South Carolina Bar
Continuing Legal Education Division

2019 It's All A Game:
Top Trial Lawyers Tackle Evidence

19-04

Friday, February 15, 2019

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 191498

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2019 It's All A Game: Top Trial Lawyers Tackle Evidence
Friday, February 15, 2019

This program qualifies for 6.0 MCLE credit hours, including up to 1.0 LEPR credit hour.
SC Supreme Commission on CLE Course #: 191498

8:30 a.m. **Registration**

8:55 a.m. **Welcome and Opening Remarks**
Honorable John Cannon Few
Justice, Supreme Court of South Carolina

9 a.m. **Thinking Through the Structure of Evidence**
Honorable John Cannon Few

10 a.m. **I See Dead People: Evidentiary Issues When Witnesses Die (or Disappear) Before Trial**
Christopher J. Bryant
Yarborough Applegate LLC, Charleston

11 a.m. **Break**

11:15 a.m. **But It Happens All the Time; the Admissibility (or Not) of Other Similar Incidents**
Julie L. Moore
Duffy & Young LLC, Charleston

12:15 p.m. **Lunch (on your own)**

1:30 p.m. **Expert Testimony, Will We Ever Settle Its Admissibility? Yes—Today!**
Byron E. Gipson
Solicitor, Fifth Judicial Circuit, Columbia

2:30 p.m. **Rules of Evidence from *L'Affaire Russe***
Christopher P. Kenney
Richard A. Harpootlian, PA, Columbia

3:30 p.m. **Break**

3:45 p.m. **The Ethics of Presenting (and Objecting to) Evidence**
Andrew B. Moorman
Deputy Criminal Chief for Narcotics, United States Attorney's Office, D.S.C., Greenville

4:45 p.m. **Adjourn**

2019 It's All A Game:
Top Trial Lawyers Tackle Evidence
SPEAKER BIOGRAPHIES
(by order of presentation)

The Honorable John Cannon Few
S.C. Supreme Court
Greenville, SC

John Cannon Few was born in Anderson and grew up in Greenwood. He attended Duke University, where he served as Duke's athletic mascot—the Blue Devil—before graduating in 1985 with a degree in English and Economics. John attended the University of South Carolina School of Law, where he was a member of The Order of Wig and Robe and The Order of the Coif. He also served as Student Works Editor of the South Carolina Law Review. He received his Juris Doctor degree in 1988.

John began his legal career as law clerk to The Honorable G. Ross Anderson, Jr., United States District Judge. He practiced law in Greenville from 1989 until 2000, and is admitted to practice in South Carolina, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States. John served as a trial judge on the Circuit Court of South Carolina from July 2000 until February 2010. He then became the Chief Judge of the South Carolina Court of Appeals, a position he held until February 2016. John was sworn in as a Justice on the Supreme Court of South Carolina on February 9, 2016.

John is a frequent public speaker on law and justice. He delivered commencement addresses at Charleston School of Law and Lander University, and he addresses bar associations and civic groups across the country. He began teaching law in 2005 and is currently an adjunct professor at the University of South Carolina School of Law. Among many other writings, John maintains a blog on the law and practice of Evidence. John has a long track record of community service, from reading to preschool children to serving on the board of Friends of the Reedy River to chairing the South Carolina Access to Justice Commission.

Christopher J. Bryant
Yarborough Applegate LLC
Charleston, SC

Chris attended Duke University, which he graduated from with a bachelor's degree in economics, and Duke University School of Law, where he served as Editor in Chief of the Duke Law Journal. After law school, Chris clerked for Judge James A. Wynn, Jr. on the U.S. Court of Appeals for the Fourth Circuit and Judge Richard M. Gergel on the U.S. District Court for the District of South Carolina. Chris currently serves on the boards of Charleston Legal Access and Public Access to Public Records (PAPR).

Julie L. Moore

Duffy & Young, LLC
Charleston, SC

Julie Moore is a trial lawyer based in Charleston, South Carolina. Julie graduated from the University of South Carolina School of Law in 2009 and began clerking for Judge John Cannon Few and was his first law clerk at the Court of Appeals. She has been practicing with Duffy & Young for almost six years and was asked to join the founders of the firm as a shareholder in January of 2018. Julie enjoys a varied civil litigation practice but focuses her work on representing people and families who have been harmed by the conduct of others – including professional negligence, products liability, wrongful death, insurance bad faith and fraud.

Julie's goal is to take as many cases to trial as possible. In 2016, she was selected from nominees across the country to participate in the American Board of Trial Advocates National Trial College at Harvard University. In 2018, she was invited to join the ABOTA faculty as a teaching fellow at the National Trial College at Yale University. She has since been named a life fellow of the ABOTA Foundation.

Julie places tremendous value on community service. She was named 2017 Young Lawyer of the Year by the South Carolina Bar for her contributions to the community. She is currently on the board of directors for Special Olympics South Carolina and also chairs the South Carolina Bar's Torts and Insurance Practice Section and the Charleston County Bar's Community Outreach Committee.

Byron E. Gipson

Solicitor, Fifth Judicial Circuit
Columbia, SC

Byron E. Gipson became the Solicitor of the Fifth Circuit on January 9, 2019. Prior to that time, he practiced with the law firm of Johnson, Toal & Battiste, P.A. for twenty-one (21) years in the areas of criminal defense and personal injury. Gipson graduated from the College of Charleston with degrees in English and Political Science. He later attended the University of South Carolina School of Law. After graduation, Gipson became law clerk to the Honorable L. Casey Manning, Chief Administrative for the Fifth Judicial Circuit.

In 2000, Gipson was appointed to the South Carolina Humanities Council Board of Directors by Governor Jim Hodges. He was later elected as the Chairman of the Humanities Council in September 2004. In 2010, he was appointed by the South Carolina Supreme Court to serve on The Committee on Character and Fitness. Gipson is also a board member of the South Carolina Bar Foundation and is past Chair of the Municipal Election Commission. He is currently a member of the Richland County, South Carolina, and National, and American Bar Associations.

Gipson has previously lectured at numerous legal seminars regarding criminal trials, evidence, and ethics.

Christopher P. Kenney

Richard A. Harpootlian, P.A.
Columbia, SC

Christopher "Chris" Phillip Kenney is an associate with Richard A. Harpootlian, P.A. whose practice includes complex civil litigation, whistleblower and false claims cases, class actions, business disputes, and personal injury cases. Mr. Kenney is a native of Toledo, Ohio and a 2004 graduate of Xavier University in Cincinnati, Ohio where he received his B.A. in history from the University's honors program.

In 2011, Mr. Kenney received his J.D. from the University of South Carolina School of Law and was admitted to practice in South Carolina that same year. Since joining Richard A. Harpootlian, P.A. in 2011, Mr. Kenney has appeared before appellate and trial courts throughout the state and federal systems, including the South Carolina Supreme Court and the United States Court of Appeals for the Fourth Circuit.

Andrew B. Moorman

U.S. Attorney's Office
Greenville, SC

Andy graduated cum laude from Furman University in 1998 and from the University of South Carolina School of Law in 2001. While in law school, Andy served as a member of the South Carolina Law Review and was the recipient of the CALI award for Legal and Equitable Remedies.

Upon graduating from law school, Andy served as law clerk for the Honorable John C. Few, Resident Circuit Judge, 13th Judicial Circuit (now Associate Justice of the South Carolina Supreme Court), where he worked from 2001-2002. In 2002, he joined the 13th Circuit Solicitor's Office as an assistant solicitor.

While at the Solicitor's Office, Andy was assigned to the general unit where he prosecuted violent felonies, drug crimes, and property crimes.

In 2007, Bannister & Wyatt, LLC, hired Andy as an associate. His practice focused on criminal defense, domestic relations, and civil litigation.

In August 2009, Andy appointed as an Assistant United States Attorney for the District of South Carolina, and he has worked in the Greenville office since he joined the Office. In 2016, Andy became the lead Organized Crime and Drug Enforcement prosecutor in the District, and he currently serves as the head of the Narcotics Unit for the District of South Carolina.

South Carolina Bar

Continuing Legal Education Division

Thinking Through the Structure of Evidence

Honorable John C. Few

Thinking Through the Structure of Evidence

This is a draft of a post to be published soon on Justice Few's evidence blog at https://artofevidence.com.

The law of Evidence is very difficult to grasp in the abstract, and in that respect "evidence" is quite different from any other subject of law. In property law, for example, it can be abstractly understood that to establish an easement by necessity the alleged dominant landowner must prove that at some point in the past her parcel was unified in title with the subservient parcel. Every student of contract law understands—in the abstract—that a contract is formed only when one party makes an offer that is accepted by the other party. Even in anti-trust law a rational explanation may be given—in the abstract—that a plaintiff must prove an adverse effect on *competition*, not simply on one or more *competitors*.

In evidence analysis, however, it is very difficult to explain in the abstract what it means "to prove the truth of the matter asserted," or to demonstrate that a trait of character is not offered "to prove that on a particular occasion the person acted in accordance with" it. Speaking of hearsay, the great Irving Younger proved the point, stating, "Standing alone, the definition is a mere abstraction, a bloodless assemblage of words strung together. It needs real settings to give it life." The point needs hardly any more proof than the words of Irving Younger! So, let's consider the uniqueness of the law of evidence.

There is an objective structure to the law of evidence. It starts with the fundamental concept that "Relevant evidence is admissible …." and "Irrelevant evidence is not admissible," as stated in Rule 402. The structure extends beyond Rule 402 to:

- Other rules that identify certain subjects and set forth circumstances in which relevant evidence may be excluded. For example,
    - Rule 407 allows a trial court to exclude subsequent remedial measures offered for the purpose of proving negligence of culpable conduct;
    - Rule 411 allows a trial court to exclude evidence of liability insurance offered for the purpose of proving "the person acted negligently or otherwise wrongfully;"
    - Rule 702 requires a trial court to act as gatekeeper and to exclude expert testimony unless the proper foundation is laid for it.
    - Rule 802 allows a trial court to exclude hearsay, but then provides that the court may nevertheless admit it if the proper foundation is laid for an exception or Rule 801(d) exemption;
        - Rules like 801(d), 803, and 804 provide foundations with specific elements for the admission of evidence in a given category. You can look up in Imwinkelreid the elements of any evidentiary foundation.
- Rules that govern the general conduct of a trial, such as Rules 103, 104, 611, and 1008.

However, unlike any other subject of law, evidence analysis must include the lawyer navigating her way through that structure, in light of the individual facts, human dynamics, and legal requirements of each case.

This brings up the fundamental skill of a great lawyer: *Thinking*. Thinking is one of the keys to success at the practice of law in general, and the practice of evidence in particular. *Structure* is at the heart of a sound approach to evidence, and that structure has two components. First, as I mentioned in the previous paragraph, there is an objective structure a trial lawyer must understand. Second, however, in the course of working on an individual evidence problem in an individual case, the lawyer must think her way through that structure—navigate it—using the individual facts, human dynamics, and legal requirements of her case. "Think"—in this instance—is an action verb describing the advocate's mental movements through the structure.

A great trial lawyer does not have time during the heat of a trial to learn this objective structure. So, if a lawyer wants to be able to navigate the structure in the heat of trial, she must commit the structure of evidence to instinct. She is then freed to use her creative thinking to formulate arguments that win evidentiary struggles, and thus win cases.

In explaining this structure, I like to think in terms of four key concepts of evidence:

(1) Relevance, or what is the structure of evidence?
(2) Authentication;
(3) Foundation;
(4) Discretion.

The first three key concepts represent the levels of the structure of evidence, while Discretion is the overriding idea that makes an evidence struggle so much fun, and one of the riskiest encounters in all of the practice of law.

Relevance

This is not an explanation of what evidence is relevant and what is not, as defined in Rule 401. Lawyers already know "relevance" in this respect, as I will discuss in another blog post. Rather, this key concept of the structure of evidence, which forms the philosophical *and* the practical starting point for all evidence analysis, is found in Rule 402. I discussed this fundamental concept in another blog post. Rule 402 starts with these critical words:

"Relevant evidence is admissible …."

This is the starting point to the structure of evidence. If evidence is relevant, it's admissible. With some minor exceptions, Rule 402 is the only rule of evidence which "admits" evidence. The rest of the rules serve to "exclude" relevant evidence. That's why the next words in Rule 402 are:

"… unless any of the following provides otherwise:"

Remember this: if evidence is relevant—it's admissible—unless some other rule excludes it! If it's not relevant, as Rule 402 also succinctly states:

"Irrelevant evidence is not admissible."

