

AMENDMENTS TO THE FEDERAL RULES OF
EVIDENCE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE THAT
HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO
28 U.S.C. 2072



NOVEMBER 12, 2014.—Referred to the Committee on the Judiciary and
ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 25, 2014.

Hon. JOHN A. BOEHNER
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 25, 2014

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rules 801(d)(1)(B) and 803(6)–(8).

[See *infra*, pp. — — .]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2014, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF EVIDENCE

**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

* * * * *

**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) the opponent does not show that the source of information 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) the opponent does not show that the possible source of the information 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)** the opponent does not show that the source
of information or other circumstances
indicate a lack of trustworthiness.

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

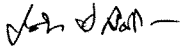
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

November 6, 2013

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: Judge John D. Bates 

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 801(d)(1)(B) and 803(6) - (8) of the Federal Rules of Evidence, which were approved by the Judicial Conference at its September 2013 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Evidence.

Attachments

EXCERPT OF THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8), with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2012.

Rule 801(d)(1)(B)

Rule 801(d)(1)(B) is the hearsay exemption for certain prior consistent statements. It would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they are admissible to 1) rebut an express or implied charge that the witness recently fabricated testimony or acted from a recent improper influence or motive in so testifying; and 2) rehabilitate the declarant's credibility when attacked on another ground. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are admissible only for rehabilitation but not substantively. There are two basic practical problems in distinguishing between substantive and credibility use as applied to

prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

In reviewing the comments received after publication, the advisory committee found two concerns that merited revisions. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995).

In response to these concerns, the advisory committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with a slight modification that the advisory committee believes would preserve the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds (such as to explain an inconsistency or to rebut a charge of bad memory). The proposed Committee Note has also been slightly modified to account for the modification to the proposed amendment to the rule.

Rules 803(6)–(8)

The recent restyling project uncovered an ambiguity in Rules 803(6)–(8)—the hearsay exceptions for business records, absence of business records, and public records. The exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” The rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if “the opponent does not show that” the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. But the proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. Most courts impose the burden of proving untrustworthiness on the opponent, but a few require the proponent to prove that a record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project.

When the Committee approved the restyled Evidence Rules, several members suggested that the advisory committee consider making a minor substantive change to clarify that the opponent has the burden of showing untrustworthiness. The proposed amendments do just that. They would clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy.

The advisory committee received two comments on the published proposals. Both approved of the text, but one comment argued that the proposed Committee Notes use language

that fails to track the text of the rules. Slight changes have been made to each of the three Committee Notes to address this concern.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 801(d)(1)(B) and 803(6)–(8), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jeffrey S. Sutton". The signature is written in a cursive, flowing style.

Jeffrey S. Sutton, Chair

James M. Cole	David F. Levi
Dean C. Colson	Patrick J. Schiltz
Roy T. Englert, Jr.	Larry A. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Diane P. Wood
Marilyn L. Huff	Jack Zouhary
Wallace B. Jefferson	

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: May 7, 2013

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on May 3, 2013 at the University of Miami School of Law, Coral Gables, Florida.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States four proposals: an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are

admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility, and amendments to Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

II. Action Items

A. Proposed Amendment to Evidence Rule 801(d)(1)(B)

The Committee proposes that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The Standing Committee approved proposed amended Rule 801(d)(1)(B) for publication at its June 2012 meeting. The proposed rule and committee note now presented for final Standing Committee approval are attached as an appendix to this report. They have been modified slightly from the versions issued for publication to address certain concerns raised by public comment.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current Rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

The public comment on the proposed amendment is summarized in the appendix to this report. Although largely negative, it is sparse. The Committee found two concerns expressed in the public comment to merit revisions to the proposed rule and committee note. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995).

In response to these concerns, the Committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with the slight modification to (ii) shown on the following blacklined version. The Committee concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds—such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague “otherwise rehabilitates” language.

