

**OFFICE OF THE PROSECUTING ATTORNEY
COUNTY OF WAYNE**

**HEARSAY, PART I:
WHAT IT IS, AND WHAT IT ISN'T**

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I. INTRODUCTION: THE THREE KINDS OF OUT-OF-COURT STATEMENTS

- A. **The “General” Definition of Hearsay.** One must determine whether an out-of-court statement or conduct falls within or without the “general” definition of hearsay. Critical to the inquiry is *the “work” to which the statement or conduct is to be put*; that is, that which it goes to prove.
- B. **Exclusions From the General Definition of Hearsay.** If an out-of-court statement or conduct *does* fall within the “general” definition of hearsay, it may nonetheless *not* be hearsay, rather than being a hearsay exception, because the rule of evidence simply *defines* the sort of statement or conduct involved as not being hearsay.
- C. **Hearsay Exceptions.** If an out-of-court statement or conduct falls within the “general” definition of hearsay, and is not “defined out” of the rule, it may nonetheless be admissible if it falls within one of the exceptions to the hearsay rule.
- D. **Relevance.** Even if not hearsay, or within a hearsay exception or exclusion, evidence is not necessarily admissible. It must be relevant under MRE 401, and its logical force for a permissible purpose not substantially outweighed by a prejudicial inference that it also carries, on application of MRE 403.

II. THE “GENERAL” DEFINITION OF HEARSAY

A. The Rule of Evidence: MRE 801(a), (b), and (c).

The following definitions apply under this article:

- (a) **Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) **Declarant.** A “declarant” is a person who makes a statement.
- (c) **Hearsay.** “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

B. The Rule Analyzed: “Statements” and “Assertions”

1. **“Assertions.”** critical to an understanding of the hearsay rule is the understanding that the out-of-court statement or conduct at issue must be an “*assertion*.” If the out-of-court statement or conduct involved is not an assertion then it *cannot* be hearsay. An assertion is *a declaration of fact, capable of being true or false*.

References

MRE 801(a)

Michigan Court Rules Practice: Evidence, § 801.2

United States v Robinzine, 80 F2d 246 (CA 7, 1996)

People v Jones (On Rehearing After Remand), 228 Mich App 191 (1998)

2. **The intention of the declarant/actor.** The out-of-court declaration or conduct is not a statement because not an assertion unless “*intended* by the person (making the statement/engaging in the conduct) as an assertion.” Thus, it is quite possible, particularly in the case of conduct, that words or conduct occurring out-of-court are admissible as circumstantial proof of a fact because those words or that conduct are *expressive* of a fact but were not *intended* as an assertion of fact at all. In such a case, the underlying rationale of the rule excluding hearsay—that the “credit of the assertor,” as put by Wigmore, is the necessary basis to credit an assertion of fact, and must be subject to cross-examination—is not involved.

References

Michigan Court Rules Practice: Evidence, § 801.2

People v Davis, 139 Mich App 811 (1984)

People v Watts, 145 Mich App 760 (198t)

People v Stewart, 397 Mich 1 (1976)

See 6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.3

Advisory Committee Note to MRE 801(a)

- 3. Burden of persuasion.** Where a verbal declaration or nonverbal conduct is claimed to be assertive and therefore within the hearsay rule, the burden of proof regarding the point is on the party making the objection to the evidence, and any ambiguity regarding whether an assertion was intended is to be resolved *against* a finding that an assertion was intended and thereby *in favor* of the admission of the evidence.

References

People v Davis, 139 Mich App 811 (1984) (citing Advisory Committee Note)

People v Watts, 145 Mich App 760 (1985)

People v Gwinn, 111 Mich App 223 (1981)

United States v. Summers, 414 F.3d 1287, 1300 (CA10, 2005)

Michigan Court Rules Practice: Evidence, § 801.2

See 6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.3

Advisory Committee Note to MRE 801(a)

C. Verbal and Nonverbal Assertions

- 1. Assertive verbal expressions.** Verbal conduct is ordinarily intended as a positive factual assertion, and because so intended, meets the definition of a “statement” so as to be hearsay if offered for its truth (and if falling within none of the defined “exclusions” from the hearsay rule, to be discussed subsequently). Where positive assertions of fact are without the hearsay rule it is because they are not offered for the truth. Further, some verbal conduct simply has no factual content, and is by *definition* relevant only if offered for something other than the truth of its “content” (e.g. “hello,” “good luck”).

References

Michigan Court Rules Practice: Evidence, § 801.2

6 Wigmore, *Evidence* (Chadbourn rev), § 1766

- 2. Nonassertive verbal expressions and implied verbal assertions.** Some verbal conduct is not intended as a positive assertion of fact but contains an implied assertion or assertions. Federal case law tends to hold that implied assertions do not fall within the definition of statements. For example, if an individual were overheard to say “Joe has cocaine” this would be an assertion of fact falling within the rule, but if that person were overheard asking “does Joe still have any stuff?” this would be admissible to prove Joe possessed cocaine (subject to circumstances giving meaning to “stuff”). Exclamations and questions commonly fall into this category.