So, this gets us to "authentication."

Authentication

We normally think of authentication in terms of compliance with Rule 901(a): introducing evidence to prove that "the matter in question is what its proponent claims." This means that when a lawyer seeks to introduce a certain piece of evidence, the lawyer must prove what it is. For example, if the lawyer wishes to introduce a letter, he must prove it is the letter that is the subject of the case, often by testimony identifying the signature of the author. If a prosecutor wishes to introduce drugs sold by a criminal defendant, the prosecutor must prove the drugs she seeks to introduce are the same ones the police seized from the scene of the sale. This is done by proving the chain of custody.

In order to fully understand an evidence question, however, the lawyer must also ask: "what is it?" on a different level. This is very much like a "second level" of authentication. Asking this question is critical to the admissibility of evidence, because depending on the answer, there may be some rule that excludes it. For example, although proving a letter was written by a key witness in a case may satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility" as set forth in Rule 901(a), the question "what is it?" may lead us to other issues regarding its admissibility. If the letter is an offer to settle a legal claim, its admissibility is affected by Rule 408; if it's a letter written to express religious beliefs, Rule 610 forbids its use to show credibility; if it's a letter offered as a prior inconsistent statement, the party offering it must take the steps set forth in Rule 613; and if the letter contains a statement offered to prove the truth of the statement, then it's hearsay, meaning almost no one will know what to do with it. Whether any of these rules, or others, affect the admissibility of the letter depends on the answer to the question "what is it?"

During the CLE Friday I will discuss another example of how the question "what is it?" affects admissibility, *State v. Andre Tufts*. Andre was working in a hospital as an orthopedic technician when he was accused of committing a sexual assault on a young patient. Shortly after the alleged crime, a hospital security guard interviewed Andre. The guard testified at trial as follows:

> Well, Mr. Tufts put his hands into his pockets. He was standing up, and I was standing near my desk. He put both hands into his pockets and started to sway from side to side, and hung his head down. At that time, he said, that he knew he had a problem with his sexual desires, but that he wanted to go home and talk with his girlfriend that night, and after he talked to his girlfriend, he would come back to see

me on the next day, which would have been Friday, and tell me what really happened to the victim in the emergency room.

Andre's lawyer objected to the admissibility of this testimony. His lawyer and the prosecutor aggressively argued their different answers to the question "what is it?" Andre's lawyer made the case that the statement "I know I have a problem with my sexual desires" was evidence of a trait of character offered to prove Andre had a propensity to commit the alleged crime. She argued, therefore, that it was character evidence and should be excluded under Rule 404(a). The prosecutor, on the other hand, argued it was a confession, and thus it was admissible because it was relevant and no rule excluded it. Although there was no issue related to Rule 901, the question of "what is it?" was critical to its admissibility. I told you how the case came out, but if you want to read it you can: *State v. Tufts*, 355 S.C. 493, 585 S.E.2d 523 (Ct. App. 2003).

Much of the difficulty of the law of evidence is answering the question "what is it?!" The most fun part of the practice of the art of evidence is studying how to make the arguments you need to make to get the judge to rule in favor of your client. Now we come to the concept of "foundation."

Foundation

When a judge answers the question "what is it?" in such a way that another rule of evidence might exclude it, there is almost always a way to try to get it into evidence anyway. For example, evidence determined to be hearsay may fit into any one of at least twenty-nine exceptions. If it fits, it's admissible. The party who wants the hearsay admitted makes it "fit" by laying the foundation. As to each hearsay exception, there is a list of elements to the foundation which if established will lead to the admission of the statement despite the fact that it is hearsay. Similarly, when any other rule excludes relevant evidence, there still is a way of getting it in. An expert opinion, although relevant, is not admissible unless the foundation is laid: (1) the expert must be qualified, (2) the opinion must assist the trier of fact, and (3) the science the expert used in reaching the opinion must be reliable. For character evidence, it is still possible to get the evidence in if the proper foundation is laid. Under Rule 404(b), which addresses the use of a defendant's other acts as evidence of his character, the foundation will vary from jurisdiction to jurisdiction, but always contains the basic elements that the defendant clearly committed the act, there is some logical connection between the act and the crime with which the defendant is charged other than a propensity to commit similar crimes, and the probative value of the other act must not be substantially outweighed by the danger of unfair prejudice.

Discretion

Evidence struggles are won or lost on the spot, in the courtroom, in front of a trial judge. In the vast majority of cases, there is no effective right of appeal. Playing to the trial judge's discretion is what makes evidence an Art! It's what makes the ability to use this structure of evidence as the basis for the creative thinking of a great trial lawyer . . . the key to being a great trial lawyer!

Why do I call this "The Art of Evidence." Isn't evidence a field of law based on rules? Well, yes, that's always the starting point, but evidence is really about people. Evidence is the art of writing and talking to judges and other lawyers in order to accomplish the goal of a client. The law of evidence has little meaning until it is applied by lawyers and judges to facts in a trial dealing with real issues in the lives of real people. Evidence is about thinking, and strategizing, and thinking about strategizing! In the end, a lawyer stands in a courtroom in front of a trial judge and makes an argument—for or against the admissibility of the evidence—and the judge makes a ruling. Evidence is all about that moment—when the trial judge exercises his or her discretion—and rules. The lawyer has either won or lost an important struggle—for a client. At that point, in somewhere above 95% of the cases, the issue is over. As the Tenth Circuit famously stated about the chances of winning on appeal after losing an evidence struggle at trial:

> The district judge has a particularly wide range of discretion in ruling on the admissibility of evidence. Indeed, we have gone so far as to declare that appellants who challenge evidentiary rulings "are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle." *United States v. Glecier,* 923 F.2d 496, 503 (7th Cir.) (citing Matthew 19:24), *cert. denied,* 502 U.S. 810 (1991).

It's an Art! Stay tuned!

As Harvard Law Professor James Bradley Thayer wrote over 100 years ago:

> Now in the application of such standards as these [considerations of confusing, misleading, or tiring the minds of the jury], the chief appeal is made to sound judgment; to what our lawyers have called, for six or seven centuries at least, the discretion of the judge. Decisions on such subjects are not readily open to revision; and, when revised, they have to be judged of in a large way; this is expressed by saying that the question is whether the discretion has been unreasonably exercised, has been abused.

See https://scholarship.law.berkeley.edu

South Carolina Bar

Continuing Legal Education Division

I See Dead People: Evidentiary Issues When Witnesses Die (or Disappear) Before Trial

Christopher J. Bryant

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VIII. Hearsay (Refs & Annos)

Federal Rules of Evidence Rule 803, 28 U.S.C.A.

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

Currentness

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

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(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.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice--unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other Exceptions.] [Transferred to Rule 807.]

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939; Pub.L. 94-149, § 1(11), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 13, 2013, eff. Dec. 1, 2013; Apr. 25, 2014, eff. Dec. 1, 2014; Apr. 27, 2017, eff. Dec. 1, 2017.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

Note to Paragraphs (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum.L.Rev. 432 (1928), it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost,* 151 Fla. 558, 10 So.2d 83 (1942); *Houston Oxygen Co. v. Davis,* 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the *time element,* Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick § 272, p. 580.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot. 78 A.L.R.2d 300.

Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co. v. Mosely,* 75 U.S. (8 Wall.) 397, 19 L.Ed. 437 (1869); *Wheeler v. United States,* 93 U.S. App.D.C. 159, 211 F.2d 19 (1953), cert. denied 347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; *Wetherbee v. Safety Casualty Co.,* 219 F.2d 274 (5th Cir.1955); *Lampe v. United States,* 97 U.S.App.D.C. 160, 229 F.2d 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick § 272, p. 579. Illustrative are *Armour & Co. v. Industrial Commission,* 78 Colo. 569, 243 P. 546 (1926); *Young v. Stewart,* 191 N.C. 297, 131 S.E. 735 (1926). Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland,* 22 Ill.2d 175, 174 N.E.2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden,* 73 N.M. 307, 387 P.2d 874 (1963); *Beck v. Dye,* 200 Wash. 1, 92 P.2d 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible *subject matter* of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception [paragraph] (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See *Sanitary Grocery Co. v. Snead,* 67 App.D.C. 129, 90 F.2d 374 (1937), slip-and-fall case sustaining admissibility of clerk's statement. "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc. v. Ball,* 101 U.S.App.D.C. 416, 249 F.2d 508 (1957), upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L.Rev. 204, 206-209 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); California Evidence Code § 1240 (as to Exception (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Note to Paragraph (3). Exception [paragraph] (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case--Thirty-three Years After, 38 Harv.L.Rev. 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U.Chi.L.Rev. 394, 421-423 (1934). The rule of *Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents and *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577-578; Annot. 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

Note to Paragraph (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend. *Shell Oil Co. v. Industrial Commission,* 2 Ill.2d 590, 119 N.E.2d 224 (1954); McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Note to Paragraph (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly,* 349 F.2d 720, 770 (2d Cir.1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens v. State,* 67 Md. 307, 316, 10 A. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; *Jordan v. People,* 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; *Hall v. State,* 223 Md. 158, 162 A.2d 751 (1960); *State v. Bindhammer,* 44 N.J. 372, 209 A.2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg & Meridian R.R. v. O'Brien,* 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); Ahern v. Webb, 268 F.2d 45 (10th Cir.1959); and see *N.L.R.B. v. Hudson Pulp and Paper Corp.,* 273 F.2d 660, 665 (5th Cir.1960); *N.L.R.B. v. Federal Dairy Co.,* 297 F.2d 487 (1st Cir.1962). But cf. *United States v. Adams,* 385 F.2d 548 (2d Cir.1967).

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella,* 93 N.J.L. 222, 107 A. 279 (1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Note to Paragraph (6). Exception [paragraph] (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. § 1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary

emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States v. Mortimer,* 118 F.2d 266 (2d Cir.1941); *La Porte v. United States,* 300 F.2d 878 (9th Cir.1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir.1948); *Gordon v. Robinson,* 210 F.2d 192 (3d Cir.1954); *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 214 (9th Cir.1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; *Yates v. Bair Transport,* Inc., 249 F.Supp. 681 (S.D.N.Y.1965); Annot., 69 A.L.R.2d 1148. Cf. *Hawkins v. Gorea Motor Express, Inc.,* 360 F.2d 933 (2d Cir.1966); *Contra,* 5 Wigmore § 1530a, n. 1, pp. 391-392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge * * * to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record * * *." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, 28 U.S.C. § 1732, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co. v. Taylor,* 79

U.S.App.D.C. 66, 147 F.2d 297 (1945); *Lyles v. United States,* 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; *England v. United States,* 174 F.2d 466 (5th Cir.1949); *Skogen v. Dow Chemical Co.,* 375 F.2d 692 (8th Cir.1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed v. Order of United Commercial Travelers,* 123 F.2d 252 (2d Cir.1941); *Buckminster's Estate v. Commissioner of Internal Revenue,* 147 F.2d 331 (2d Cir.1944); *Medina v. Erickson,* 226 F.2d 475 (9th Cir.1955); *Thomas v. Hogan,* 308 F.2d 355 (4th Cir.1962); *Glawe v. Rulon,* 284 F.2d 495 (8th Cir.1960). In the state courts, the trend favors admissibility. Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938); *Allen v. St. Louis Public Service Co.,* 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); *People v. Kohlmeyer,* 284 N.Y. 366, 31 N.E.2d 490 (1940); *Weis v. Weis,* 147 Ohio St. 416, 72 N.E.2d 245 (1947). In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer,* 129 F.2d 976, 991 (2d Cir.1942). The direct introduction of motivation is a disturbing factor, since absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L.Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc.,* 249 F.Supp. 681 (S.D.N.Y.1965), otherwise if offered by the opposite party, *Korte v. New York, N.H. & H.R. Co.,* 191 F.2d 86 (2d Cir.1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog v. United States,* 217 F.2d 706 (4th Cir.1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States v. Ware,* 247 F.2d 698 (7th Cir.1957), error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), *infra,* as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir.1962); Taylor v. Baltimore & O.R. Co., 344 F.2d 281 (2d Cir.1965), since the report was oriented in a direction other than the litigation which ensued. Cf. Matthews v. United States, 217 F.2d 409 (5th Cir.1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos v. United States,* 82 U.S.App.D.C. 278, 163 F.2d 593 (1947), error to admit police records of convictions; *Standard Oil Co. of California v. Moore,* 251 F.2d 188 (9th Cir.1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148, error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Note to Paragraph (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra,* decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Note to Paragraph (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating resort to the less appropriate business record exception to the hearsay rule. *Kay v. United States,* 255 F.2d 476 (4th Cir.1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo v. McGrath,* 196 F.2d 120 (9th Cir.1952), and see *Chesapeake & Delaware Canal Co. v. United States,* 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), supra.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States,* 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin,* 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906), General Land Office records; *Ballew v. United States,* 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895). Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook,* 284 F.2d 489 (7th Cir.1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States,* 242 F.2d 937 (5th Cir.1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley,* 150 F.2d 356 (8th Cir.1945); Weather Bureau records of rainfall; *United States v. Meyer,* 113 F.2d 387 (7th Cir.1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States v. Dumas,* 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; *McCarty v. United States,* 185 F.2d 520 (5th Cir.1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran v. Pittsburgh-Des Moines Steel Co.,* 183 F.2d 467 (3d Cir.1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W___, 164 F.Supp. 659 (E.D.Pa.1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin v. Skelly Oil Co.,* 141 F.2d 568 (10th

Cir.1944), State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co. v. United States,* 183 F.2d 331 (9th Cir.1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung v. Dulles,* 229 F.2d 244 (2d Cir.1956), "Status Reports" offered to justify delay in processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.,* (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir.1944); (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Note to Paragraph (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281.