(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; * * *

The committee note has also been slightly modified to account for the proposed changes to the Rule.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendments to Evidence Rules 803(6)-(8)

The Committee proposes that Evidence Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed at that time because the changes required to clarify the ambiguity were viewed as substantive. The Standing Committee approved proposed amended Rules 803(6)-(8) for publication at its June 2012 meeting. The proposed rules and committee notes now presented for final Standing Committee approval are attached as appendixes to this report. The committee notes have been modified slightly from the versions issued for publication to address the concern, raised by public comment, that the notes use language that fails to track the text of the Rules. No changes have been made to the proposed rules as published.

The restyling project uncovered an ambiguity in Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if “the opponent does not show that” the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But this proposal did not go forward as part of restyling because research into the

case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project. When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness.

Initially, the Committee did not think it necessary to propose clarifying amendments to these Rules. At its spring 2012 meeting, however, the Reporter noted that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee then revisited the matter. The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the Rules as originally adopted and as restyled; and third, 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.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the committee notes use language that fails to track the text of the Rules. Slight changes have been made to each of the three committee notes to address this concern.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rules 803(6)-(8) be approved and transmitted to the Judicial Conference of the United States.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF EVIDENCE*

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

3 * * * * *

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

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

10 * * * * *

11 (B) is consistent with the declarant's testimony
12 and is offered;

13 (i) to rebut an express or implied charge
14 that the declarant recently fabricated it

* New material is underlined; matter to be omitted is lined through.

15 or acted from a recent improper
 16 influence or motive in so testifying; or
 17 (ii) to rehabilitate the declarant's
 18 credibility as a witness when attacked
 19 on another ground; or
 20 * * * * *

Committee Note

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 Advisory Committee 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 the cases; 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 influence 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.

Changes Made After Publication and Comment

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant Is**
3 **Available as a Witness**

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

7 * * * * *

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

11 **(A)** the record was made at or near the time by
12 — or from information transmitted by —
13 someone with knowledge;

14 **(B)** the record was kept in the course of a
15 regularly conducted activity of a business,
16 organization, occupation, or calling,
17 whether or not for profit;

18 (C) making the record was a regular practice of
 19 that activity;
 20 (D) all these conditions are shown by the
 21 testimony of the custodian or another
 22 qualified witness, or by a certification that
 23 complies with Rule 902(11) or (12) or with
 24 a statute permitting certification; and
 25 (E) ~~neither the opponent does not show that the~~
 26 source of information ~~nor~~ the method or
 27 circumstances of preparation indicate a lack
 28 of trustworthiness.
 29 * * * * *

Committee Note

Subdivision (6)(E). 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. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on the 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.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
 2 **Regardless of Whether the Declarant Is**
 3 **Available as a Witness**

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

7 * * * * *

8 **(7) *Absence of a Record of a Regularly Conducted***
 9 ***Activity.*** Evidence that a matter is not included
 10 in a record described in paragraph (6) if:
 11 **(A)** the evidence is admitted to prove that the
 12 matter did not occur or exist;
 13 **(B)** a record was regularly kept for a matter of
 14 that kind; and
 15 **(C)** ~~neither the opponent does not show that the~~
 16 possible source of the information ~~nor~~
 17 other circumstances indicate a lack of
 18 trustworthiness.

* * * * *

Committee Note

Subdivision (7)(C). 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).

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant Is**
3 **Available as a Witness**

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

7 * * * * *

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

10 **(A)** it sets out:

- 11 **(i)** the office's activities;
12 **(ii)** a matter observed while under a legal
13 duty to report, but not including, in a
14 criminal case, a matter observed by
15 law-enforcement personnel; or
16 **(iii)** in a civil case or against the
17 government in a criminal case, factual

18 findings from a legally authorized
 19 investigation; and
 20 (B) ~~neither the opponent does not show that the~~
 21 source of information ~~nor~~ other
 22 circumstances indicate a lack of
 23 trustworthiness.
 24 * * * * *

Committee Note

Subdivision (8)(B). 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. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to “demonstrate why a time-tested and carefully considered presumption is not appropriate.” *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

