

- Exceptions to the Hearsay Rule
- Why do they exist?
 - Presumed high level of reliability for various reasons, addressed under each exception.
- Irrelevant with respect to some exceptions whether the witness is present at trial or not; others require showing of witness unavailability. Why?
 - Considered very high level of reliability;
 - Often only way to prove fact in dispute. Exclusion would lead to injustice.

- FRE 803(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.
- FRE 803(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.
- FRE 803(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.*
- What do these 3 exceptions have in common?

- Nuttall v. Reading Co. Husband dies at work for RR. Wife contends forced to work, although sick. Question is admissibility of testimony by widow as to what she overheard husband say on the phone before he left for work.
- Pre-rules case, but would Nutall's comments to supv on phone meet current exception?
 - Yes, then existing state of mind
 - What of 911 calls, or cell phone descriptions?
 - "They must have been drunk."
 - "We're going to see them in an accident down the road."

- U.S. v. Arnold, 6th Cir. 2007. Arnold convicted of felon-in-poss-firearm. Arrested b/c girlfriend, Gibson, called 911 and said he had pulled a gun on her and threatened to shoot her. Gibson does not testify at trial. Prosecutors admit Gibson's statements in 911 call through "excited utterance" objection to h-s rule. Valid?
 - Yes. Three elements:
 - Must be an exciting event;
 - Comment must have been made before time passes to contrive or misrepresent;
 - Declarant must still be under stress of the excitement when making the statement.
 - But can the statement itself be used to establish first element? What are the problems with doing so?
 - Not currently resolved; however
 - Rarely actually in issue in cases. ACN: "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."
 - Does the excited utterance exception apply only to victims or parties, or also to eyewitnesses?
 - All of the above

- Prob. 4-1. Worker comes home in middle of day, tells his wife: "I felt this sudden pain." Never came home early before. Later dies of heart attack. Is statement to wife admissible:
- As present sense impression?
 - No, because not made at time of event or immediately thereafter.
- As excited utterance?
 - What was the exciting event?
 - Was he still under influence of exciting event when related to wife
- Hold off on consideration of 803(3) – statement of physical condition.

- Statements of fear by victims. Do they meet the state of mind exception? (“A statement of the declarant's then existing state of mind...”)
 - Yes, but any additional reasons might not be admissible in a criminal case?
 - O.J. Simpson case. Judge excluded statements of ex-wife that she thought O.J. would eventually kill her. Admissible? If not, why not?
 - Right of confrontation – risk that jury would convict on uncrossed out-of-court statement of fear of the victim.
 - Different rule if fear of the victim is an issue? (Extortion).

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US v. Pheaster

- Pheaster and Angelo Anciso convicted of conspiracy to kidnap Larry Adell. Evid. from Gomez, Larry's date, that Larry said he was going to go meet Angelo to pick up a pound of marijuana Angelo promised, just before he turned up missing. Court admits under *Hillmon Doctrine*.
 - Comes in as statement of Larry's then-existing state of mind.
 - In *Hillmon*, insurance co. took position it was Walters, not Hillmon, who was killed at Crooked Creek. Insurer offers two letters, written by Walters before he disappeared, saying he planned to travel with Hillmon to look for a ranch. USSC says admissible as statement of Walter's intention of going, and of going with Hillmon. Advisory Committee said that *Hillmon* survived the rules.
- Question, though, if the statement comes in only to prove Larry's state of mind, does it not also tend to prove that Angelo intended to meet Larry to deliver the marijuana. Therefore, does that portion fit the exception? No, but it appears it comes in under *Hillmon* and the Rules anyway.

- FRE 803(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.*
- ACN: "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."
- ACN: "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."

- *Blake v. State*. High-school aged sexual assault victim examined by police-provided physician, confirms repeated sexual assaults and identifies step-father. Statements admissible pursuant to 803(4)?
 - Under this case, yes. However, what are the problems with it?
 - What is the reason for the exception?
 - Were these statements really made for purposes of medical diagnosis or treatment?
 - Are statements regarding the identity of the perpetrator necessary for diagnosis or treatment?
 - What about continuing history statements within medical records?

- FRE 803(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....
- This is known as a *“past recollection recorded.”*
 - Witness must presently be unable to testify fully or accurately
 - Witness had knowledge at the time record made or when adopted
 - Must have been made when matter fresh in mind of witness
 - If admitted, may be read into evid. but not received as exhibit unless offered by opponent
- *Contrast with Present Memory Refreshed*
 - Witness can use anything to refresh recollection
 - Document not an exhibit, not evid.
 - But can be used to impeach witness.

- *Ohio v. Scott*. Scott shoots at cop. Girlfriend, Tackett, gives hand-written and signed statement to police, saying Scott told her at theater that he had shot someone. At trial, Tackett cannot remember what Scott told her at the theater. Prosecution wants to admit the statement. Is it admissible as a past recollection recorded?
 - Yes. However, what of right to cross-examine witness?
 - Can the witness truthfully testify that she wrote down the truth when she cannot remember the facts?
 - Does the statement have undue influence, since it will be taken to the jury room while other testimony will not?
 - Why is this not generally in issue?
 - Because statement can always be used to impeach. Only important if you need this substantive evidence on burden of proof.