Note to Paragraph (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. § 1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. § 405(c)(3), (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. People v. Love, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as to Uniform Rule 63(17); California Evidence Code § 1284; Kansas Code of Civil Procedure § 60-460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. § 1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Note to Paragraph (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See California Evidence Code § 1315 and Comment.

Note to Paragraph (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

Note to Paragraph (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra.* The rule is substantially identical in coverage with California Evidence Code § 1312.

Note to Paragraph (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an *Erie* nature under *Cities Service Oil Co. v. Dunlap,* 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), is not present, since the local law in fact governs under the example.

Note to Paragraph (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Note to Paragraph (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assurance Co.,* 286 F.2d 388 (5th Cir.1961), upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see California Evidence Code § 1331.

Note to Paragraph (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Note to Paragraph (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan v. Hardy,* 237 Ala. 603, 188 So. 264 (1939); *Lewandowski v. Preferred Risk Mut. Ins. Co.,* 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner,* 365 F.2d 554 (6th

Cir.1966); *Sayers v. Gardner,* 380 F.2d 940 (6th Cir.1967); *Colwell v. Gardner,* 386 F.2d 56 (6th Cir.1967); *Glendenning v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo.1962); *Cook v. Celebrezze,* 217 F.Supp. 366 (W.D.Mo.1963); *Sosna v. Celebrezze,* 234 F.Supp. 289 (E.D.Pa.1964); and see *McDaniel v. Celebrezze,* 331 F.2d 426 (4th Cir.1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed, to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus,* 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson,* 193 So.2d 648 (Fla.App.1967), cert. denied Fla., 201 So.2d 556; *Darling v. Charleston Memorial Community Hospital,* 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Dabroe v. Rhodes Co.,* 64 Wash.2d 431, 392 P.2d 317 (1964).

In Reilly v. Pinkus, *supra,* the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. Dabroe v. Rhodes Co., *supra.* Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 613(b) and 801(d)(1).

Note to Paragraphs (19), (20) and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id.* § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People v. Reeves,* 360 Ill. 55, 195 N.E. 443 (1935); *State v. Axilrod,* 248 Minn. 204, 79 N.W.2d 677 (1956); Mass.Stat.1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.,* and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Note to Paragraph (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note 27 Ill.L.Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co. v. Militello,* 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S.S. Co. v. Continental Cas. Co.,* 117 F.2d 404, 411 (2d Cir.1941); *Connecticut Fire Ins. Co. v. Farrara,* 277 F.2d 388 (8th Cir.1960).

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope v. Goble,* 39 Cal.App.2d 448, 103 P.2d 598 (1940); *Jones v. Talbot,* 87 Idaho 498, 394 P.2d 316 (1964); *Warren v. Marsh,* 215 Minn. 615, 11 N.W.2d 528 (1943); Annot., 18 A.L.R.2d 1287, 1295-1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950). Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which

conviction of another person is an element of the crime, e.g. 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); California Evidence Code § 1300; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Note to Paragraph (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke,* Carth. 181, 90 Eng.Rep. 710 (K.B. 1691); *Neill v. Duke of Devonshire,* 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the United States, *Patterson v. Gaines,* 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co. v. United States,* 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v. Mid-Continent Petroleum Corp.,* 67 F.2d 37 (10th Cir.1933), records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v. Cahill,* 81 F.2d 809 (9th Cir.1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. *Contra,* In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).

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Note to Paragraph (3). Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon,* 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

Note to Paragraph (4). After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Note to Paragraph (5). Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, 18 U.S.C. 3500. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Note to Paragraph (6). Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in 28 U.S.C. 1732. Moreover, the Committee concluded that the additional requirement of Section

1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Note to Paragraph (7). Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

Note to Paragraph (8). The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

Note to Paragraph (13). The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11). House Report No. 93-650.

Note to Paragraph (4). The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with rule 35 of the Federal Rules of Civil Procedure which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Note to Paragraph (5). Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act [18 U.S.C. § 3500].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis v. Bradley* [65 Conn. 99, 31 Atl. 591 (1894); see, also, *Rathbun v. Brancatella,* 93 N.J.L. 222, 107 Atl. 279 (1919); see, also, McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under this rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Note to Paragraph (6). Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the

traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors--e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment. [See Nev.Rev.Stats. § 15.135; N.Mex.Stats. (1973 Supp.) § 20-4-803(6); West's Wis.Stats.Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the word "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

Note to Paragraph (8). The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not

think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

* * * *

> Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.,* 141 F.2d 568 (19th Cir.1944); (4) possible motivation problems suggested by *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

* * * *

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

Note to Paragraph (24). The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6)[(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness [sic] and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assoc. Co., Ltd.,* 286 F.2d 388 (5th Cir.1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the

structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also *United States v. Barbati,* 284 F.Supp. 409 (E.D.N.Y.1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections. Senate Report No. 93-1277.

Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

Note to Paragraph (6). The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the

records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

Note to Paragraph (8). The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)--Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

Note to Paragraph (24). The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement. House Report No. 93-1597.

1987 Amendment

The amendments are technical. No substantive change is intended.

1997 Amendment

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 803. The words “Transferred to Rule 807” were substituted for “Abrogated.”

2000 Amendment

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.

GAP Report--Proposed Amendment to Rule 803(6)

The Committee made no changes to the published draft of the proposed amendment to Evidence Rule 803(6).

2011 Amendments

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2013 Amendments

Rule 803(10) has been 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 incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

Changes Made After Publication and Comment

No changes were made to the proposed amendment or Committee Note as they were issued for public comment.

2014 Amendments

[Subdivision (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. 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.

[Subdivision (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).

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.

[Subdivision (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. 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.

2017 Amendments

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases--such as cases involving latent diseases and environmental damage--parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability--which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)--or under any ground available for any other document--remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. *See* Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that--the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

Notes of Decisions (2230)

Fed. Rules Evid. Rule 803, 28 U.S.C.A., FRE Rule 803
Including Amendments Received Through 2-1-19

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VIII. Hearsay (Refs & Annos)

Federal Rules of Evidence Rule 804, 28 U.S.C.A.

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

Currentness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Transferred to Rule 807.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1942; Pub.L. 94-149, § 1(12), (13), Dec. 12, 1975, 89 Stat. 806; Mar. 2, 1987, eff. Oct. 1, 1987; Pub.L. 100-690, Title VII, § 7075(b), Nov. 18, 1988, 102 Stat. 4405; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Note to Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt v. State,* 35 Ala.App. 147, 46 So.2d 837 (1950); *State v. Stewart,* 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code § 240(a)(1); Kansas Code of Civil Procedure § 60-459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People,* 152 Colo. 586, 384 P.2d 454 (1963); *People v. Pickett,* 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). *Contra, Pleau v. State,* 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as grounds. McCormick §§ 234, 257, 297; Uniform Rule 62(7)(c); California Evidence Code § 240(a)(3); Kansas Code of Civil Procedure § 60-459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 32(a)(3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7)(d) and (e); California Evidence Code § 240(a)(4) and (5); Kansas Code of Civil Procedure § 60-459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant.

Note to Subdivision (b). Rule 803, *supra,* is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which

admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, supra. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness of the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 526-527; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L.Rev. 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a preliminary hearing was held in *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra,* at 652; McCormick § 232, pp. 487-488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. This position is supported by modern decisions. McCormick § 232, pp. 489-490; 5 Wigmore § 1388.

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§ 1290-1292; Kansas Code of Civil Procedure § 60-460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, *supra,* at 659-660. The constitutional acceptability of dying declarations has often been conceded. *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby v. United States,* 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890 (1899); *Pointer v. Texas,* 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Exception (2). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng.Rep. 352, 353 (K.B.1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 224, n. 4. Kansas by decision extended the exception to civil cases. *Thurston v. Fritz,* 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60-460(e); New Jersey Evidence Rule 63(5).

Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman v. Northwest Engineering Co.,* 346 F.2d 668 (6th Cir.1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2) [sic; probably should be "Rule 801(d)(2)"], and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Higham v. Ridgway, 10 East 109, 103 Eng.Rep. 717 (K.B.1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng.Rep. 897 (Q.B.1861); McCormick, § 256, p. 551, nn. 2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-549. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States,* 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People v. Spriggs,* 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); *Sutter v. Easterly,* 354 Mo. 282, 189 S.W.2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J.Super. 522, 163 A.2d 465 (1960); *Newberry v. Commonwealth,* 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas,* the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton.* On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against dissenting aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10); California Evidence Code § 1230; Kansas Code of Civil Procedure § 60-460(j); New Jersey Evidence Rule 63(10).

Exception (4). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i)[(A)] specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii)[(B)] deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.,* § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.,* § 1491.

For comparable provisions, see Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(u), (v), (w); New Jersey Evidence Rules 63-23), 63(24), 63(25).

1974 Enactment

Note to Subdivision (a)(3). Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States v. Insana,* 423 F.2d 1165, 1169-1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Note to Subdivision (a)(5). Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable", that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression "(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)". The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Note to Subdivision (b)(1). Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Note to Subdivision (b)(2). Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Note to Subdivision (b)(3). Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

Statement against interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner v. Antonio Triano Tile and Marble Co.,* 410 F.2d 238 (D.C.Cir.1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States v. Dovico,* 380 F.2d 325, 327 nn. 2, 4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly v. United States,* 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton v. United States,* 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that event the declarant would not be "unavailable". House Report No. 93-650.

Note to Subdivision (a)(5). Subdivision (a) of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable."

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. [Uniform rule 63(10); Kan.Stat.Anno. 60-460(j); 2A N.J.Stats.Anno. 84-63(10).]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) the Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trial. The committee does not consider it necessary to amend the

rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Note to Subdivision (b)(1). Former testimony.--Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

Note to Subdivision (b)(3). The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability. [Nev.Rev.Stats. § 51.345; N.Mex.Stats. (1973 Supp.) § 20-4-804(4); West's Wis.Stats.Anno. (1973 Supp.) § 908.045(4).]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton v. United States,* 391 U.S. 123 (1968). Bruton held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see *United States v. Mancusi,* 404 F.2d 296 (2d Cir.1968), cert. denied 397 U.S. 942 (1907); where the accused was placed at the scene of the crime, see *United States v. Zelker,* 452 F.2d 1009 (2d Cir.1971). For these reasons, the committee decided to delete this provision.

Note to Subdivision (b)(5). See Note to Paragraph (24), Notes of Committee on the Judiciary, Senate Report No. 93-1277, set out as a note under rule 803 of these rules. Senate Report No. 93-1277.

Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

Note to Subdivision (a)(5). Subsection (a) defines the term "unavailability as a witness". The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

Note to Subdivision (b)(3). The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

Note to Subdivision (b)(5). The Senate amendment adds a new subsection, (b)(6) [now (b)(5)], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement. House Report No. 93-1597.

1987 Amendments

The amendments are technical. No substantive change is intended.

1997 Amendments

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982), *cert. denied*, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. *See, e.g., United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir.1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir.1982), *cert. denied*, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir.1979), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358-59 (8th Cir.), *cert. denied*, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. *Contra United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), *cert. denied*, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

GAP Report on Rule 804(b)(5). The words "Transferred to Rule 807" were substituted for "Abrogated."