References

People v Jones (On Rehearing After Remand), 228 Mich App 191 (1998)(rejecting doctrine of implied assertions)

United States v Long, 905 F2d 1573 (CA DC, 1990)(unintended implicit messages are not within the hearsay rule)

Advisory Committee Note to FRE 801(a)(even “verbal conduct which is assertive” but which is “offered as a basis for inferring something other than the matter asserted” is also excluded from the definition of hearsay “by the language of subdivision (c)” because not offered for the “truth of the matter asserted”)

United States v Jackson, 88 F3d 845, 847 -848 (CA 10, 1996). Question by individual to returned pager, "Is this Kenny?" not hearsay. “...it might be possible to imply that the declarant believed [defendant] was in possession of the pager and therefore he was the person responding by telephone to the declarant's message. The mere fact, however, that the declarant conveyed a message with her question does not make the question hearsay. ... Rather, the important question is whether an assertion was intended.”

- 3. Assertive conduct.** MRE 801(a) itself provides that nonverbal conduct is a statement within the meaning of the rule but only if “*intended by the person as an assertion.*” Plainly, conduct, such as pointing to a person to identify them in a lineup, may be the equivalent of words, and intended as an assertion.

References

Michigan Court Rules Practice: Evidence, § 801.2

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.2

2 McCormick, *Evidence* (7th Ed), § 250

United States v Abou-Saada, 785 F2d 1 (CA 1, 1986)

- 4. Nonassertive conduct and implied assertions.** As with verbal conduct, implied assertions by conduct are not covered by the hearsay rule as not within the definition of “statement.” The Advisory Committee Note states that nonverbal conduct “may be offered as evidence that the person acted as he did because of his *belief* in the existence of the condition sought to be proved, *from which belief the existence of the condition may be inferred.* This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept.” Nonetheless, this nonverbal conduct is not included within the definition of “statement” because though “evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the act, ...the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.” A common example is that observation of a person stepping outside and opening an umbrella is admissible over a hearsay objection to prove that it was raining at the time.

References

People v. Gursky, 486 Mich 596 (2010)

People v Davis, 139 Mich App 811 (1984) (child breaking into tears when asked about defendant's conduct with her—the ultimate charge was sexual assault—held not an assertion, citing Advisory Committee Note)

Advisory Committee Note to FRE 801(a)

People v Gwinn, 111 Mich App 223 (1981)

See *People v McReavy*, 436 Mich 197 (1990)(demeanor of accused during interrogation)

See *People v Schollaert*, 194 Mich App 158 (1992)(demeanor of accused when arrested)

2 McCormick, *Evidence* (7th Ed), § 250

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.3

United States v Butler, 763 F2d 11 (CA 1, 1985)

D. Statements/Assertions Not Offered For The Truth of The Matter Asserted

- 1. Verbal acts.** A statement is a verbal act when the utterance is itself an “operative fact that gives rise to legal consequences.” For example, where the crime is threatening a federal judge, the threats themselves are not offered to prove the truth of the matter asserted, but have independent legal significance giving rise to legal consequences.

References

Michigan Court Rules Practice: Evidence, § 801.2

2 McCormick, *Evidence* (4th ed), § 249

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.5

6 Wigmore, *Evidence* (Chadbourn rev), § 1770

United States v Diaz, 597 F3d 56 (CA 1, 2010)

United States v Jones, 663 F2d 567 (CA 5, 1986)

- 2. Verbal part of an act.** A statement is a verbal part of an act when it “accompanies conduct to which it is desired to attach some legal effect.” As stated by McCormick, “the bare physical act of handing over money to another person is susceptible of many interpretations. The possibilities include loan, payment of a debt, bribe, bet, gift, (and robbery)....Explanatory words which accompany and give character to the transaction are not hearsay.”

References

Michigan Court Rules Practice: Evidence, § 801.2

State v Mesk, 123 Mich App 111 (1983)

2 McCormick, *Evidence* (7th ed), § 249

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.5
6 Wigmore, *Evidence* (Chadbourn rev), § 1772
United States v Faulkner, 439 F3d 1221 (CA 10, 2006)

3. **State of mind of the listener.** Very common in law enforcement is the use of statements not for the truth of the matter asserted, but as bearing on the conduct of an individual who heard or became aware of the statement, so as to explain it. For example, that an officer proceeded to a location because of a radio run is admissible, as is information going to probable cause. In essence, where going to knowledge, belief, good faith, reasonableness, diligence, motive, and so on, statements are admissible as they go to the state of mind of the listener without regard to their truth.

References

People v. Gaines, 306 Mich App 289 (2014)
People v Eggleston, 148 Mich App 494 (1986)
People v Lewis, 168 Mich App 255 (1988)
People v Eady, 409 Mich 356 (1980)(demonstrating that fact of receipt of dispatch by police may be admissible but *contents may be excluded as unduly prejudicial and unnecessary* to show why officers went to the scene)
Michigan Court Rules Practice: Evidence, § 801.2.13-14
2 McCormick, *Evidence* (7th ed), § 249
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.5
6 Wigmore, *Evidence* (Chadbourn rev), § 1789
United States v Blandina, 895 F2d 392 (CA 7, 1989)
United States v Harris, 942 F2d 1125 (CA 7, 1991)
United States v Shepherd, 739 F2d 510 (CA 10, 1984)(instructions are not offered for truth)
United States v Vizcarra-Porrás, 889 F2d 1435 (CA 5, 1989)(informant's statements admissible to show reasonableness of officer where entrapment raised)
United States v Green, 887 F2d 25 (CA 1, 1989)

4. **Impeachment.** Where the out-of-court statement is offered to impeach credibility it is not offered for the truth of the matter asserted by definition (unless also falling within a hearsay exclusion or exception).

