

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

REPORT

**Proposed Amendment of Pa.R.E. 803(6), (8), (10) with
Revision of the Comment to Pa.R.E. 803(7) and New-Pa.R.E. 902(13)**

In 1998, the Court adopted the Pennsylvania Rules of Evidence. These rules incorporated the structure, format, and language of the Federal Rules of Evidence where identical or similar. Where the law of evidence differed, the rules were modified to reflect Pennsylvania evidentiary law. Within Article VIII, there were eight provisions of the Federal Rules that were not incorporated into the Pennsylvania Rules, including F.R.E. 803(6)-(8), and (10). Instead, these provisions were “reserved” to maintain parallel numbering between the two bodies of rules. Additionally, some of the Comments to these “reserved” or “unadopted” provisions provided reference to case law or statute on the topic.

Effective December 1, 2014, F.R.E. 803(6)-(8) were amended:

[T]o 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 a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness 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.

Effective December 1, 2013, F.R.E. 803(10) was amended:

in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporate[d], with minor variations, a “notice-and-demand” procedure that was approved by the *Melendez-Diaz* Court. See Tex. 36 Code Crim. P. Ann., art. 38.41.

28 U.S.C. app. F.R.E. Committee Notes on Rules - 2013 Amendment.

These amendments prompted the Committee on Rules of Evidence to undertake an evaluation of the “reserved” Pennsylvania Rules of Evidence to identify whether any changes were warranted. As a result of this review, the Committee proposes amendment to Pa.R.E. 803(6), (8), and (10) with a revision to the Comment to Pa.R.E. 803(7) and new-Pa.R.E. 902(13).

Pennsylvania Rule of Evidence 803(6)

Prior to the restyling of the rules, 43 Pa.B. 620 (February 2, 2013), the Comment to Pa.R.E. 803(6) stated:

Pa.R.E. 803(6) places the burden on an opposing party to show that the sources of information or other circumstances indicate that a business record is untrustworthy, and thus does not qualify for exception to the hearsay rule. The statute places the burden on the proponent of the evidence to show circumstantial trustworthiness.

The restyled rule did not carry over the above-Comment because it was not clear that the rule text placed the burden on the proponent. Moreover, 42 Pa.C.S. § 6108 did not specifically assign the burden of proving untrustworthiness on the opponent – that was inferred from the burden of proving trustworthiness on the proponent.¹ In *Folger v.*

¹ The operative aspect of this statute states:

General rule. - A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the

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Dugan, 876 A.2d 1049, 1056 (Pa. Super. 2005), the Superior Court cited the Comment to Rule 803(6) when it stated: “Appellants bear the burden of demonstrating lack of trustworthiness.” However citing a case in the Comment that cited the Comment to establish the burden shift was believed to be tautological. Therefore, the restyled rule remained silent on the burden of proving untrustworthiness.

Notwithstanding the lack of authority on the subject, the Committee renews its previously held belief that the proponent has the burden of proving Pa.R.E. 803(6)(A)-(D), which establish circumstantial evidence that a record is trustworthy given the manner in which it is created and maintained. Once this burden has been satisfied, the burden shifts to the opponent to show a lack of trustworthiness. Apportioning the burden eliminates a possible construction where the proponent would be required to prove both trustworthiness and the lack of untrustworthiness.

Given that this represents a definitive burden shift between the parties, the Committee recommends it be codified in the rule text rather than be re-inserted as interpretative guidance in the form of a Comment. Additionally, this amendment would be consistent with the recent amendment of F.R.E. 803(6). The Committee also favors expansion of the Comment to provide reference to Pa.R.Crim.P. 574.

Pennsylvania Rule of Evidence 803(7)

The amendment of F.R.E. 803(7) prompted the Committee to reevaluate the Comment to Pa.R.E. 803(7), which contains the original rationale for not adopting a rule concerning the absence of a business record. First, unlike a public record, it should be recognized that neither Pennsylvania rule, common law, nor statute provide for the use of a certificate as conclusive proof of the absence of a business record. Second, as indicated in the Comment, documentary evidence to show the non-existence of a fact is merely circumstantial. For example, a proponent might have once used the absence of an entry in a telephone book as circumstantial evidence to prove that a person did not have a telephone. Of course, testimonial evidence from a custodian or other qualified witness about their personal knowledge of a compendium of business records and whether a particular record existed is not hearsay and not subject to Article VIII.