GAP Report on Rule 804(b)(6). The title of the rule was changed to "Forfeiture by wrongdoing." The word "who" in line 24 was changed to "that" to indicate that the rule is potentially applicable against the government. Two sentences were added to the first paragraph of the committee note to clarify that the wrongdoing need not be criminal in nature, and to indicate the rule's potential applicability to the government. The word "forfeiture" was substituted for "waiver" in the note.

2010 Amendments

Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor

for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

2011 Amendments

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

No style changes were made to Rule 804(b)(3), because it was already restyled in conjunction with a substantive amendment, effective December 1, 2010.

Notes of Decisions (827)

Fed. Rules Evid. Rule 804, 28 U.S.C.A., FRE Rule 804
Including Amendments Received Through 2-1-19

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VIII. Hearsay (Refs & Annos)

Federal Rules of Evidence Rule 807, 28 U.S.C.A.

Rule 807. Residual Exception

Currentness

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

CREDIT(S)
(Added Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES
1997 Amendments

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 807. Restylization changes in the rule were eliminated.

2011 Amendments

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Notes of Decisions (417)

Fed. Rules Evid. Rule 807, 28 U.S.C.A., FRE Rule 807
Including Amendments Received Through 2-1-19

End of Document

Code of Laws of South Carolina 1976 Annotated
South Carolina Rules of Evidence
Article VIII. Hearsay

Rule 803, SCRE

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

Currentness

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, 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, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however,* that subjective opinions and judgments found in business records are not admissible. The term “business” as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Subsection (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subsection (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a

memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; *provided, however,* that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

(9) Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a

subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject.

(19) Reputation Concerning Personal or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment (to include final judgments in juvenile delinquency matters), entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Credits
[Adopted effective September 3, 1995.]

Notes of Decisions (109)

Code of Laws of South Carolina 1976 Annotated
South Carolina Rules of Evidence
Article VIII. Hearsay

Rule 804, SCRE

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

Currentness

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Credits

[Adopted effective September 3, 1995.]

Notes of Decisions (53)

Rules of Evid., Rule 804, SC R REV Rule 804
Current with amendments received through December 1, 2018.

End of Document

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) CASE NO. 2009-CP-40-05680

BASILIDES F. CRUZ, JOSEPH A. FLOYD, SR., ARTHUR C. GILLAM, III, ALMA C. HILL, BARRY N. MARTIN, CHARLES F. MORRIS, SR., AND JOSEPH A. SMITH,

Plaintiffs,

vs.

CITY OF COLUMBIA,

Defendant.

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) CASE NO. 2013-CP-40-5097

LARRY STRICKLAND, DENIOUS L. DIMERY, AND BAILEY G. McCLINTON,

Plaintiffs,

vs.

CITY OF COLUMBIA,

Defendant.

* * * * * * * * * * * * * * * * *

TRANSCRIPTION OF STATEMENTS OF LEONA PLOUGH

Transcribed By: Eve Wilbanks, RPR and Notary Public

POST OFFICE BOX 21119
CHARLESTON, SOUTH CAROLINA 29413

MS. LEONA PLOUGH: Thank you, Mayor, Council, I appreciate the opportunity. Um, and, Daniel, I appreciate the work -- again, I really do appreciate the work that you've done.

Um, but I understand that the city is really in bad financial straits, and that you have some very difficult decisions to make, both in healthcare and in other -- other aspects of -- of your budget. Um, I really thought that maybe we could work something together that would solve the problem and better it for everyone. But as helpful as Daniel has been, Council Rickenmann has been, we really do see things differently.

Um, at your first public meeting, you acknowledged that you promised the city retirees to provide free healthcare. And you, quite honestly, have always promised and subsidized -- not promised, but subsidized both active and retirees' dependents' healthcare, and you're still doing that to this day. That's to -- I commend you for that.

Council has indicated to us, through

these public hearing processes, that you really no longer can afford to do what you have done in the past in terms of the healthcare and living up to those promises; um, that it was just cost prohibitive.

And this is kind of where we sort of part waters, I think, as Daniel and I look at the numbers. Because as we and a group of us that have been looking at the numbers that Daniel nicely and helpfully have provided to us -- as we looked at it, we saw that in this new healthcare plan that over $3,000,000 will be saved, which is commendable. But you must realize that that $3.3 million really comes out of the pockets of your retirees and your employees, your active employees. That's where that savings comes from.

As Daniel mentioned, 645,000 of that comes out of the pockets of the retirees in the form of increased deductions, co-pays, you know, the whole series of things that happens when you change your healthcare plan. The city will save annually the 645. So it is not a one-time; it's an annual $645,000. The city could use this savings to pay for the retiree

healthcare premiums. They could use this money to pay off any increase in GASB and still have a substantial amount of money left to go towards other liabilities; to the tune of upwards of $245,000 would still be left to help go towards future liabilities in healthcare annually.

So the fact is, that you really can afford to fulfill your promise made to retirees. I was told yesterday in talking with a member of city council that -- in these words, I cannot justify giving up the savings, to which I say to you and I said to this person, the 45 -- the $645,000 in savings is generated out of the pockets of your retirees. Yes, you can use that money -- that savings, if you will -- to the benefit of your retirees. Yes, you can take that savings and grandfather the retirees. Others have done it; you can too.

Councilman Cromartie, back in March, you were quoted as saying, Maybe we can grandfather many of them, maybe we can make a difference. And I would say to you, and I would say to all of you, yes, you can; you can

make a difference. You can do exactly -- that is exactly what we are asking that you consider; that you consider grandfathering the retirees and paying with it from the funds that are in your -- will be your savings generated through this plan.

So you have a true -- you truly have an opportunity today, an opportunity to help keep your promise, an opportunity to fund that promise, offer what your retirees will pay in out of their own pockets. And I really hope and pray you will give serious thought to this, and that you will do the right thing. Thank you.

C E R T I F I C A T E

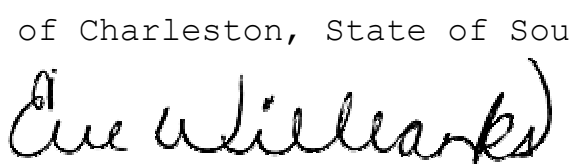
STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did transcribe the foregoing statements; and that the transcript is a true record of the statements given by the parties.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 14th day of December, 2018, in the City of Charleston, County of Charleston, State of South Carolina.



Eve Wilbanks,
Registered Professional Reporter
and Notary Public

My commission expires:
November 18, 2024

Dear Sir,

On [redacted] I requested to be treated For Hep "C". My sister was on Dialisis and I need to be Free of the disease before I could even be considered as a candidate as a donor.

I was to be tested but was told my numbers too low for treatment and would be tested every year there after.

In [redacted] I had a quadruple by pass, while there they performed a liver biopsy where it was discovered that I am in Stage 4 cirhosis.

I can't help but wonder if my disease would be this advanced had I received the treatment.

At my urging the test was performed again this morning. I'm currently waiting for results.

I'm to see if there is any legal action that can be taken.

I have the original letter and the request and refusal.

Anything that can be done will be appreciated. Thank you,

[redacted]

South Carolina Bar

Continuing Legal Education Division

But It Happens All the Time, the Admissibility (or Not) of Other Similar Incidents

Julie L. Moore

MORE OF THE SAME: ADMISSIBILITY OF EVIDENCE OF OTHER SIMILAR INCIDENTS IN SOUTH CAROLINA PRODUCT DEFECT CLAIMS

2019 It's All A Game: Top Trial Lawyers Tackle Evidence
February 15, 2019

Julie L. Moore
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I. PROOF OF A DEFECTIVE PRODUCT.

"Defectiveness lies at the center of products liability law. Merely making and selling a product that causes accidental harm to another fails to provide a sufficient basis for moral or legal responsibility. Instead, the defendant is liable in products liability law only if the defendant supplied a product that was deficient in some respect, rendering the product 'defective.'"[1]

There are three types of defects the plaintiff in a products liability suit can allege:

- Manufacturing Defect
- Warning Defect
- Design Defect

Regardless of the type of defect, the plaintiff must prove that a product contains an excessive level of danger. As Professor Owen explained:

> Regardless of the underlying cause of action, plaintiffs in products liability cases ordinarily must establish that something was wrong with the product. Virtually every product is dangerous in some manner and to some extent, at least when put to certain uses. But most such dangers are simple facts of physics, chemistry, or biology. There is no reasonable way to avoid them. For such natural risks of life, product users, rather than product suppliers, properly bear responsibility for avoiding and insuring against any injuries that may result. But some products carry excessive risks that users and consumers should not fairly be required to shoulder, either because the risks are unexpected, or because they feasibly can be avoided by manufacturers or other product suppliers. And so the law properly requires that a product contain some excessive level of danger before shifting the loss to the seller. The label that the law attaches to products carrying such excessive risks is "defective."

Id. at 2.

[1] David G. Owen, *Proof of Product Defect*, 93 KY. L.J 1, (2004) (citing David G. Owen, *The Moral Foundations of Product Liability Law: Toward First Principles,* 68 NOTRE DAME L. REV. 427, 461 (1993)).

II. ELEMENTS OF PRODUCT DEFECT CLAIMS IN SOUTH CAROLINA.

A plaintiff can bring a product defect claim under three theories of liability:

1. Negligence
2. Strict Liability
3. Warranty

Regardless of the theory of liability, a plaintiff must prove:

- He was **injured** by the product;
- The injury occurred because the product was in a **defective condition**, unreasonably dangerous to the user; and
- That the product at the time of the accident was in essentially the **same condition** as when it left the hands of the defendant.

III. OTHER SIMILAR INCIDENTS.

The phrase "Other Similar Incidents" typically refers to evidence of other incidents involving the same or similar products to the product at issue in a given lawsuit. You will often see this evidence referred to simply as "OSI."

IV. DOES EVIDENCE OF OTHER SIMILAR INCIDENTS MATTER?

Very much—to both the plaintiff and the defendant. The admission or exclusion of OSI can be a gamechanger in a product defect case.[2]

OSI can be used for a variety of reasons, including to demonstrate:

1. The existence of a defect.
2. Notice of the defect by a defendant.
3. A causal relationship between the defect and the injury.

Said differently: OSI may be probative of a product's dangerous condition, notice to the manufacturer of the condition, and/or causation.

[2] *See* Owen, *supra* note 1, at 20 ("Plaintiff attorneys consider other-accident evidence to be an especially powerful form of proof, while defense attorneys view it as largely, if not entirely, irrelevant and prejudicial to the fair adjudication of a products liability case.").

V. START WITH THE EVIDENTIARY RULES.

Rule 401, SCRE – Definition of "Relevant Evidence"

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

- Relevant evidence is admissible unless some other rule otherwise provides.
- Irrelevant evidence is not admissible.

Rule 403, SCRE – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

- This is one rule that can work to bar otherwise admissible evidence.
- Potential prejudice to a defendant manufacturer is a major concern in OSI cases.

VI. ADMISSIBILITY OF *LACK* OF OSI IN SOUTH CAROLINA.

In *Gantt v. Columbia Coca-Cola Bottling Co.*, the plaintiff sued for injuries suffered from drinking a Coca-Cola which allegedly contained bluestone, a poisonous substance. The trial court refused to permit the defendant to introduce evidence that it had never had any prior complaints of bluestone in Coca-Cola. The Supreme Court reversed:

> we think it would have been entirely relevant for the plaintiff in the case at bar to offer evidence, provided of course the facts warranted it, that at about the same time as that of the incident in question some other bottle or bottles of Coca-Cola put out by the defendant company were found to contain bluestone. And by the same token we see no good reason why it would not have been equally relevant

> in behalf of the defendant company for it to offer evidence if warranted by the facts, tending to show that the other Coca-Cola bottled by it at about that time was free from bluestone. Hence testimony that no charge or complaint had ever been made that bluestone had been discovered in Coca-Cola bottled by this company, except in this particular case, would have been a supporting and relevant circumstance to that end. Applying the rule of logic (or its equivalent here, common sense), which really determines the matter of relevancy, such evidence would have at least some probative value to be considered by the jury especially in the light of the testimony that the bottling of Coca-Cola by the defendant company is a mass production--84 bottles or more a minute; and hence that a great number of bottles might go through the same process at the same time and under the same conditions.