References

MRE 607
People v Rodgers, 388 Mich 513 (1972)
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.5

III. EXCLUSIONS FROM THE GENERAL DEFINITION OF HEARSAY

A. The Rule of Evidence: MRE 801(d)

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

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by Party Opponent. The statement is offered against a part and is (A) the party’s own statement in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, 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 conspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

B. Exclusions From The General Definition Of Hearsay: Prior Inconsistent Statements

- 1. Alteration of the common-law rule.** The common-law rule did not permit substantive use of inconsistent statements of any sort, and thus the federal rule is a modification of the common law, and is limited to inconsistent statements given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. This limitation is *not* constitutionally required, and some jurisdictions allow all inconsistent statements of a testifying witness as substantive evidence.

References

Michigan Court Rules Practice: Evidence, § 801.7,
California v Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (1979)
2 McCormick, *Evidence* (7th ed), § 251

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.11
6 Wigmore, *Evidence* (Chadbourn rev), § 1789

- 2. Declarant must testify and be “subject to cross-examination.”** “A witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.” Because a defendant is guaranteed under the Confrontation Clause only “an opportunity for effective cross-examination, not cross-examination that is effective,” so long as the declarant testifies and is subject to cross-examination *it matters not whether the declarant remembers making the prior statement but fails to remember its content, fails to remember making the prior statement, or denies making the prior statement completely.*

References

United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988)

- 3. The statement must be inconsistent with the declarant’s testimony.** Generally speaking, the test for inconsistency which is applied with regard to impeachment with prior inconsistent statements should be used to determine whether the prior statement is inconsistent. It may be questioned whether a prior statement of the event is inconsistent with present testimony of lack of recollection of the underlying event (e.g. a witness gives a statement that “I saw a green Ford pull away from the bank” and testifies at trial “its been so long I don’t remember anything that happened that day”). Because of the tendency of “unwilling or untruthful witnesses to seek refuge in forgetfulness,” use of the prior statement will ordinarily be permitted (and in cases where the prior statement was itself not only under oath, but subject to cross-examination, the prior recorded testimony exception would suffice to admit the prior testimony).

References

See 2 McCormick, *Evidence* (7th ed), § 251

See also 1 McCormick, *Evidence* (7th ed), § 34 (regarding requirement of inconsistency in prior statements used for impeachment)

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.11

People v Chavies, 234 Mich App 274 (1999) (overruled on other grounds, *People v Williams*, 475 Mich 245 (2006))

United States v Gajo, 290 F3d 292 (CA 7, 2002) (lack of memory is inconsistent)

United States v Jones, 808 F2d 561 (CA 7, 1986)

United States v Bonnett, 877 F2d 1450 (CA 10, 1989)

United States v Gravely, 840 F2d 1156 (CA 4, 1988)

United States v Williams, 737 F2d 594 (CA 7, 1984)

C. Exclusions From The General Definition Of Hearsay: Prior Consistent Statements

1. **Substantive evidence.** Because excluded from the hearsay rule, prior consistent statements are not only corroborative but substantive evidence, so long as the foundation for admissibility is met.

References

Michigan Court Rules Practice: Evidence, § 801.8
2 McCormick, *Evidence* (7th ed), § 251

2. **Motive to fabricate.** It is now clear that when the prior consistent statement is offered “to rebut an express or implied charge” of “recent fabrication, improper influence or motive,” the prior statement must itself have been made *before* the motive or influence came into existence or before the time of the alleged fabrication.

References

Tome v United States, 513 US 150, 130 L Ed 2d 574, 115 S Ct 696 (1995)
People v Rodriquez, 216 Mich App 329 (1996)
People v Fisher, 220 Mich App 133 (1996), overruled on other grounds, *People v. Houthoofd*, 487 Mich. 568 (2010)
People v Brownridge, 225 Mich App 291 (1997)(rev’d on other grounds, 459 Mich 456 (1999))
People v McCrary, 245 Mich.App. 631(2001)
People v Jones, 240 Mich App 704 (2000)
See also 4 Wigmore, *Evidence* (Chadbourn rev) §1128
United States v Acker, 52 F3d 509 (CA 4, 1995)
See *United States v Reliford*, 58 F3d 247 (CA 6, 1995)

3. **Not limited to rebutting the specific inconsistency.** Prior consistent statement use is not limited to statements directly relating to inconsistencies brought out on cross-examination. So long as there is a suggestion of recent fabrication a prior statement before the charge of recent fabrication is permitted where it is generally consistent with the testimony at trial.

