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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of )  
 ) Arizona Supreme Court No. R-14-0002  
 )  
ARIZONA RULES OF )  
EVIDENCE 801(d)(1)(B) AND )  
803(6)-(8) )  
 ) PETITION TO AMEND ARIZONA  
 ) RULES OF EVIDENCE 801(d)(1)(B)  
 ) AND 803(6)-(8)  
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## **PETITION TO AMEND 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, Mark W. Armstrong and Samuel A. Thumma, petitions the Court to amend Arizona Rules of Evidence 801(d)(1)(B) and 803(6)-(8), as reflected in the attachment hereto, effective January 1, 2015.

### **I. INTRODUCTION AND BACKGROUND**

Arizona Supreme Court Administrative Order No. 2012-43, dated June 11, 2012, established the Advisory Committee on Rules of Evidence 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. The Advisory Committee has met regularly since September 28, 2012.

At its regular meeting of October 18, 2013, the Advisory Committee unanimously recommended that Arizona Rules of Evidence 801(d)(1)(B) and 803(6)-(8) be amended to be consistent with proposed amendments to Federal Rules of Evidence 801(d)(1)(B) and 803(6)-(8), which are expected to become

effective December 1, 2014. Prior to the Advisory Committee's formal vote, a subcommittee had studied the proposed amendments and recommended their adoption.

## **II. SUMMARY OF THE PROPOSED AMENDMENT TO ARIZONA RULE OF EVIDENCE 801(d)(1)(B)**

After circulating a prior amendment that would have substantially broadened the use of prior consistent statements of a witness at trial,<sup>1</sup> and receiving largely negative responses,<sup>2</sup> the Federal Advisory Committee on Evidence Rules modified its original proposal to the one that appears herein.

At its meeting of June 3-4, 2013, the Federal Standing Committee on Rules of Practice and Procedure recommended that the Judicial Conference approve the proposed amendment, as modified. In September 2013, the Judicial Conference approved the proposed amendment, and agreed to transmit it to the United States

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<sup>1</sup> The original federal proposal issued for public comment in 2012 read as follows (additions in rule text are indicated by underscoring):

### **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

\* \* \*

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

\* \* \*

**(B)** is consistent with the declarant's testimony and

(i) is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying;

or

(ii) otherwise rehabilitates the declarant's credibility as a witness;

\* \* \*

<sup>2</sup> The federal public comment period ended February 15, 2013.

Supreme Court with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. If it is approved by the Court, and Congress does not act to defer, modify or reject it, the proposed amendment will become effective December 1, 2014.

In recommending this change to the Arizona Rules of Evidence, the Arizona Advisory Committee on Rules of Evidence recognizes that the proposed amendment to Federal Rule of Evidence 801(d)(1)(B) has not been finally adopted. Thus, the Advisory Committee has conditioned its recommendation on the final adoption of the proposed federal rule in its current form.

### **III. SUMMARY OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 803(6)-(8)**

These proposed amendments concern the trustworthiness clauses of Rule 803(6)-(8) — the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” The exceptions do not specifically state which party has the burden of showing trustworthiness or untrustworthiness, and there is some conflict in the federal case law on which party has that burden.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Advisory Committee for the amendment are: (1) to provide a uniform rule; (2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and (3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

At its meeting of June 3-4, 2013, the Federal Standing Committee on Rules of Practice and Procedure recommended that the Judicial Conference approve the proposed amendments. In September 2013, the Judicial Conference approved the proposed amendments, and agreed to transmit them to the United States Supreme Court with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. If they are approved by the Court, and Congress does not act to defer, modify or reject them, the proposed amendments will become effective December 1, 2014.

In recommending these changes to the Arizona Rules of Evidence, the Arizona Advisory Committee on Rules of Evidence recognizes that the proposed amendments to Federal Rule of Evidence 803(6)-(8) have not been finally adopted.

Thus, the Advisory Committee has conditioned its recommendation on the final adoption of the proposed federal rule in its current form.

### **CONCLUSION**

Petitioners respectfully request that the Court consider this petition and proposed rule changes at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2014, and that the Court adopt the proposed rules as they currently appear, or as modified in light of comments received from the public, with an effective date of January 1, 2015.

DATED this \_\_th day of January, 2014.

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Mark W. Armstrong  
Co-Chair, Advisory Committee on Rules of Evidence

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Samuel A. Thumma  
Co-Chair, Advisory Committee on Rules of Evidence

## ATTACHMENT<sup>3</sup>

### ARIZONA RULE OF EVIDENCE 801(d)(1)(B)

#### **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

\* \* \* \* \*

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

\* \* \* \* \*

**(B)** is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

\* \* \* \* \*

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<sup>3</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

## Comment to 2015 Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the federal Advisory Committee on Evidence Rules noted, “[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.”

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness’s testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness’s credibility. The original Rule also led to some conflict in federal cases and cases from other jurisdictions; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment

may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

### **Comment to 2012 Amendment**

[No change in text.]

### **Comment to Original 1977 Rule**

[No change in text.]

**ARIZONA RULES OF EVIDENCE 803(6)-(8)**

**Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

\* \* \* \* \*

**(6) *Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

- (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

**(7) *Absence of a Record of a Regularly Conducted Activity.***

Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

**(8) *Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

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### **Comment to 2015 Amendment to Rule 803(6)**

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

### **Comment to 2015 Amendment to Rule 803(7)**

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

### **Comment to 2015 Amendment to Rule 803(8)**

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the

exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. Public records have justifiably carried a presumption of reliability. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

#### **Comment to 2012 Amendment**

[No change in text.]

#### **Comment to 1994 Amendment**

[No change in text.]