193 S.C. 51, 64-65, 7 S.E.2d 641, 647 (1940).

VII. ADMISSIBILITY OF OSI IN SOUTH CAROLINA.

A plain statement of South Carolina's rule on the admissibility of other similar incident evidence:

> Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between them tending to prove or disprove some fact in dispute. *Brewer v. Morris*, 269 S.C. 607, 610, 239 S.E.2d 318, 319 (1977). This rule, which governs the admissibility of prior accidents, transactions, or happenings, is based on "relevancy, logic, and common sense." *Id.* Because evidence of other accidents may be highly prejudicial, "[a] plaintiff must present a factual foundation for the court to determine that the other accidents were 'substantially similar' to the accident at issue."

Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (quoting *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C 1995)).

VIII. THE TEST: EVIDENCE OF OSI MUST BE "SUBSTANTIALLY SIMILAR" BECAUSE IT MAY BE "EXTREMELY PREJUDICIAL."

"Courts require a plaintiff to establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial." *Watson v. Ford Motor Co.*, 389 S.C. 434, 454, 699 S.E.2d 169, 179-80 (2010).

Courts consider the following factors when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect:

1. the **products** are similar;
2. the alleged **defect** is similar;
3. **causation** related to the defect in the other incidents; and
4. exclusion of all reasonable **secondary explanations** for the cause of the other incidents.

Id. at 453, 699 S.E.2d at 179 (quoting *Whaley*, 362 S.C. at 483, 609 S.E.2d at 300).

IX. BURDEN OF PROVING SUBSTANTIAL SIMILARITY.

The plaintiff bears the burden of proving that OSI evidence is "substantially similar" to incident in her case.

X. COURT'S DETERMINATION OF SUBSTANTIAL SIMILARITY.

The trial court makes the legal determination that the proffered OSI evidence satisfies the "substantially similar" requirement. The trial court's rulings on the admissibility of evidence are reviewed on appeal for abuse of discretion.

XI. HOW SIMILAR DOES OSI NEED TO BE TO BE "SUBSTANTIALLY SIMILAR"?

Duncan v. Ford Motor Company, 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009). The Court of Appeals affirmed the trial court's determination that evidence of the reasons for a 1999 Ford recall of panther platform line of vehicles was substantially similar to the alleged switch failure in the plaintiffs' Ford Expedition. The 1999 recall did not include a recall of the Expedition. Here, the plaintiffs' Expedition caught fire and destroyed their home in 2005.

Substantially Similar: The facts highlighted in the opinion include:

1. Ford conceded that the recalled vehicles and the vehicle at issue contained a switch with the same design and same component parts.

2. Ford's expert and the plaintiffs' expert both testified that the cause of the switch failure was "identical" in the recalled vehicles and the subject vehicle.

Notice to Ford: The opinion noted that plaintiffs' expert testified that Ford had notice of the defect with the switch prior to the manufacture of the plaintiffs' 2000 Expedition.

Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E.2d 169 (2010). The trial court erred in admitting evidence of similar incidents involving sudden acceleration of Explorers.

Not Substantially Similar: The facts highlighted in the Supreme Court's opinion include:

1. The products were made in different years.

2. The models were different—the OSI models were British and positioned the driver's seat on the right side.

3. There was no proof of similarity in causation.

4. The plaintiff failed to exclude reasonable explanations for the cause of the other incidents.

Failure to Offer Expert Testimony: The Court noted that the plaintiff only offered testimony of other drivers and did not offer expert testimony to show that the defect in the other incidents was similar.

Not Relevant: "Accordingly, this evidence was not relevant because Respondents failed to show that evidence of these incidents made the existence of the EMI defect in this case more probable."

Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010). The Supreme Court reversed and remanded the case for reasons other than the trial court's admission of OSI. In its opinion, the Court offered a discussion of pre-manufacture rollover data as a "general guideline" for the new trial.

Pre-Manufacture Evidence: Ford contended that the admission of evidence of pre-manufacture comparative rollover data failed to satisfy the "substantially similar" test because the plaintiff failed to show a similar cause in the other accidents to the rollover of the Bronco II at issue.

The Court disagreed. "Yet, where the precise cause of an accident is not known, Bronco II rollover accident data has relevance when compared to rollover accident data of other vehicles in class. This relevance is linked directly to Branham's claim that the design of the Bronco II caused it to

have an unreasonably dangerous tendency to rollover." 390 S.C. 203, 233, 701 S.E.2d 5, 21 (2010).

Post-Manufacture Evidence: The Court separately analyzed post-manufacture evidence of comparative rollover data. The Bronco II at issue was manufactured in 1986. At trial, Branham offered rollover data that came to light after 1986, including a memo discussing comparative testing done by Consumer Report magazine and various tests and evaluations Ford conducted.

The Court clarified that post-distribution evidence is "evidence of facts neither known nor available at the time of distribution." 390 S.C. 203, 227, 701 S.E.2d 5, 17 (2010).
The Court made clear:

> When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or "reasonably attainable" at the time of manufacture. The use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper.

390 S.C. 203, 227, 701 S.E.2d 5, 17-18 (2010).

Graves v. CAS Med. Systems, 401 S.C. 63, 735 S.E.2d 650 (2012). The Supreme Court affirmed the trial court's exclusion of expert testimony and grant of summary judgment. The product at issue was a monitor that tracked infant breathing and heart rates. The plaintiffs claimed that the monitor's software design was defective and caused the monitor to fail to alert.

The plaintiffs' software design experts concluded that the software error was the most likely cause of the monitor's failure to alert based, in part, on other reported incidents of alarm failure—which consisted of approximately fifty reports from the FDA where an alarm on the defendant's monitor allegedly failed to sound during an event.

Expert Testimony: The Court agreed with the trial court that the experts improperly relied on the FDA reports to bolster the claim that the product at issue failed as the result of software error.

> While the products in the FDA report are similar to the one here, the record contains no evidence suggesting any further connection to or whether a software error was even involved in these cases. In order to deem these other incidents substantially similar, we would have to automatically equate an alleged failure with a software defect claimed by the Graves without any evidentiary basis for doing so. This we will not do.

401 S.C. 63, 77, 735 S.E.2d 650, 657 (2012).

South Carolina Bar

Continuing Legal Education Division

Expert Testimony, Will We Ever Settle Its Admissibility? Yes—Today!

Byron E. Gipson

Expert Testimony, Will We Ever Settle Its Admissibility? Yes—Today!

This is a draft of a post to be published soon on Justice Few's evidence blog at https://artofevidence.com

The study of the admissibility of expert testimony took an interesting turn on July 1, 1975, but we didn't really know that until June 28, 1993. The first date is the effective date of the Federal Rules of Evidence. The second date, as many of you immediately recognized, is the day the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). It's an important point, however, that not as much changed on these dates as everyone seems to think. Focusing on what did *not* change will help us get to the crux of the challenge of understanding the admissibility of expert testimony. I will divide this discussion into four sections—the simple; the philosophical; the practical; and the technical.

The Elements of the Foundation for Rule 702 of the Federal Rules of Evidence

Let's start this discussion with ***the simple***. Here are the elements the proponent of expert testimony must show to lay the foundation for its admission:

1. The witness must be "qualified"
2. The "expert's … knowledge" must "help the trier of fact"
3. The testimony must meet the requirement of "reliability," which requires:
    - the testimony must be "based on sufficient facts or data"
    - the testimony is "the product of reliable principles and methods"
    - the expert has "reliably applied the principles and methods to the facts"

These are key words. They are the words of Rule 702 of the Federal Rules of Evidence. In its entirety, the Rule provides,

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Is that enough for you to master the study of expert testimony? No, because those are just words. But they are the key words. Even if your state Rule is different, these are still the key words. To

understand what those words mean to practicing lawyers and trial judges, however, and how to apply them in trials, we have to move on to the philosophical, the practical, and the technical.

Reliability!

This is ***the philosophical***. To get to what I think is the key philosophical point in the admissibility of expert testimony, let's look at a quick history. Until *Daubert*, no court had definitively explained the role of Rule 702 in the admissibility of expert opinion. Until then, most courts used the "general acceptance" test from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as the test for admissibility of expert opinion. In *Daubert*, the Court explained "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence." 509 U.S. at 587. There remain, however, two interesting things about the "*Frye* test" that inform modern trial lawyers on how to introduce expert testimony, and also how to oppose its admission. First, an analysis of *Frye* teaches us that the central philosophy regarding the admissibility of expert opinion has not changed since 1923, and in particular, did not change with *Daubert* in 1993. While there are three primary elements to the "foundation" for expert testimony, the admissibility of a particular opinion often really boils down to the reliability of the underlying principles and methods the expert used in arriving at the opinion (knowledge) to be presented to the jury in the trial. Second, the way the court expressed the "*Frye* test" is simply awesome! Though it is no longer specifically applied in trials, the "*Frye* test" still helps us to understand the modern requirement of reliability.

Here is how *Frye* came about. James Alphonso Frye was charged with murder. At his trial in the D.C. District in the early 1920's, Frye offered into evidence the testimony of an expert witness who was prepared to testify Frye was telling the truth when he denied guilt. As it does even today in almost every challenge to the admissibility of an expert's opinion, the admissibility of the opinion came down to reliability. Reviewing on appeal the District Court's decision to exclude the opinion, the D.C. Circuit looked at it as two questions:

1. How did Frye's expert arrive at this opinion?

2. Was this method sufficiently reliable that the opinion should be allowed into evidence?

The D.C. Circuit explained all this in compelling terms. As to the first question, the answer was that the expert used an early version of the modern "lie detector" test. The court stated:

> In the course of the trial counsel for defendant offered an expert witness to testify to the result of a deception test made upon defendant. The test is described as the systolic blood pressure deception test. It is asserted that blood pressure is influenced by change in the emotions of the witness, and that the systolic blood pressure rises are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime,

> accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the examination touches the vital points in respect of which he is attempting to deceive the examiner.

293 F. at 1013-14.

The D.C. Circuit then focused in on the second question—the reliability of the method the court had just described. The court noted the challenge of distinguishing between a method with an acceptable level of reliability and a method that is too speculative. Here is where the court really shone. It stated,

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs*.

293 F. at 1014. The Supreme Court quoted this in *Daubert*, and called it an "infamous passage." The emphasis was added in *Daubert*. 509 U.S. at 585-86.

There aren't many judges left who can write in these epic, "infamous," terms, and it may take today's reader several times reading through it to get past the drama of the language, but the *Frye* court is writing about reliability! Thus, in 1923, as today, the philosophy of the admissibility of expert testimony focused on the reliability of "the thing from which the deduction is made." In modern terms, *Frye* tells us the principles and methods the expert used in arriving at the opinion to which he is now proposing to testify must have been "sufficiently" reliable.

In *Frye*, and for seventy years afterwards, sufficient reliability was measured by "general acceptance" in the applicable field of study. *Daubert* changed how we measure reliability, but it did not change the importance of reliability. When the *Daubert* Court held the "austere standard" of *Frye* was too "rigid" a test, and ruled that "the *Frye* test was superseded by the adoption of Federal Rules of Evidence," the philosophical premise of *Frye* remained—reliability is the focal point for determining the admissibility of expert testimony. In *Daubert*, the Court applied the requirement of reliability in the context of Rule 702, and left us with the three primary elements I listed above:

1. The witness must be “qualified”
2. The testimony must “help the trier of fact”
3. The proponent must meet the requirement of “reliability”

Is that all you need to know? No! We covered only the simple and the philosophical. Now we have to go practical, and then get technical.

"How Do You Know That?"

This is ***the practical***. Don't lose me here; I promise to make this relevant. A couple of years ago, I was trying to buy my son a used pickup truck. I doubted my own competence to determine if I was getting a good truck, and I really doubted the seller's willingness to shoot me straight. The seller assured me the truck had been fully checked out by an independent mechanic. I talked to the mechanic, who said, "You got yourself a real cream puff!" Being an experienced trial judge, I immediately recognized his statement as an opinion, although I needed Google to confirm what a "cream puff" is,

> More often than not, gently used cars previously owned by an elderly person are sold instead of gifted as an estate after the owner has died. "Cream puff" is the car dealer term given to those cars, as they are both inexpensive and in great condition.

Refusing to accept the mechanic's opinion at face value, I conducted what was basically a *Daubert* hearing. I asked him the critical question that is always at the center of such an inquiry, "How do you know that?" He was an experienced witness. Here's what he told me,

- "Look, I'm qualified. I've been a mechanic on Chevy pickups all my adult life."
- "And I know you need help, because you don't know anything about trucks."
- "And I didn't just guess at this. I checked this truck out using my Solus Diagnostic Scanner. If you need me to go one at a time through all the modules the scanner tests, I will. But this "Scanner" is a sophisticated computer that examines every computer module in the truck, and if there had been any malfunction in the truck over the last six months or more, the scanner would have given me a specific 'trouble code' I could use to follow up for further inspection. This truck came out clean. It's a cream puff!"