References

United States v Casoni, 950 F2d 893 (CA 3, 1991)

4. **Manner of proof.** The prior statement is provable either by the declarant himself, or by any other person with personal knowledge of it. If the latter method is employed, then because the rule requires that the declarant be subject to cross-examination *concerning the prior statement* the witness/declarant must be subject to recall for cross-examination.

References

See generally 6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.12

D. Exclusions from the General Definition of Hearsay: Statements of Identification

1. **Foundational requirements.** It is required that the declarant testify at the trial or hearing and be subject to cross-examination. As indicated previously, “subject” to cross-examination does not mean successful cross-examination. That the witness claims a lack of memory regarding the underlying event or the statement of identification does not preclude admission of the prior statement; indeed, if the witness fails to identify in court and *denies* making the prior statement, the statement is still admissible. The legislative history, as well as the plain language of the text of the rule, supports this interpretation. Note: there is no requirement of “immediacy” with regard to the identification.

References

People v Malone, 445 Mich 369 (1994)

People v Whitfield, 214 Mich App 348 (1995)

People v Sykes, 229 Mich App 254 (1998) (discussion between police officer and store clerk about the race, age, height, weight, clothing, and style of haircut of three men who were in store, including purchase by one of them of brown gloves which had been found at larceny scene, was not an “out-of-court statement of identification” of a person made after perceiving the person)

United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988)

2 McCormick, *Evidence* (7th ed), § 251

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.13

- 2. Method of proof.** Given that the prior statement of identification is admissible even if repudiated or denied, it is clear that the declarant is not the only permissible method of proof; any witness to the prior statement may testify to it, whether the declarant affirms the prior statement, denies or, or fails to remember it. Thus, it is quite common for police officers to testify to an identification made at a lineup, for example.

References

People v Malone, 445 Mich 369 (1994)
United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988)
2 McCormick, *Evidence* (7th ed), § 251
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.13
United States v Lewis, 565 F2d 1248 (CA 2, 1977)
United States v Jarrad, 754 F2d 1451 (CA 9, 1985)
United States v O'Malley, 796 F2d 891 (CA 7, 1986)

E. Exclusions From The General Definition Of Hearsay: Admissions--The Statements Of The Accused

- 1. Party-opponent.** Only the *opposing* party may admit a statement by a party. In a criminal case, then, the prosecution may admit a statement of the defendant, but the defendant in a criminal case may not put into evidence his or her own self-serving statements nor those of the victim, as the victim is not a party opponent .

References

People v Perryman, 89 Mich App 516 (1979)(cannot put in own statements)
People v Vanderford, 77 Mich App 370 (1977)(cannot put in own statements)
People v Carson, 87 Mich App 163 (1978)(defendant cannot put in victim's statements in criminal case; victim not party-opponent)
2 McCormick, *Evidence* (7th ed), § 254
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.15

- 2. Need not be against interest when made.** The requirement for admissibility is relevance; an admission need not be against interest when made. Declarations against penal interest are a hearsay exception, with particular foundational requirements.

References

See *Shields v Reddo*, 432 Mich 761 (1989)
People v Moncure, 94 Mich App 252 (1979)
People v Brown, 120 Mich App 765 (1982)
Michigan Court Rules Practice: Evidence, § 801.10

2 McCormick, *Evidence* (7th ed), § 254 (noting that the phrase “admission against interest” still “continues to appear with embarrassing frequency”)
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.1
United States v Turner, 995 F2d 1357 (CA 6, 1993)

- 3. Testimonial qualifications.** The ordinary rules of testimonial qualification of a witness do not apply to party admissions; neither mental competency nor firsthand knowledge are required (the overall theory of the exception is: “you said it, you explain it”). The rule also allows admissions which are in the form of opinion.

References

2 McCormick, *Evidence* (7th ed), § 255, § 256
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.16; § 801.24

- 4. False exculpatory statements.** False exculpatory statements are admissible and are circumstantial evidence of guilt.

References

People v Dandron, 70 Mich App 439 (1976)
People v Cutchall, 200 Mich App 396 (1993)
People v Wackerle, 156 Mich App 717 (1986)(prosecutor must be allowed to prove falsity of statements)
People v Seals, 285 Mich App 1 (2009)
People v Wolford, 189 Mich App 478 (1991)(instruction that false exculpatory statement may be considered evidence of guilt is proper)

- 5. Admissions by conduct.** Conduct of the accused such as threats, flight to avoid arrest, using an alias, changing appearance, resisting arrest, attempts to suborn perjury or destroy evidence or otherwise obstruct justice, are often admitted under the admissions exclusion as “admissions by conduct.” Though this will serve quite well to admit the evidence, these acts are not intended as assertions, and technically are not hearsay for that reason.

References

People v Hooper, 50 Mich App 186 (1973)
People v Taylor, 66 Mich App 456 (1975)
People v Dixon, 84 Mich App 675 (1978)
People v Clark, 124 Mich App 410 (1983)
People v Cutchall, 200 Mich App 396 (1993)
People v Coleman, 210 Mich App 1 (1995)

See *People v McReavy*, 436 Mich 197 (1990)(demeanor of accused during interrogation)

People v Sholl, 453 Mich 730 (1996)

See *People v Schollaert*, 194 Mich App 158 (1992)(demeanor of accused when arrested)

2 McCormick, *Evidence* (7th ed), § 263

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.3

- 6. Admissions by conduct/refusal to act.** Refusing to obey lawful commands of the police or of a court may be considered an admission by conduct (or, correctly viewed, as nonassertive conduct), such as where a defendant refuses to obey a search warrant for blood, or refuses to stand in a lineup. Where there is no right to refuse, evidence of refusal is admissible if relevant.