- *Multiple Recorder Problem*

- Saleswoman makes \$300 sale 2-2-82. Per co. policy, she tells bookkeeper, who writes down. At trial, need to prove date and specifics of sale.
- Written memo could be construed as present sense impression of saleswoman
- Saleswoman could use bookkeeper's memo to refresh
- Memo could be bookkeeper's past recollection recorded
- If routine, could satisfy business record exception of 803(6)

FRE 803(6) Business Record Exception

- Can include acts, events, conditions, opinions, or diagnoses
- Must be made at or near the time of the event recorded
- Must be made by person with personal knowledge or from information transmitted by person with personal knowledge
- Must be in the course of a regularly conducted business
- Business can be any business, institution, association, profession, occupation, or calling of any kind
- Not necessarily a business for profit
- Must have been the regular practice of business to make this type of memo
- Can be shown by custodian or other qualified witness
- *If method or circumstances indicate lack of trustworthiness, can be excluded.*

- **FRE 803(7) Absence of entry in records kept in accordance with the provisions of paragraph (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 paragraph (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.

- *Petrocelli v. Gallison*. Medmal case, plaintiff claims surgeon negligently cut nerve during hernia surgery. Judge excludes portion of subsequent medical records in which second surgeon dictates that patient had nerve cut in prior surgery, and consult by another doctor who wrote that he was experiencing pain from a severed nerve. Records otherwise clearly admissible business records pursuant to 803(6). Verdict for defense. Are the challenged statements properly admissible "opinions" or "diagnoses" under 803(6)?
- What if Petrocelli could prove that the information came from a discussion between the surgeons?
- Even if the statements came from Petrocelli, why aren't they admissible under 803(4) (statements for purposes of medical diagnosis or treatment)?
- What if the records said that Petrocelli admitted the pain started when he was lifting weights 6 months after Gallison's surgery?

- *Norcon, Inc. v. Kotowski*. Mary Kotowski was sexually harassed by her supervisor, Posehn. Company hires investigator, Ford of Purcell Security, to perform investigation. Investigator interviews Coyle, a head supervisor for Norcon, who says that there was inappropriate entertaining of women with alcohol by Posehn. Kotowski wants to admit report under 803(6) business record exception. Is the report admissible as the 803(6) business records of Norcon or Purcell?
- Is there any other way to get Coyle's statements admitted?
 - Yes. Authorized admissions by Coyle, pursuant to 801(d)(2)(C), and the remainder arguably admissible as Norcon's business records (except perhaps for conclusions as to veracity of complaints).
- If these records are admissible, what should the courts do with self-serving investigations designed to whitewash the company?

- *U.S. v. Kim* Bribery trial. Gov't subpoenas records from Korean bank to determine defendant's assets. Instead, bank sends a telex which confirms a \$400k withdrawal. Def. wants to introduce telex to show he had abundant money and did not need to resort to crime.
- Would underlying bank records meet bus. rec. exception?
 - Yes. How would def. prove up?
- Who could testify? Custodian, American representative?
 - Either.
- What if a computer record?
 - Need person who can explain how record generated?
 - No. Circumstances such that the business usually relies on this type of record indicates trustworthiness.
- What if records prepared just for litigation?
 - Generally not admissible.
- Does telex meet bus. rec. exception? Why not?
 - Made years later, not near the time of the transactions represented.
 - Was prepared in response to a subpoena, not in the regular course of business. Does this indicate lack of trustworthiness?
 - Could the telex have complied with 803(6) if it had been routinely prepared in response to an inquiry from an American bank? Why or why not?
- Does telex meet the summary of bus. recs. rule (FRE 1006)?
 - No. Underlying info must be made available (though not necessarily introduced), and must be so voluminous that the records themselves are not feasible for admission or consideration.

- Is the requirement of “trustworthiness” a part of the proponent’s burden, or is it sort of an “affirmative defense” to admission?
- How important are business records?
 - Are employment records bus. recs?
 - Medical recs?
 - Insurance recs?
 - Vehicle history recs?

- Records of neighborhood poker club. Meet criteria? Why not?
 - Regular bus activity? Could it be an association? What about a profession of one of the players who keeps track?
- Employee has accident, co. prepares rpt. Admissible as bus. rec. exception?
 - Was it a regular part of the co's business to prepare this type of report?
 - What if report is self-serving? Indicate lack of trustworthiness?
 - What if report made to prevent future accidents, even if never done before?
 - Could you get it in by having an expert rely on it?
- Narrative letter prepared by treating dr., IME dr., or WC dr.
 - Does it meet the criteria?
 - Why not usually admitted?

- Letter in file from plaintiff's attorney asks business record exception questions and then asks questions regarding nature of injury, degree of incapacity, duration of incapacity, and causation.
- Why not admissible?
 - Because mere statements by witness that meet business record exceptions insufficient if clear that factual basis for same does not exist.

- FRE 803(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, or (C) *in civil actions and proceedings and against the Government in criminal cases*, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

- FRE 803(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.

Beech Aircraft Co. v. Rainey, USSC 1988

- Military air crash. Investigated by naval officer as required by law. Officer concluded accident caused by pilot error. Rpt included "fact findings," "opinions," and "recommendations."
- Court of Appeals relied on bus. rec. exception, which allows opinions, while public recs. exception does not. Was that a correct usage of the bus. rec. exception?
- USSC admits as public record exception. Examines legislative history and notes that there is no practical difference between a "fact finding" and an "opinion."

- Note: In criminal cases, state and federal, the prosecution cannot use "findings," *i.e.*, chemist analysis, fingerprints, etc., under Rule 803(8) alone. Prosecution must have a witness testify to same for admissibility. However, this does not usually apply to ministerial findings, such as putting suspect's fingerprints on a card without analysis. Keep in mind that the defense can admit findings in records, pursuant to the rule, and that the prohibition against the use does not apply in civil proceedings. However, the findings may still be excludable in civil cases if there is no showing of sufficient expertise of the government agent, lack of trustworthiness in the underlying data or methodology, etc.