I overruled my own objection, and bought the truck. Five years later, it's still a "cream puff!"

In this practical example—not different from similar inquiries all of us make every day—I did the same thing Rule 702 asks trial judges to do to fulfill their gatekeeping responsibility. I engaged the purported expert in a structured conversation in which I asked the expert to explain to me *how he knows* what he contends he knows. In fact, a trial lawyer who visualizes a *Daubert* hearing as a structured conversation with a witness in which the witness explains to the trial judge "how he knows that" is going to be very effective.

Only in an actual *Daubert* hearing, the trial judge is going to expect you to get a little more technical.

Understanding the Elements of the Rule 702 Foundation

Now we are down to ***the technical***. As this post is already too long, however, I am going to separate the "technical" discussion of each element out into three posts, which you will be seeing shortly. Stay tuned!

South Carolina Bar

Continuing Legal Education Division

Rules of Evidence from *L'Affaire Russe*

Christopher P. Kenney

Christopher P. Kenney
Richard A. Harpootlian, P.A.

Rules of Evidence from L'affaire Russe

DISCLAIMER

The accused are presumed innocent until proven otherwise beyond a reasonable doubt.

For the purpose of this discussion, allegations by the Special Counsel's Office (SCO), US Attorneys' offices with related matters, and information reported in the public record are assumed to be accurate. This presentation is a discussion of how they might be proven through rules of evidence.

CONSPIRACY OR CONSPIRATORIAL?

CASE UPDATE

DISCUSSION

Roadmap

RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(14) Records of Documents Affecting an Interest in Property. The record of **a document purporting to establish or affect an interest in property**, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property **if the matter stated was relevant to the purpose of the document**, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

McGuire v. Walker, 188 W. Va. 214, 215, 423 S.E.2d 617, 618 (1992)

"The appellant argues that this finding is directly contradicted by the evidence in this case. She points to a number of deeds, including one recording the sale to J.M. Bowling by the Commissioner of School Lands. The later deeds repeatedly refer back to this school lands sale deed.

These deeds are admissible hearsay evidence."

(footnote omitted)

RULE 901: REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(9) Process or System. Evidence **describing a process or system used to produce a result** and **showing** that the process or system **produces an accurate result**.

State v. Brown, 424 S.C. 479, 482-90, 818 S.E.2d 735, 736-41 (2018)

The central issue before the Court concerns authentication of Global Positioning System (GPS) monitoring evidence. Specifically, is the requirement for authentication satisfied by testimony that GPS data is accurate because "[w]e use it in court all the time"? The answer is an unqualified "no."

…

Thus, we hold that the State needed to present "[e]vidence describing [the] process or system used to produce" the GPS records and "showing that the process or system produces an accurate result" in accordance with Rule 901(b)(9), SCRE, to authenticate Wilson's GPS records in this case.

1. See also State v. Patterson, No. 2016-000863, 2019 WL 99151, at *3-4 (S.C. Ct. App. Jan. 4, 2019) (State established authenticity through testimony of witnesses with first-hand knowledge of procedures for collecting, storing, maintaining, and testing DNA profile and who reviewed and verified results (citing Rule 901(b)(1) & (4), SCRE)).
2. See also United States v. Recio, 884 F.3d 230, 236–37 (4th Cir. 2018) (government met burden with affidavit from Facebook records custodian and evidence account was associated with defendant's email).
3. See also Six v. Generations Fed. Credit Union, 891 F.3d 508, 512 (4th Cir. 2018) (explaining difference between authenticity and authentication (i.e., failure to follow Rule 901 procedure)).

RULE 404:
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTION; OTHER CRIMES

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

United States v. Sterling, 860 F.3d 233 (4th Cir. 2017)

- Circumstantial evidence case against CIA agent charged with disseminating classified information to a journalist.
- The government introduced four classified documents seized from defendant's home to establish modus operandi was to store classified CIA materials at residence.
- To be admissible under Rule 404(b), the evidence must be (1) relevant to an issue other than the general character of the defendant, (2) necessary to prove an essential claim or element of the charged offense, and (3) reliable. Subject to Rule 403 balancing.
- Mere involvement in prior criminal activity is not itself a sufficient nexus to the charged conduct if prior activity is not related in time, manner, place, or pattern of conduct.

RULE 608:
EVIDENCE OF CHARACTER, CONDUCT AND BIAS OF WITNESS

(c) Evidence of Bias. Bias, prejudice or **any motive to misrepresent** may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Smalls v. State, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840 (2018), reh'g denied (Mar. 29, 2018)

- "Evidence of a witness's bias can be compelling impeachment evidence, and for that reason 'considerable latitude is allowed' to defense counsel in criminal cases 'in the cross-examination of an adverse witness for the purpose of testing bias.'" (citation omitted)
- Anything having a tendency to throw light on the accuracy, truthfulness, and sincerity of a witness.
- Any fact may be elicited which tends to show interest, bias, or partiality of the witness.

RULE 801: DEFINITIONS

(d) Statements Which Are Not Hearsay. A statement is not hearsay if -

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or **(B) a statement of which the party has manifested an adoption or belief in its truth**, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

United States v. Recio, 884 F.3d 230, 234–35 (4th Cir. 2018)

"To constitute an adoptive admission, the Government must be able to point to 'sufficient foundational facts from which the jury *could* infer that the defendant ... acquiesced in the statement.'

Foundational facts were present here. Namely, Recio did not use quotation marks, attribute the lyric to the artist, or provide other signals to indicate to his Facebook audience that someone else authored the words in his post. Nor did he include additional explanation, commentary, or criticism that could refute an inference that he adopted the lyric as his own words. In addition, Recio slightly editorialized the song lyric. His post stated, 'Kuz I'll B Damn If My Life Get Took!!'; the original lyric is 'cause I'll be damned if I get my life took.' **Based on these facts, a jury *could* infer that by posting the lyric on Facebook, Recio meant to adopt it as his own words."**

(citation omitted, bold added)

RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, 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, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6) does not require that the records be created by the business having custody of them.

A "qualified witness" need not personally participate in creation of the document or know who actually recorded the information. Qualified witness must be familiar with the record-keeping procedures of the organization.

Qualified witness must be able to testify that the record was kept in the course of a regularly conducted business activity and also that it was a regular practice of that business activity to make the record.

Gen. Ins. Co. of Am. v. United States Fire Ins. Co., 886 F.3d 346, 358 (4th Cir. 2018), as amended (Mar. 28, 2018)

State v. Thompson, 420 S.C. 386, 392–93, 397, 803 S.E.2d 44, 47, 49 (Ct. App. 2017), cert. granted (Mar. 7, 2018)

Defendant moved to suppress a trespass notice banning him from victim's apartment complex.

"We find the letter was relevant to the element of consent in first-degree burglary. … The letter shows Thompson was not a resident of the apartment complex."

"We find the letter was not impermissible hearsay because it fell under the business records exception."

RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been **made or adopted by the witness when the matter was fresh in the witness' memory** and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

RULE 701:
OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are **rationally based on the perception** of the witness, (b) are **helpful to a clear understanding** of the witness' testimony or the determination of a fact in issue, and (c) **do not require special knowledge, skill, experience or training.**

State v. Hurell, 424 S.C. 341, 351–53, 818 S.E.2d 21, 26 (Ct. App. 2018)

Hurell first argues the trial court erred by allowing Shelby Bradt, the former girlfriend of Hurell's brother Tramaine, to testify the man on the videotape was not Tramaine. Hurell argues the evidence was confusing to the jury. The State argues the evidence was relevant to eliminate alternative suspects because the evidence showed the suspect went into the apartment where Hurell's sister lived and anyone who also had a connection to Hurell's sister could have been a suspect.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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RULE 613:
PRIOR STATEMENTS OF WITNESSES

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. **Extrinsic evidence** of a prior inconsistent statement by a witness **is not admissible unless** the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. **If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.** However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

State v. Washington, 424 S.C. 374, 397–98, 818 S.E.2d 459, 471 (Ct. App. 2018), reh'g denied (Sept. 20, 2018)

"At any rate, even assuming for the sake of argument that the issue is properly preserved, we find no abuse of discretion by the trial court because no proper foundation was laid for admission of the evidence as a prior inconsistent statement. … 'The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement.' State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004)."

State v. Barnes, 421 S.C. 47, 57–58, 804 S.E.2d 301, 307 (Ct. App. 2017)

"Once the State confronted Ms. Barnes with the substance of her previous statement, the time and place it was made, and the person to whom it was made, and she denied making it, the foundation required by Rule 613(b) was complete.

The rule does not require extrinsic evidence of the prior statement be admitted immediately. It merely authorizes the use of extrinsic evidence to prove the inconsistency. Because the impeaching evidence is "extrinsic," the avenue of its admissibility may not always run through the witness to be impeached by it, for that witness may not be competent to authenticate the extrinsic evidence.

... We are not prepared to require a witness who has denied making a prior inconsistent statement to remain glued to the stand until thoroughly impeached, so a party can ask the witness to "explain" her earlier denial."

(citations omitted).

RULE 804: HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant -

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, **or so far tended to subject the declarant to civil or criminal liability,** or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017).

- Convicted by a jury of murder, kidnapping, second-degree burglary, and attempted armed robbery.

- "Barnes next argues the trial court erred in admitting the testimony of Wright and Schaefer under the hearsay exception for statements against penal interest, Rule 804(b)(3), SCRE. We agree." Barnes, 421 S.C. at 53, 804 S.E.2d at 305.

Barnes, 421 S.C. at 55, 804 S.E.2d at 305–06; see also State v. Fuller, 337 S.C. 236, 244–45, 523 S.E.2d 168, 172 (1999) (adopting Williamson)

Williamson v. United States, 512 U.S. 594, 600–01[ ] (1994), is the starting point for considering admissibility of statements against penal interest:

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

.

State v. Young, 420 S.C. 608, 614, 803 S.E.2d 888, 891 (Ct. App. 2017), cert. denied (Mar. 7, 2018).

"Additionally, [Barnes' mother] Latoya testified she received a letter from Barnes dated March 31, 2014, while he was in the detention center. Over Young's objection that it was inadmissible hearsay and violated Bruton v. United States, the letter was entered into evidence. In the letter, Barnes admitted his role in the shooting and implicated Young."

[T]he term "statement" as used in the text of Federal Rule of Evidence 804(b)(3) refers to **a "single declaration or remark."** Rejecting the broader construction that a "statement" can encompass a narrative or extended declaration, the Court reasoned:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, **even reasonable people who are not especially honest**, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. **One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.**

Young, 420 S.C. at 617–18, 803 S.E.2d at 893 (quoting Williamson, 512 U.S. at 599–600).

RULE 805:
HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 804: HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant -

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RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of Regularly Conducted Activity. A memorandum, report,[or] record… made at or near the time by… a person with knowledge, if kept in the course of a regularly conducted business activity…

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible.

RULE 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, **that diligent search failed to disclose** the record, report, statement, or data compilation, or entry.

RULE 401:
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

State v. Hurell, 424 S.C. 341, 818 S.E.2d 21 (Ct. App. 2018)

Screen shots from shoe seller's website showing tread pattern of shoe similar to perpetrator's were relevant to establishing identity of perpetrator where defendant's social media page contained photographs of him wearing similar red and black shoes and tread on that brand was similar to bloody footprint.

United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency, 912 F.3d 731, 735–36 (4th Cir. 2019).

Oberg contends that the Audit was relevant for several reasons. First, he argues that the Audit's critical findings tended to establish scienter—i.e., that desire for personal gain motivated PHEAA officers to submit false claims. This argument fails because unlike the securities fraud cases on which Oberg relies, FCA claims require a relator to show only that the defendant had *knowledge* of the illegality of its actions, rather than *specific intent* to defraud. As the district court correctly explained: "It doesn't really make any difference whether they were operating well or not well or whatever. The only issue in this case is: Did they commit fraud and file a false claim?"