References

People v Abernathy, 153 Mich App 567 (1986)

People v Benson, 180 Mich App 433 (1989)

People v Williams, 181 Mich App 551 (1989)

F. Exclusions From The General Definition Of Hearsay: Admissions—Statements By Representatives Or Authorized Agents

- 1. Proof of agency or authorization.** This is a question for the court to decide under MRE 104(a), regarding which the rules of evidence do not apply.

References

United States v Flores, 679 F2d 173 (CA 9, 1982)

2 McCormick, *Evidence* (7th ed), § 259

- 2. Attorneys and pleadings.** McCormick states that an attorney in a lawsuit “has *prima facie* authority to make relevant judicial admissions by pleadings, by oral or written stipulations, or by formal opening statement, which unless allowed to be withdrawn are conclusive in the case.”

References

See *People v Von Everett*, 156 Mich App 615 (1986)(regarding alibi notice as admission by agent)

2 McCormick, *Evidence* (7th ed), § 259

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.23

United States v McKeon, 738 F2d 26 (CA 2, 1984)

See “Evidentiary Admissions Of Defense Counsel In Federal Criminal Cases,” 24 Am Cr L Rev 93 (1986)

G. Exclusions From The General Definition Of Hearsay: Admissions—Adoptive Admissions

- 1. Words or conduct.** An easier case for adoption or belief in truth of the assertion of another is made where the individual alleging adopting the assertion has responded in some manner either through conduct or words. The question of adoption is treated by commentators as one of conditional relevance under MRE 104(b) rather than one of a preliminary question of admissibility under MRE 104(b), which leaves the question of adoption for the jury rather than the judge so long as the judge determines that the jury *could* find by a preponderance of the evidence that the statement was adopted.

References

People v Dietrich, 87 Mich App 116 (1978)
People v Godboldo, 158 Mich App 603 (1987)
People v Bushard, 444 Mich 384 (1993)
2 McCormick, *Evidence* (7th ed), § 261
6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.20

- 2. Silence.** Demonstration of *adoption by silence* is difficult in any case, and more difficult in criminal cases. While ordinarily some participation in the conversation in a manner indicating assent is required, there are cases which find adoption through silence in criminal cases, so long as Fifth Amendment or due process concerns are not violated (that is, the silence is not after Miranda warnings).

References

People v Dietrich, 87 Mich App 116 (1978)
People v Godboldo, 158 Mich App 603 (1987)
2 McCormick, *Evidence* (7th ed), § 262
2 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.21
United States v Ojala, 544 F2d 940 (CA 8, 1976)
United States v Schaff, 948 F2d 501 (CA 9, 1991)

H. Exclusions From The General Definition Of Hearsay: Admissions—Statements of Coconspirator

1. **The “in the course of and in furtherance” requirement.** “Statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirator abreast of an ongoing conspiracy’s activities are admissible.” Thus, statements made prior to the conspiracy and after its termination are not admissible against other than the declarant (where the admissions exclusion would apply). Upon proper proof, statements related to disposition of the fruits of the underlying offense or concealment of it are admissible if these activities are demonstrated to be part of the overall agreement which forms the conspiracy.

References

Michigan Court Rules Practice: Evidence, § 801.15

People v Ayoub, 150 Mich App 150 (1985)

People v Hall, 102 Mich App 483 (1980)

People v Centers, 141 Mich App 346 (1985)(vacated on other grounds, 422 Mich 925)

People v Cadle, 204 Mich App 646 (1994)(statement after conspiracy ended inadmissible)

2 McCormick, *Evidence* (7th ed), § 259

6 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.25

United States v Arias-Villanueva, 998 F2d 1491 (CA 9, 1993)

2. **Foundational requirements and the decisionmaker.** Proof of the conspiracy, its scope, and whether the statements were in its course and in furtherance of it are required as foundational matters. These matters are for determination by the court under MRE 104(a), which is to determine the matter by a preponderance of the evidence. The rules of evidence do not apply to preliminary questions of admissibility, so in other jurisdictions the statement sought to be admitted may itself be considered on the question of proof of these foundational matters; however, in Michigan *the rule itself requires independent proof of the conspiracy.*

References

People v Vega, 413 Mich 773 (1982)

People v Gay, 149 Mich App 468 (1986)

People v Rockwell, 188 Mich App 405 (1986)

2 McCormick, *Evidence* (7th ed), § 259

2 Graham, *Handbook of Federal Evidence* (7th Ed), § 801.25

United States v Gordon, 844 F2d 1397 (CA 9, 1988)

United States v Sepulveda, 15 F3d 1161 (CA 1, 1993)

