprise, confusion,
15 or waste of time.
16 (c) Opposing counsel must be given reasonable opportunity
17 to object to the use of any illustrative aid prepared before
18 trial.
19 (d) The jury may use illustrative aids during deliberations
20 only if all parties consent, or if the court so orders after a
21 party has shown good cause.
22 Illustrative aids remain the property of the party that
prepared them. They may be used by any party during the
trial. They must be preserved for the record for appeal or
further proceedings upon the request of any party.

³ See Daniel J. Capra & Jessica Berch, *Evidence Circuit Splits, and What to Do About Them*, 56 U.C. Davis L. Rev. 127, 181–91 (2022) (providing a robust and informative summary of the various Rule 1006 circuit splits).

1 Me. R. Evid. 616.

2 After receiving public comment, the Federal Committee proposed the
3 following Rule:

4 **Rule 107. Illustrative Aids**

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

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

14 (1) all parties consent; or

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

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

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

22 Comparing the two rules, it is apparent that Maine's Rule differs from the
proposed Federal Rule 107 in at least two critical respects. First, the Maine Rule
establishes a mandatory notice requirement, whereby opposing counsel must be
given a reasonable opportunity to object to the use of any illustrative aid before trial.
The federal rule lacks this requirement. This is likely because the public opposed a

1 notice requirement on grounds of impracticability. According to the minutes from
2 the Federal Committee’s April 28, 2023 Meeting, the public felt it would be
3 impossible to disclose the use of aids in advance because they are often “created on
4 the fly in the courtroom” and they can be properly classified as “attorney work
5 product.”⁴ Given the opposition, the Federal Committee removed the notice
6 requirement.

7 The second notable difference between Maine’s Rule and Federal Rule 107
8 is that Maine requires the aid be preserved in the record upon the *request* of any
9 party. Conversely the Federal Rule states that “[w]hen practicable, an illustrative
10 aid used at trial must be entered into the record.” As explained by the Federal
11 Committee, this difference is because “many trial judges do not make aids a part of
12 the record” and that “hampers appellate review.”⁵

14 Despite these modifications, Rule 107 resolves many of the issues that have
15 historically plagued federal courts. First, it defines an illustrative aid as material
16 designed to aid the factfinder, thereby distinguishing illustrative aids from
17 substantive evidence. Second, it provides judges with discretion to prohibit the use
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21 ⁴ Meeting Minutes, Advisory Committee on Evidence Rules (Apr. 28, 2023), at 3
22 https://www.uscourts.gov/sites/default/files/2023-04_advisory_committee_on_evidence_rules_meeting_minutes_final_0.pdf.

⁵ *Id.*

1 of an illustrative aid, provided its utility is not outweighed by the danger of unfair
2 prejudice. While this language is reminiscent of Rule 403, the pointed use of the
3 word “utility” in lieu of “probative value” reaffirms that an illustrative aid is not
4 substantive evidence. Third, it establishes the default rule that illustrative aids are
5 not to be used in jury deliberations absent good cause or consent of all parties, and
6 in so doing resolved a surplus of conflicting case law.

7 **B. Federal Rule 1006.**

8 As a companion amendment to the addition of Rule 107, the Federal
9 Committee also proposed altering Rule 1006 to distinguish Rule 1006 summaries
10 from Rule 107 illustrative aids and to resolve questions about the admissibility of
11 the underlying voluminous materials. The proposed federal amendment provides:
12

13 **Rule 1006. Summaries to Prove Content**

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

21 (b) Procedures. The proponent must make the underlying
22 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.

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

4 When the amendment was initially proposed, some committee members
5 suggested that the Rule include a specific time-period requirement of producing the
6 underlying materials to the opposing party. The Federal Committee, however,
7 declined to include any time provision, explaining that the Rules of Evidence
8 sparingly incorporate specific time-periods “due to the need for flexibility in the
9 trial process as well as the lack of a time-counting provision in the Rules.”⁶

10 Some committee members also recommended that the rule include a
11 requirement that the summary be “non-argumentative” out of the concern that a
12 proponent may use a Rule 1006 summary as a vehicle for improper arguments. The
13 Federal Committee rejected this proposal as unnecessary, but added the requirement
14 that the underlying contents must be admissible. Moreover, courts have largely been
15 uniform in mandating that a Rule 1006 summary be accurate and non-argumentative
16 to be admissible. *See, e.g., Peat, Inc. v. Vanguard Rsch., Inc.*, 378 F.3d 1154, 1160
17 (11th Cir. 2004) (“Rule 1006 is not a back-door vehicle for the introduction of
18 evidence which is otherwise inadmissible.”); *United States v. Scales*, 594 F.2d 558,
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⁶ *Id.* at 12.