(emphasis original, citations omitted)

JURY PRACTICE IN POST-TRUTH AMERICA: A CAUTIONARY NOTE

Richard A. Harpootlian
Christopher P. Kenney[*]

Trial lawyers and judges like to regale jurors with the fact that the word "verdict" comes from the Latin *veredicto,* meaning "to speak the truth."[1] When a jury reaches a verdict, it speaks truth by resolving factual disputes between the parties. Did the defendant shoot the victim? Was the plaintiff injured when the contract was breached? Disputed facts are proven or disproven through the presentation of evidence, testimony and tangible objects that make the existence of a fact more or less probable.[2] This basic formula—evidence proving facts, facts informing truth—is fundamental to our notion of ordered liberty and the constitutional guarantee of a jury trial.

Truth-seekers are a beleaguered lot in the aftermath of the 2016 presidential election, a campaign whose winner was propelled to victory by demagoguery, racism, sexism, and a willful resistance to any fact that challenged these grotesque views. While ambitious public office-seekers have long stretched the truth, Donald Trump's indifference to it altogether confounded political opponents and challenged the fourth estate to reconcile its commitment to objectivity with a documentarian's moral obligation to call a lie a lie.[3] There is

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Dick Harpootlian is a former chair of the South Carolina Democratic Party and early supporter of Barack Obama. In 1990, Harpootlian was elected district attorney for the judicial circuit that includes Columbia, South Carolina. In 1983, while serving as the district's deputy prosecutor, he obtained a conviction and death sentence for Donald "Pee Wee" Gaskins, the state's most notorious serial killer. During his more than 30 years as a prosecutor, defense attorney, and civil litigator, Harpootlian has tried hundreds of cases to a jury verdict.

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[1] *See, e.g.*, Ralph King Anderson, Jr., South Carolina Requests to Charge–Civil, 2009, § 1-1 (preliminary charge on general matters).

[2] *See* Fed. R. Evid. 401 (defining relevant evidence as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.")

[3] Liz Spayd, *When to Call a Lie a Lie*, N.Y. TIMES, (Sept. 20, 2016), http://www.nytimes.com/2016/09/20/public-editor/trump-birther-lie-liz-spayd-public-editor.html.

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Rules of Evidence from L'affaire Russe

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Truth-seekers are a beleaguered lot in the aftermath of the 2016 presidential election, a campaign whose winner was propelled to victory by demagoguery, racism, sexism, and a willful resistance to any fact that challenged these grotesque views. While ambitious public office-seekers have long stretched the truth, Donald Trump's indifference to it altogether confounded political opponents and challenged the fourth estate to reconcile its commitment to objectivity with a documentarian's moral obligation to call a lie a lie.[3] There is something pernicious about disputing facts by rejecting evidence outright. It threatens clear thinking and poses the ultimate distraction by attacking the predicate to any informed policy debate.[4] While Hillary Clinton was a predictably flawed candidate,[5] she marshaled the facts against her general election opponent with lawyerly competence. An alarmingly large electoral plurality did not care. Lawyers and litigants should find this troubling because, more than the nation's political institutions, the jury system's reliance on evidence-based reasoning is fundamental to its operation and the predictable administration of justice.

The assault on evidence-based reasoning was forefront in our minds the week after Trump's surprise election victory as we sat in a Richland County courtroom next to Jermaine Davis—a 16-year-old, African-American male charged with murder—and prepared to strike 12 jurors and two alternates to hear evidence the State claimed would prove Jermaine shot and killed a man walking home from a neighborhood convenience store. Since our investigation revealed facts casting serious doubt on the State's allegations, we believed Jermaine would be exonerated

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[*] Dick Harpootlian and Chris Kenney are trial lawyers at Richard A. Harpootlian, P.A. This article was previously published at 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 131 (2017); THE JUSTICE BULLETIN, SCAJ (Winter 2017); and THE PRAIRIE BARRISTER, NE Asso. Trial Attys., Vol. 23, No. 3 (Fall 2017).

1 *See, e.g.*, Ralph King Anderson, Jr., South Carolina Requests to Charge–Civil, 2009, § 1-1 (preliminary charge on general matters).

2 *See* Fed. R. Evid. 401.

3 Liz Spayd, *When to Call a Lie a Lie*, N.Y. TIMES, (Sept. 20, 2016).

4 *See* Masha Gessen, *Arguing the Truth with Trump and Putin*, N.Y. TIMES (Dec. 17, 2016).

5 Jim Morrill, *S.C. Democrat tries to jumpstart Biden bandwagon*, CHARLOTTE OBSERVER, (Aug. 18, 2015) ("'I don't believe [Clinton] can beat the Republican in 2016,' Harpootlian says.").

if jurors followed the evidence. As our recent trial work alerted us to the threat posed by evidence-adverse jurors, we endeavored to do what counsel must in the current litigation environment: identify and exclude them.

* * *

Jermaine's representation was an unusual one for our office. Jermaine is a ward of the State who had spent nine years in the "care" of the Department of Social Services bounced between 15 foster placements and two group homes. During summer 2016, he ran away from a group home in Columbia and was living on the streets when he was arrested by the Richland County Sheriff's Department and charged in the shooting. When our practice takes a criminal representation, it routinely quotes a six-figure fee. Jermaine fired his public defender and hired our office for five ($5) dollars.

Jermaine gave the police a written statement denying he shot the victim. They charged him anyway. The State had no DNA, no fingerprints, and no eyewitnesses linking Jermaine to the killing. The only witness was a woman who heard shots outside her apartment window followed by the revving of a car engine and the squealing of tires. A ballistics report on the bullet retrieved from the victim's chest indicated the murder weapon was likely a semi-automatic pistol, but police found no shell casings at the scene. Nor was the victim robbed of his cash, wallet, or cell phone. This, and other circumstantial evidence, suggested a drive-by shooting—a theory inapposite to the State's theory Jermaine followed the victim from the convenience store and shot him over a brief verbal altercation some three days earlier.

Testimony from star prosecution witnesses cast further doubt on this theory and the soundness of the police's investigation. When the State called Jermaine's 16-year old girlfriend to testify she saw him with a gun the day of the shooting, she testified she did *not* see him with a gun that day, but the story she told police actually occurred earlier that week. She explained the police pressured her to change her story, threatened to charge her as an accessory to murder, and showed her a holding cell. The girl's mother corroborated this account, explaining her teenage daughter was so visibly distraught during the interrogation she could see the girl's heart beating in her chest. In fact, the last time Jermaine's girlfriend saw the gun, it was in the home of the State's other key witness: Terrance.

Terrance, another black, 16-year-old youth, was living in the apartment of a woman who took him in after his mother kicked him out. He befriended Jermaine and the boys were frequently seen at the convenience store together including the night of the murder and three days earlier when both had words with the victim. The only DNA recovered showed that Terrance, or "T", had worn Jermaine's hoodie—the hoodie police claimed concealed the gun the night of the shooting. The alleged murder weapon was never recovered, but was last seen in a purse behind the sofa in the apartment where T was living. Police recovered the empty purse, not behind the sofa, but in T's room. After police arrested him, T claimed Jermaine told him that he (Jermaine) shot the victim. T was interrogated twice without a parent, guardian, or lawyer. None of the interrogations were recorded. With Jermaine facing a possible life sentence for a crime he did not commit, our

concern was seating a jury guided by the evidence or, rather, an extraordinary lack of evidence, implicating Jermaine.

* * *

The modern American jury's role as factfinder traces its roots to an early nineteenth century shift divesting the jury of authority to decide questions of law.[6] During the colonial and post-Revolutionary period, juries routinely decided the law with little direction from, and sometimes in contravention to, the law explained by the court.[7] This near absolute power over legal and plenary matters accorded with the trial court's modest role of maintaining order, jurists with little or no training, and a belief that the entirety of a dispute was before the jury.[8] Accordingly, when the Supreme Court empaneled a jury in 1794, Chief Justice John Jay charged:

> For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still *both objects* are lawfully, within your power of decision.[9]

By the 1830s, the landscape of jury power had taken its present shape whereby courts, guided by precedent or legislative enactment, instructed juries on the law and set aside verdicts that departed from that instruction.[10] In 1835, Justice Joseph Story articulated the modern view that "[i]t is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court."[11]

One commentator attributes this shift to an effort to meet the needs of a burgeoning business community by promoting more predictable litigation outcomes in a changing public sphere.[12] This change was practical and normative "as American[s] perception of the jury changed from seeing it as a protective barrier between the citizen and a potentially tyrannous, corrupt state to seeing it as an instrument for the fair and efficient administration of justice."[13] The eighteenth century jury picked winners and losers based on whether a cross-section of the community believed punishment or reward was owed. While this open-ended inquiry comports with the framer's skepticism toward government power, it could not survive the rise of a professional legal class, maturation of a robust jurisprudence, extensive legislative codifications, and the inclusion of ethnically, religiously, and ideologically heterogeneous jurors in the venire. Contemporary

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6 *See, e.g.*, Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 902–21 (1994); *Martin A. Kotler, Reappraising the Jury's Role as Finder of Fact*, 20 Ga. L. Rev. 123, 128–34 (1985).

7 *Alschuler*, *supra* n. 6 at 903–04.

8 *Id*. at 903–06.

9 *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794). (emphasis added).

10 *See* W. Nelson, *The Americanization of the Common Law: The Impact of Legal Changes on Massachusetts Society*, 1760–1830, p. 8 (1975).

11 *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835).

12 Nelson, *supra* n.10.

13 Kotler, *supr*a n.6 at 127–28.

reappraisals of the jury's role raise more arguments urging caution than supporting reforms allowing juries to again decide questions of law.[14] Thus, to the extent modern jury procedure is designed to resolve factual disputes, decision-making that occurs in spite of trial evidence is a real threat to that system.

* * *

Our concerns in Jermaine's case arose one year earlier during a civil suit, captioned *Stevens & Wilkinson v. City of Columbia*, tried to a $1.6 million verdict. Our client, one of South Carolina's most reputable architectural firms, sued the city for unpaid fees. In preparing our trial strategy, we focused grouped the case with two groups of 10 citizens. Our findings were critical.

The sole question at trial was whether the city contracted to continue work on construction drawings for a publicly financed hotel while the city waited for bond financing to close. Believing they had a contract, the architectural firm finished the hotel drawings. Meanwhile, the bonds never closed, city politics changed, and support for a publicly financed hotel evaporated. When Stevens & Wilkinson sought payment, the city disclaimed the contract. Evidence the jury would hear at trial supported only one of two possible conclusions. If the jury believed the city, there was no contract, nothing was owed. If the jury believed our client, the architectural firm was entitled to a weekly rate multiplied by the weeks it worked—an amount equaling $1.6 million.

Pretrial focus groups revealed troubling outliers on damages notwithstanding unanimous agreement the city breached a valid contract. Without much thought, the first four individuals favored an award of $1.6 million—the only conclusion possible based on the facts given. The fifth person: $600,000. Our curious moderator paused, "tell me why you say $600,000." A slightly overweight white man in his early 60s with a snowy, unkempt beard and overalls rocked back in his chair. "Well," he began, "$1.6 million is an awful lot of money and $600,000 just seems fair," he concluded. When explication did not follow, our moderator pressed, "does it matter to you the evidence will show that what they agreed to adds up to $1.6 million?" Without hesitation, "nope. $600,000. That's what's fair."

Two more were polled: $1.6 million each. Then another man, also white, mid-40s with creased, leathery skin and a goatee uncrossed his arms, peaked out from under the bill of his camouflage ball cap and said, "I'd do 400." Looking at the bearded man, he continued, "600 is ok with me too." The moderator probed: "What about this document that says they agreed to pay a certain amount each week? Doesn't that add up to $1.6 million?" "Yep, but that don't mean I agree with that." "What if the architect ends up losing money at $400,000 because they had to pay people to draw hundreds of pages of blueprints?" "That don't matter because that's not what I would give'em," re-crossing his arms to signal that was the end of the matter. The second panel yielded a similar result with two panelists taking a facts-be-damned approach.

Our moderator joined us in the room where we watched on a big screen TV. "I think what you have to take from this is there are some people who do not care about the facts," he said. "They

14 *See id*. at 135–72.

have a gut feeling and you're not going to dislodge it by emphasizing the evidence." Once he said it, it was obvious which jurors might harbor an aversion to evidence-based reasoning. They were white. They lived in rural or suburban Richland County. They had little or no college education. Their wages were stagnant. They were motivated by resentment. They could not identify with a deal to pay professional architects $1.6 million for drawings. At the time we did not know it, but they would vote for Donald Trump.