**OFFICE OF THE PROSECUTING ATTORNEY
COUNTY OF WAYNE**

**HEARSAY, PART II:
EXCEPTIONS TO THE HEARSAY RULE WHERE AVAILABILITY
OF THE DECLARANT IS IMMATERIAL**

Presented: 2015

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I. PREFACE: CRIMINAL CASES AND THE “TESTIMONIAL” QUESTION

- A. The Foundation of the Issue—An Absent Declarant.** Under the Sixth Amendment, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” With regard to the admission of hearsay evidence under some exception or exclusion, the confrontation issue arises only when the declarant is absent. If the declarant testifies, then the admission of some out-of-court statement of the declarant for the truth of the matter raises no confrontation issue, even if the declarant denies making the statement or does not remember either it or the events it discusses. But even where under the rules the availability of the declarant is “immaterial,” so that unavailability need not be shown as a part of the foundation of the admission of the statement under the rules, if the declarant is absent a confrontation-clause issue may arise.

References

United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988) (“A witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.” Because a defendant is guaranteed under the Confrontation Clause only “an opportunity for effective cross-examination, not cross-examination that is effective,” so long as the declarant testifies and is subject to cross-examination *it matters not whether the declarant remembers making the prior statement but fails to remember its content, fails to remember making the prior statement, or denies making the prior statement completely*)

- B. The “Testimonial” Test.** The admission of a hearsay statement from an absent declarant under some exception or exclusion violates the defendant’s right to confront the witnesses against him or her if the statement is “testimonial.” Just what this means remains the subject of litigation.

- 1. The Crawford Definition.** “The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 1 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘*a solemn declaration or affirmation made for the purpose of establishing or proving some fact.*’ . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”

References

Crawford v Washington, 541 US 36, 124 S Ct 1354, 158 L.Ed.2d 177 (2004) (formal statements by witnesses to police during interviews are testimonial)

- 2. Ongoing emergencies.** A statement is not testimonial if its primary purpose was to enable the authorities to respond to an ongoing emergency.

References

Davis v Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L Ed 2d 224 (2006) (911 call that described ongoing events—and would thus have met the exception for present sense impression—was not testimonial, as its primary purpose was to enable police assistance to meet an ongoing emergency. But as the questioning from a 911 operator progresses, answers to questions may be testimonial. And the affidavit taken by an officer from a victim/witness regarding a domestic violence situation was testimonial)

Michigan v Bryant, 562 US 344, 131 S Ct 1143, 179 L Ed 2d 93 (2011)(When the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial, and, therefore, statements made in the course of such an interrogation are nontestimonial, and not within the scope of the confrontation clause. The existence of an ongoing emergency at the time of an encounter between an individual and the police, in the context of determining whether statements made in the course of an interrogation are nontestimonial under the confrontation clause, must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight; if the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the confrontation clause).

- 3. Laboratory reports.** It depends!

References

Police laboratory reports. “Ordinary” lab reports, such as chemical analysis in drug cases, fall within neither the public records nor the business records hearsay exceptions. *People v. McDaniel*, 469 Mich. 409 (2003). See also *People v. Payne*, 285 Mich. App. 181 (2009); *Melendez-Diaz v. Massachusetts*, 557 US 305, 129 S Ct 2527, 174 L Ed. 2d 314 (2009).

Bullcoming v. New Mexico, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) (state cannot, in place of technician who performed the lab tests, employ testimony from a supervisor who neither participated in nor observed the testing of the defendant's blood sample).

Williams v. Illinois, 132 S Ct. 2221, 183 L Ed 2d 89 (2012). In a 4–1–4 opinion the United States Supreme Court has allowed admission of a laboratory report from a private laboratory used in DNA analysis. A rape kit was collected after an abduction-rape, and the evidence sent to Cellmark, which performed a DNA analysis. That profile was entered into the State's DNA databank, and a hit occurred with defendant's DNA profile.

Defendant was then arrested, and the victim identified him. The expert from the state lab who had developed defendant's DNA profile was called, as well as the DNA analyst who compared that profile with the profile prepared by Cellmark from the vaginal swabs taken from the victim. No Cellmark technician was called. The state expert testified to chain of custody of the swabs sent to Cellmark and the receiving of the Cellmark reports. She testified to comparing the defendant's DNA profile and the Cellmark profile, and finding a match. The question was whether the testimony regarding the DNA profile prepared by Cellmark was admitted in violation of the Confrontation Clause. The admission was upheld, but there was no agreement on a rationale by the Court.

Autopsy reports. See *People v. Lewis*, 490 Mich. 921 (2011) (suggests autopsy report testimonial); *People v. Dendel*, 289 Mich. App. 445, 797 N.W.2d 645 (2010) (autopsy report testimonial where toxicology report prepared by outside agency employed in report). Other jurisdictions have held autopsy reports not testimonial. See e.g. *State v. Craig*, 853 N.E.2d 621 (Ohio, 2006)

Certificate of mailing. A certificate of mailing of a driver's license suspension is not testimonial because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Instead, the circumstances reflect that the creation of a certificate of mailing, which is necessarily generated before the commission of any crime, is a function of the legislatively authorized administrative role of the agency independent from any investigatory or prosecutorial purpose. Therefore, the DOS certificate of mailing may be admitted into evidence absent accompanying witness testimony. *People v. Nunley*, 491 Mich. 686 (2012)

4. Children/non-law enforcement/lack of formality (*Ohio v Clark*)

Facts. A pre-school teacher saw that a child's eye appeared bloodshot, and asked him "what happened." Eventually he said that he "fell." When the teacher saw other red marks, she notified the lead teacher, who asked "Who did this? What happened to you?" The child said "Dee, Dee,' the name he called defendant by. When lifting the boy's shirt revealed more injuries, a child abuse hotline was called. At trial, the child's statement was admitted under a state hearsay exception dealing with these circumstances, though the child, who was 3 years old, was found incompetent to be a witness. The Ohio Supreme Court found a violation of the confrontation clause.