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sources of information, method and time of preparation were such as to justify its admission.

For these reasons, the Committee does not favor proposing a rule similar to F.R.E. 803(7). The Committee does favor making a correlative revision to the Comment to reflect the amendment of F.R.E. 803(7). Readers should note that the proposed bracketed citation to F.R.E. 803(6) is intended to indicate an alteration from the original text rather than a proposed deletion.

Pennsylvania Rule of Evidence 803(8)

When the Pennsylvania Rules of Evidence were first prepared in 1998, rules pertaining to the exclusion of public records from the hearsay rule were not adopted. Rather, the Comments to “reserved” Pa.R.E. 803(8) and Pa.R.E. 803(10) block quoted statutory provisions.

The Committee believes that the bench and bar would benefit from having the provisions of the statutes incorporated and organized into the rule text. However, in doing so, the Committee does not intend to make any substantive change from the statutory provisions. Therefore, the Committee is not recommending verbatim adoption of F.R.E. 803(8). Further, the Comment to the rule would be revised to eliminate the block quotations and add references to authentication provisions. Finally, the Committee believes that codification within Pa.R.E. 803(8) would be preferred given the proposed changes to Pa.R.E. 803(10).

Pennsylvania Rule of Evidence 803(10)

Under the F.R.E. 803(10), the absence of a public record can be proven by a certificate of non-existence of record (CNR). A CNR is an exception to the hearsay rule in so much as it does not require the testimony of a witness who conducted the record search. “A substantial majority of courts have held since *Melendez-Diaz* that clerk certifications attesting to the nonexistence of a public record are testimonial statements subject to confrontation.” *State v. Jasper*, 271 P.3d 876, 886 (Wash. 2012). In reaction to a growing body of case law, F.R.E. 803(10) was amended December 1, 2013 to provide for a simple notice-and-demand procedure for the admission of CNRs.

In 1998, Pennsylvania did not adopt a corresponding Pa.R.E. 803(10); instead, the Comment to “reserved” Pa.R.E. 803(10) referred to existing statutes admitting such evidence. The stated rationale for not adopting a rule like F.R.E. 803(10) was the same reason that Pa.R.E. 803(7) was not adopted – this type of evidence was not considered hearsay.

Preliminarily, the proof of the absence of a public record can be distinguished from the proof of the absence of a business record. The former can be conclusively

proven by documentary evidence (*i.e.*, certification) while the later cannot. Next, the Committee is not persuaded that a written certification that there is no record is anything but an assertion - it is a statement for the truth of the matter asserted (*i.e.*, there is no record). Therefore, these certifications of the non-existence of public records are hearsay.

Given this conclusion, the Committee does not believe that the rationale in the Comment to Pa.R.E. 803(7) should continue to be incorporated into the Comment to Pa.R.E. 803(10). Consequently, the Committee favors removal of this statement from the Comment. Further, the Committee favors adoption of the language from F.R.E. 803(10)(A) because it is consistent with the statutory provisions concerning the absence of a public record.

The Committee also recommends inclusion of the concept set forth in F.R.E. 803(10)(B) concerning “notice and demand” in criminal proceedings into the rule text. However, the structure and language were modified to maintain consistency with Pa.R.Crim.P. 574 (Forensic Laboratory Report; Certification In Lieu of Expert Testimony). The Committee believes such a provision is necessary otherwise the rule may be unconstitutional in cases where a defendant had a right of confrontation.

Pennsylvania Rule of Evidence 902(13)

F.R.E. 803(10) includes “a certification under Rule 902.” Upon review of Pa.R.E. 902, the Committee cannot discern a provision clearly applicable to the self-authentication of a certificate that a public record does not exist. Rules 902(1)-(4) all apply to public documents that exist, but the Committee does not favor a strained interpretation of these provisions to extend to non-existent public records. Therefore, the Committee proposes new-Pa.R.E. 902(13) to specifically provide for self-authentication of these certificates.

The Committee invites all comments, objections, and suggestions concerning this proposal.