



TO:

Rule 28 Distribution

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## ATTACHMENT<sup>1</sup>

### Arizona Rules of Evidence

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

(a)-(c) [No change in text.]

(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:

(A) [No change in text.]

(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

(C) [No change in text.]

(2) [No change in text.]

#### **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

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<sup>1</sup> Additions to text are indicated by underscoring and deletions by ~~strikeouts~~.

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.

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.

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

[No change in text.]

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

[No change in text.]

**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:

**(1)-(5) [No change in text.]**

**(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.

**(9)-(25) [No change in text.]**

**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 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 amendment to the trustworthiness clause of Rule 803(6).

**Comment to 2014 Amendment [*Comment effective Jan. 1, 2014*]**

[No change in text.]

**Comment to 2012 Amendment**

[No change in text.]

**Comment to 1994 Amendment**

[No change in text.]