The Supreme Court disagreed. The Court said that "a statement cannot fall within the Confrontation Clause *unless its primary purpose was testimonial*. . . . Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." But "that does not mean that the Confrontation Clause bars every statement that satisfies the 'primary purpose' test. . . . the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. . . . Thus, the

primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause."

The Court made clear that though the case involved a statement to a non-law-enforcement person, *it was "declin[ing] to adopt a categorical rule excluding them from the Sixth Amendment's reach."* But *this is a relevant factor*, as "such statements are *much less likely to be testimonial than statements to law enforcement officers.*" Here, considering all factors, the child's statements "clearly were not made with the primary purpose of creating evidence for Clark's prosecution." Rather, the statements were made "in the context of an ongoing emergency." The teachers became worried that the child was the victim of violence, and "needed to know whether it was safe to release [the child] to his guardian at the end of the day," and so "needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help their questions and [the child's] answers were primarily aimed at identifying and ending the threat."

The Court also that "Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system." And again, that the statements was made to non-law-enforcement purposes also "remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. . . . Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior *are significantly less likely to be testimonial* than statements given to law enforcement officers."

Ohio v Clark, __US__ (6-18-2015)

5. A note regarding domestic violence victim statements. MCL 768.27c provides that:

(1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

Paragraph (2) describes those factors that go into a trustworthiness analysis, and paragraph (3) requires notice of intent by the prosecution. *Such statements are almost certainly testimonial, and thus would generally only be admissible where the declarant testifies at trial*

References

People v Meissner, 294 Mich App 438 (2011)

People v Cameron, 291 Mich App 599 (2011)

C. Forfeiture of Confrontation Right By Wrongdoing. MRE 804(b)(6) provides that not excluded by the hearsay rule is a “statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” The act must have been done with the intent to cause the unavailability of the person as a witness.

References

Giles v California, 554 US 353, 128 S Ct 2678, 171 L Ed 2d 488 (2008)

People v. Burns, 494 Mich 104 (2013)

People v. McDade, 301 Mich App 343 (2013)

People v Roscoe, 303 Mich App 633 (2014)

II. “UNPREMEDITATED” STATEMENTS: STATEMENTS REGARDING PHYSICAL, MENTAL, AND EMOTIONAL “EVENTS”

A. MRE 803(1)/Present Sense Impression: The Rule. “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

1. Theory. The theory of “trustworthiness” with this exception is that a contemporaneous statement regarding an event or condition is unlikely to be the product of “deliberate or conscious misrepresentation.”

References

Advisory Committee Note to FRE 803(1)

2 McCormick, *Evidence* (7th Ed.), § 271

2. **Participant or bystander.** The declarant may be either a participant in the event or condition described or explained, or simply a bystander. There is no requirement of participation.

References

See *Michigan Court Rules Practice: Evidence* § 803.1

Advisory Committee Note to FRE 803(1) ("Participation by the declarant is not required: a non-participant may be moved to describe what he perceives....")

3. **Personal knowledge.** Personal knowledge of that contained in the statement on the part of the *declarant* is required, as implicit in the requirement that the statement explain or describe an event or condition made after the *declarant perceived it*. There is, however, no requirement that the *witness on the stand recounting the statement* have any actual knowledge, and the rule does not require an available declarant.

References

See *Bemis v Edwards*, 45 F3d 1369 (CA 9, 1995) (personal knowledge required on the part of the declarant; statement inadmissible where there was no showing that 911 caller had personal knowledge of that reported)

See *United States v Blakey*, 607 F2d 779 (CA 7, 1979)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.1

4. "Describing or explaining an event or condition."

- a. **Generally.** While a statement which does not describe an event or condition even though evoked or caused by that event or condition may be admissible as an excited utterance, it is not admissible under this exception.

References

Michigan Court Rules Practice: Evidence, § 803.1

Advisory Committee Note to FRE 803(1) (as compared to the excited utterance exception, present sense impression has a shorter permissible time lapse and a narrower breadth of subject matter)

- b. **Evaluative statements.** Evaluative statements or opinions do *not* "explain or describe" a condition or event. For example, to say that someone "was confused" is an evaluation of their thought process, and does not fall within the exception.

References

Vitek Systems v Abbott Laboratories, 675 F2d 190, 194 (CA 8, 1982)

5. **Hearsay within hearsay.** While Dean Robinson observes that this exception may be applied to “contemporaneous handwritten notes of meetings and telephone conversations” as nothing in the rule requires “that the ‘statement’ be oral, and nothing requires the ‘event’ described to be something other than a conversation,” such use of the exception could often run afoul of hearsay problems in that if the notes reflect statements which are themselves hearsay, a second hearsay exception would be required to justify admission of this “hearsay within hearsay.”