1 563 (6th Cir. 1979) (explaining that a Rule 1006 summary “must be accurate,
2 authentic and properly introduced before it may be admitted in evidence”).

3 The Rule 1006 amendment provides answers to the various questions that
4 have left circuit courts bemused. First, it identifies a Rule 1006 summary as
5 substantive evidence—unlike a Rule 107 illustrative aid. Second, it clarifies “that a
6 Rule 1006 summary is admissible whether or not the underlying evidence has been
7 admitted” because it is an *alternate* means of offering of the underlying voluminous
8 materials. Third, it provides that the underlying materials must still be *admissible*
9 evidence—a litigant may not use a Rule 1006 summary to advance improper or
10 inaccurate arguments.
11

12 **III. THE ARIZONA PETITION.**

13 Adopted in 1977, the Arizona Rules of Evidence were modeled off their
14 federal counterpart. Ariz. Sup. Ct. Admin. Order No. 2010-42. In like fashion, the
15 pending Petition proposes to make nearly identical changes to the Arizona Rules of
16 Evidence.
17

18 **A. Adopting Arizona Rule of Evidence 107.**

19 As to Rule 107, the Petition proposes adopting a nearly identical version of
20 the federal rule with one modification: to provide a definition for an illustrative aid
21 in subsection (e). According to the Committee, incorporating this definition
22 obviates the need for a four-page long comment as is proposed in the federal action.

1 Having reviewed the Petition, the State Bar agrees and recommends adopting the
2 proposed language as proposed.

3 **B. Amending Arizona Rule of Evidence 1006.**

4 The Petition also seeks to adopt a parallel amendment to Arizona Rule of
5 Evidence 1006 with no changes. The State Bar believes that a comment explaining
6 the modifications to Rule 1006 is necessary to provide clarity to litigants faced with
7 a surplus of conflicting federal case law. Accordingly, the State Bar recommends
8 incorporating the following comment:
9

10 **Comment to 2025 Amendment**

11 The amendment clarifies certain ambiguities
12 relating to Rule 1006. First, the amendment identifies a
13 Rule 1006 summary as substantive evidence, and as such,
14 is subject to the strictures of Rule 403, the hearsay rule,
15 and other evidentiary screens. The amendment also
16 establishes that a Rule 1006 summary may be admitted as
17 evidence so long as the underlying materials are
18 admissible.

19 Lastly, the amendment requires a proponent of a
20 Rule 1006 summary to make the underlying materials
21 available to other parties at a reasonable time and place.
22 The trial judge has discretion in determining the
reasonableness of the production in each case but must
ensure that all parties have complied with relevant
disclosure rules and have a fair opportunity to evaluate the
summary.

23 Incorporating the above comment will accomplish two principal tasks. First,
24 it will inform litigants of the reasons behind the amendment and the answers to

1 questions that have been plaguing federal courts. Second, it provides litigants with
2 guidance on the differences between a Rule 107 illustrative aid—which is not
3 substantive evidence—and a Rule 1006 summary—which is substantive evidence.
4 The State Bar believes a short comment is necessary for a significant amendment
5 that establishes uniformity in a sea of conflicting federal case law.

6 **IV. CONCLUSION.**

7 The State Bar supports the Petition to adopt Rule 107 and amend Rule 1006.
8 The State Bar also recommends adding a comment to explain the underlying
9 reasons for the Rule 1006 amendment. The comment is necessary to provide
10 guidance to future represented and self-represented litigants alike.
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12 RESPECTFULLY SUBMITTED this 1st day of May 2024.

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14 _____
15 Lisa M. Panahi
16 General Counsel
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18 Electronic copy filed with the
19 Clerk of the Supreme Court of Arizona
20 this 1st day of May 2024.

21 by: PSequin
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