* * *

Perhaps we should have seen this coming. Some did. In his 2005 pilot of *The Colbert Report*, Stephen Colbert coined the term "truthiness," described as belief guided by what *felt* true.[15] While Colbert's left-leaning audience chuckled along, he drew the battle lines for the nation's contemporary kulturkampf between "those who think with their head and those who know with their heart." The following year, Merriam Webster recognized Colbert's contribution, choosing "truthiness" as its word of the year ahead of contenders like "google," "decider," and "quagmire."[16] A decade after Colbert's bit defined the encroaching zeitgeist, the Oxford Dictionary recognized "post-truth" as its 2016 word of the year[17] while the assault on evidence-based reasoning marched on.

These observations are supported by evidence. Consider a recent Public Policy Polling (PPP) survey[18] asking respondents whether they "think the unemployment rate has increased or decreased since Barack Obama became President?" Forty-one (41%) percent believe unemployment is up, while survey crosstabs explain an astonishing 67% of Trump voters[19] hold this demonstrably false[20] belief. Likewise, 39% of Trump voters believe "the stock market has gone down since Barack Obama became President." The same days PPP conducted this survey, the Dow Jones hit record highs, 13,000 points higher than when Obama took office. These erroneous beliefs concerning objective facts are motivated by a feeling Obama performed poorly as president. Even Trump expressed astonishment at this phenomenon, explaining, "I could stand in the middle of Fifth Avenue and shoot somebody, okay, and I wouldn't lose any voters, okay?"[21]

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15 Comedy Central broadcast Oct. 17, 2005, http://www.cc.com/video-clips/63ite2/the-colbert-report-the-word-truthiness.

16 Merriam-Webster website, *Merriam-Webster Announces Truthiness' as 2006 Word of the Year*, https://www.merriam-webster.com/press-release/2006-word-of-the-year.

17 Post-truth is an adjective "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." Oxford Dictionaries website, "Word of the Year 2016 is. . .", https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016.

18 PPP, National Survey Results (1,224 registered voters, conducted Dec. 6–7, 2016), http://www.publicpolicypolling.com/pdf/2015/PPP_Release_National_120916.pdf.

19 Compared to 32% of Johnson and Stein voters and 18% of Clinton's voters.

20 U.S. Dept. Labor website, http://data.bls.gov/timeseries/LNS14000000.

21 Ali Vitali, *Trump Says He Could 'Shoot Somebody' and Still Maintain Support*, NBC NEWS, (Jan. 23, 2016), http://www.nbcnews.com/politics/2016-election/trump-says-he-could-shoot-somebody-still-maintain-support-n502911.

Experienced trial practitioners have long been cognizant how to neutralize jury bias. Belief bias recognizes jurors are more likely to embrace an argument that supports a conclusion they already hold true, while confirmation bias places too much weight on facts supporting a preference.[22] Biases have long affected the *manner* in which information is processed, but there is something qualitatively different to an outright rejection of evidence's ability to persuade. While it may be error to give greater weight to certain evidence, it is folly to throw the scale out the window.

* * *

The jury trial remains the most potent civil institution for dispensing justice *provided* counsel is prepared to avoid seating jurors impervious to evidence-based reasoning. This requires compiling all information about potential jurors that can ethically be collected and employ a strategy exercising strikes within constitutional bounds. While South Carolina clerks of court merely disseminate lists with names, addresses, gender, and race, the District Court disseminates a 47-question juror questionnaire asking jurors whether they can be fair in cases involving litigant classes routinely subject to bias.[23] Far more helpful are open-ended questions concerning participation in civic, religious, or other organizations; bumper sticker display; and primary source(s) of news. There is likely no better indicator of whether an individual values objective fact-finding than the sources they rely on to gather information for them. Subscribers to a national newspaper no doubt value objective fact-finding more than those reliant on Facebook to aggregate "newsworthy" content.[24]

Counsel should also gather voting history and information posted to social media. While lawyers must refrain from contacting prospective jurors, many users' settings publically share profile information, posts, photos, and friend lists without requiring a request.[25] Likewise, blogs, tweets, Instagrams, and other posting services publically broadcast private views that may offer insight into the juror's thought process. Partisan primary voting histories, available from election commissions or private data vendors, can also be a telling information source, particularly when coupled with other indicators. A reliable Republican voting record might be indicative of an aversion to evidence-based reasoning. However, when this voting record presents alongside a steady diet of Facebook and Fox News, proceed with extreme caution.

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22 Roger G. Oatley, *An Overview of the Jury Bias Model,* Ann. 2005 ATLA-CLE 1613.

23 While striking a federal jury in 2015, potential jurors indicating they could not be fair to foreign nationals were so numerous the judge expressed his own surprise.

24 Facebook-reliant jurors should receive great scrutiny given the proliferation of fake news on the platform. *See* Craig Silverman, "This Analysis Shows How Fake Election News Stories Outperformed Real News On Facebook", BuzzFeed, Nov. 16, 2016, *available at* https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.ygQwp9Wg8#.tvdnrq9Ya (top fake news generated more pre-election engagement than mainstream news).

25 *See ABA* Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014) (passive activity permitted; requests for access prohibited).

Be prepared to use this information within the confines of the law. The constitution forbids preemptory challenges based on race.[26] When a litigant mounts a "*Batson* challenge" claiming race motivated juror exclusion, the challenged party must offer a race-neutral reason for the strike. When the characteristic warranting exclusion is typically identifiable within a single racial group (e.g., white people), counsel must consistently apply the rationale by striking jurors across racial lines[27] and be prepared to justify it, possibly by divulging research substantiating a race-neutral strategy.

* * *

On the seventh day, Jermaine's case went to the jury. After three and one-half hours, the court received a note indicating a deadlock. The judge charged the jury on *Allen*[28] and deliberations continued. One hour later, another note reported a deadlock and a vote: 11 not guilty, one guilty. After the foreman reported further deliberation would not be productive, the judge declared a mistrial.[29]

The next day, we contacted one of the jurors seeking insight into the deliberations. The conversation soon turned to the lone holdout for guilty. Much to our chagrin, our holdout was a black man in his late 30s who worked for a local government and appeared attentive, contemplative, even friendly each day of trial as he sat neatly dressed on the front row. He fit the profile of an individual who might be troubled by sloppy police work and sympathetic to a young black child ensnared by a rush to clear the case. Unbeknownst to us, our holdout was moonlighting as a preacher, a fact he shared with fellow jurors when explaining he was certain of Jermaine's guilt because God had spoken to him and told him so.

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26 *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991).

27 *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1750–52 (2016) (prosecutors' explanations were "difficult to credit" because white jurors were not excluded for the same reasons).

28 *Allen v. United States*, 164 U.S. 492 (1896).

29 *See S*.C. Code Ann. § 14-7-1330 (1976) (prohibiting jury from being sent out second time without consent).

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South Carolina Bar

Continuing Legal Education Division

The Ethics of Presenting (and Objecting to) Evidence

Andrew B. Moorman

Effective Advocacy for Evidentiary Issues

By:
Andy Moorman
Deputy Criminal Chief, Narcotics Unit
U.S. Attorney's Office, District of South Carolina

The Trial: A Search for the Truth

- "A trial is a proceeding designed to be a search for the truth. (Citation omitted)."

  Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 849 (5th Cir. 1996)

The Rules of Evidence and the Truth

- "The purpose of rules of evidence is to ascertain the truth as to facts in issue. . . ."

  Dingess v. Huntington Dev. & Gas Co., 271 F. 864, 866 (4th Cir. 1921)

Judges apply rules of evidence

- "The competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine. (Citations omitted)."

  Matter of Lucks, 794 S.E.2d 501, 506 (N.C. 2016)

Judges are people

- "Judges are, and always will be, prejudiced and biased to some extent on occasion. Trial judges are people, too, and share the same cross-section of feelings and human frailties as the rest of us."

  Shaffer v. Jones, 650 P.2d 918, 921 (Okla. Ct. App. 1982)

Judges' Motivations

- Do the right thing
- Appellate concerns

Doing the right thing

- Apply law to the facts of the case, including the Rules of Evidence
  - In the weeds on precedent and on the facts of the cases on which the parties rely;
  - Issues of "fairness" already have been decided by rules, cases, and statutes
  - Not concerned with who wins and who loses the case;
- Make sure the trial is conducted "fairly"
  - Sense of fairness is the most important guiding principle when conducting the trial;
  - Concerned with not ruling in one party's favor too often because doing so would unfairly tip the scales;
  - Not concerned with who wins and who loses the case;

Appellate Concerns

- Does not want case to be reversed.
  - Most important consideration is creating record during trial that will withstand scrutiny by appellate court.
  - Views appellate court decisions as expressions of policy preferences and not as a mere judgment on prior proceedings.
  - Familiar with standards of review on appeal.
  - Not concerned with who wins and who loses the case. . . .

- Strategies for dealing with judges who have different motivations on evidentiary issues

Instill confidence and trust

- Judges are people too. Get to know them.
  - Judges are typically charismatic, intelligent, and hard-working and friendships with them will likely enhance our lives.
- Be prepared.
  - Know the facts of your case
  - Prepare witness directs and crosses
  - Dress professionally
- The "10 second rule"
  - Say what you've got to say in 10 seconds.
- Raise issues early and comprehensively
  - Trial brief?

Get to know Judges

- Who are the people in our lives we trust the most?
  - Our spouses
  - Other family members
  - Friends we've had for a long time

Give judges reasons to trust you

- "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ."

  S.C. App. Ct. R. RULE 407 RPC 3.1

- **"(a)** A lawyer shall not knowingly:

  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

  (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

  (3) offer evidence that the lawyer knows to be false. . . .

S.C. App. Ct. R. RULE 407 RPC 3.3

Be prepared

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

  S.C. App. Ct. R. RULE 407 RPC 1.1

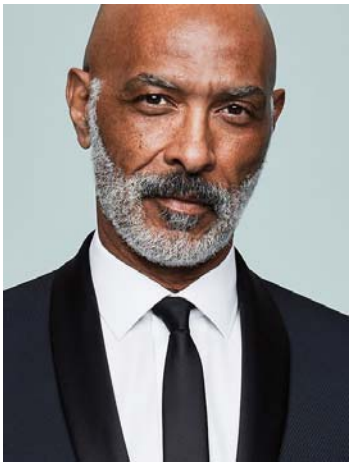
- "A lawyer shall act with reasonable diligence and promptness in representing a client."

  S.C. App. Ct. R. RULE 407 RPC 1.3

Who would you trust?

Who would you trust (cont)?

Who would you trust (cont)?



10 Second Rule

- https://www.youtube.com/watch?v=uhiCFdWeQfA
- A person's attention span is extremely short, especially these days. You have a very short time to convey your message before your audience loses interest. Make the most of it!

Raise issues early and comprehensively

- Trial brief?

Raise issues early and comprehensively (cont)

- Trial brief?

"Fingerprint . . . analysis (has) long been recognized by the courts as (a) sound method() for making reliable identifications. (Citations omitted)." *United States v. Crisp*, 324 F.3d 261, 265 (4th Cir. 2003). "Fingerprint identification has been admissible as reliable evidence in criminal trials in this country since at least 1911." *Id.,* at 266.

Know what motivates the judge

- How?
  - Do you know this judge?
  - Watch the judge try a case.
  - Talk to other lawyers who have tried cases before the judge.
  - Read opinions involving judge's previous trials.

Doing the right thing

- Apply law to the facts of the case, including the Rules of Evidence
  - READ CAREFULLY cases on which you are relying before you argue them before the judge;
  - View the facts, not necessarily the holding, as the most important part of the case;
  - Be conservative in the confidence you express as to the applicability of the case: resist the urge to use phrases like "right on point" unless the case is really "right on point."
  - In pleadings, use signals (like "cf") when citing cases to show judge that you know case may have different facts but still supports your argument.

Doing the right thing (cont)

- Sense of fairness is the most important guiding principle when conducting the trial.
  - Very difficult to predict which evidence will be admissible and which will not.
  - Build in "throw-aways" in your case-in-chief. Invite judge to exclude less important evidence.
    - Example- South Carolina v. Larry Williams
  - In articulating objections, be willing to use more colloquial language to support arguments (i.e. "What's good for the goose is good for the gander.").
    - Example- South Carolina v. Maurice Antonio Williams

Appellate concerns

- Does not want case to be reversed;
  - Cite recent, binding appellate court cases where appellate court has reversed trial court for admitting evidence on similar basis.
  - In articulating objections to evidence, use phrases that reference standard of review on appeal.
  - Be willing to ask to proffer evidence the judge is excluding.

Why is it important to know what motivates the judge?

- A miscalculation may cause essential evidence to be excluded.
  - *United States v. Hall* example

- The End