

SUPREME COURT

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In the Matter of the Amendment of  
the Rules of Evidence: Wis. Stat.  
§§ (Rules) 908.03(6), 909.02(12),  
and 909.02(13), Related to Domestic  
and Foreign Records of Regularly  
Conducted Activity

AMENDED  
PETITION

No. 04-09

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The petitioner, Attorney Jason J. Hanson, respectfully petitions the Supreme Court of Wisconsin as follows:

- 1) To permit the filing of this amended petition for the Court's consideration at the scheduled March 15, 2005 hearing on the original petition. The original petition omitted the text "or by certification that complies with §909.02(12), §909.02(13), or a statute permitting certification," in the proposed amendments to §908.03(6) as a result of a drafting error. The inclusion of this text is necessary for the rule changes sought by the petition to have the desired effect.
- 2) For an order amending Wis. Stat. § (Rule) 908.03(6) and creating Wis. Stat. §§ (Rules) 909.02(12), and 909.02(13), of the Rules of Evidence, as follows:

Section I. Wis. Stat. §908.03(6) is amended to read:

**(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with §909.02(12), §909.02(13), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

*Note: This section would adopt the amendment of Federal Rule of Evidence Rule 803(6) in 2000. The Advisory Committee's Notes pertaining to that amendment are as follows: "The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp., 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on*

*business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.” Prior Wisconsin decisions have held that, though §908.03(6) does not contain the specific language added by this amendment, §908.03(6) and FRE 803(6) are virtually identical in meaning. Accordingly, the amendment would cause virtually no change in meaning but would bring the language in Wisconsin’s rule into conformity with the federal rule.*

Section II. Wis. Stat. §909.02(12) is created to read:

**(12) Certified Domestic Records of Regularly Conducted Activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under §908.03(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any statute or rule adopted by the supreme court, certifying that the record:

- (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (b) was kept in the course of the regularly conducted activity; and
- (c) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

*Note: This section would adopt the creation of Federal Rule of Evidence Rule 902(11) in 2000. The Advisory Committee’s Notes pertaining to that provision are as follows: “The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.*

*A declaration that satisfies 28 U.S.C. § 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.*

*The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.”*

Section III. Wis. Stat. §909.02(13) is created to read:

**(13) Certified Foreign Records of Regularly Conducted Activity.** The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under §908.03(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

- (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (b) was kept in the course of the regularly conducted activity; and
- (c) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

*Note: This section would adopt the creation of Federal Rule of Evidence Rule 902(12) in 2000. The Advisory Committee's Notes pertaining to that provision are as stated in the last section. While FRE 902(12) begins with a clause limiting its application to civil cases, the notes clearly indicate that this was done because a similar provision for federal criminal cases already exists in 18 U.S.C. §3505. Because Wisconsin law does not have a similar provision for certifying foreign records of regularly conducted activity, the limiting clause should not be included in Wisconsin's rule.*

WHEREFORE the petitioner believes that the adoption of these provisions would greatly enhance the efficiency of the courts, result in substantial savings for litigants and the holders of business records who would otherwise be required to appear as witnesses, and accomplishes these goals while providing all parties with a fair opportunity to challenge the records under appropriate conditions, the petitioner respectfully requests that the changes proposed be adopted and incorporated into the Wisconsin Rules of Evidence.

Dated this \_\_\_\_ day of January, 2005.

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Attorney Jason J. Hanson  
Dane County District Attorney's Office  
210 Martin Luther King, Jr. Blvd., Rm. 523  
Madison, WI 53703  
Voice (608) 266-4211  
FAX (608) 267-2545