References

Michigan Court Rules Practice: Evidence, § 803.1

6. **Timing and the “immediately thereafter” requirement; “substantially contemporaneous.”** Given the theory of reliability of present sense impression—that a contemporaneous statement regarding an event or condition is unlikely to be contrived or misrepresented—some degree of rigor regarding the time element is required. But that the statement must have been made by the declarant “while perceiving” the event or condition (a contemporaneous statement), or “immediately thereafter” does *not* mean *instantly* thereafter; rather, a “slight lapse” of time is permitted. It has been held that if the statement is “substantially contemporaneous” with the event(s) this portion of the foundation has been met.

References

Advisory Committee Note to FRE 803(1) (“With respect to the time element, (the exception) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable”)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.1

Michigan Court Rules Practice: Evidence, § 803.1

Though the first case in Michigan interpreting the exception held that “immediately” means “instantly,” the delay there was as long as 30 minutes, and subsequent cases have not followed the “instantly” interpretation.

Hewitt v Grand Trunk W. R. Co, 123 Mich App 309 (1983) (requiring the statement be made “instantly” after the event or condition was perceived)

Johnson v White, 430 Mich 47 (1988) (allowing statement made as much as four minutes after perception of event)

People v Chelmicki, 305 Mich App 58 (2014) (15 minutes)

People v Jensen, 222 Mich App 575 (1997) (next day too long)

See also *Berryman v K Mart*, 193 Mich App 88 (1992) (“immediately thereafter” is not synonymous with “instantly thereafter”)

People v Slaton, 135 Mich App 328 (1984)

People v Cross, 202 Mich App 138 (1993)

Michigan Court Rules Practice: Evidence, § 803.

7. Timing examples:

References

Officer in pursuit of defendant saw him bend down and appear to place something on the ground in a backyard. On the officer's arrival in the yard a minute later, and his observation of money and a rock of cocaine on the ground, a six year old girl in the yard said "That man put that there." When asked if the man was the man fitting the description of the defendant, the girl said "yes." Held admissible under MRE 803(1), as made "immediately thereafter" the event observed.

People v Cross, 202 Mich App 138 (1993)

Immediately upon the arrival of the officer at the scene, one family member blurted out that the defendant was threatening to kill members of her family; also, the officer observed the defendant at that moment in a heated argument with his sister. Held that the statement concerned an ongoing event, and was admissible as present sense impression.

United States v Jackson, 124 F3d 607 (CA 4, 1997)

Officer's testimony that when informant turned over marijuana and firearms to him the informant stated he had just purchased the items from the defendant found to be within the exception.

United States v Beck, 122 F3d 676 (CA 8, 1997)

Testimony by officers who served as "note-takers" for other surveillance officers as to what those officers were observing admissible as within the exception.

United States v Gil, 58 F3d 1414 (CA 9, 1995)

911 tapes are often admitted under this exception (while the time lapse is shorter than with an excited utterance, the advantage is that it need not be shown that the declarant was under the influence of excitement from the event).

See *People v Slaton*, 135 Mich App 328 (1984)(tape of murder victim's call that someone was trying to "get upstairs")
United States v Hawkins, 59 F3d 723 (CA 8, 1995)(call was within 7 minutes at most, and victim stated "my husband *just* pulled a gun out on me")

United States v Mejia-Valez, 855 F Supp 607 (EDNY, 1994)(a tape of a 911 call within 2-3 minutes of the shooting, and another 16 minutes after the shooting, both held admissible)

See also *Bemis v Edwards*, 45 F3d 1369 (CA 9, 1995)

- 8. Proof of the event or condition.** Though the rule itself contains no such requirement, the Michigan Supreme Court has held there must be some independent proof of the event or condition, which may be circumstantial.

References

People v Hendrickson, 459 Mich 229 (1998)

But see 2 McCormick, *Evidence* (7th Ed.), § 271

But see 6 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.1

NOTE: But this decision was based on a similar requirement for excited utterances established in *People v Burton*, 433 Mich 268 (1989)—“[i]n *People v. Burton*, we held that an excited utterance could not establish its own underlying event. Because of our aversion to the ‘bootstrapping’ of hearsay evidence, we concluded that an excited utterance was inadmissible without independent proof, direct or circumstantial, that the underlying event took place. . . . Given the analytical similarity between the present sense impression and excited utterance exceptions, we conclude that their independent evidence requirements are similarly analogous”—and *Burton* has been *overruled*, which thus seems to call *Hendrickson* into question.

See *People v Barrett*, 480 Mich 125 (2008), overruling *Burton*.

- B. MRE 803(2)/Excited Utterances: The Rule.** 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.”

It has been clarified that the excited utterance exception in Michigan contains two criteria:

- ✍ the statement must arise out of an event that is startling enough to produce nervous excitement, and
- ✍ the resulting statement must be made while the declarant was under the excitement caused by the event.
- ✍ There is also a third very important “prong” to the inquiry, in that the statement must also relate to the circumstances of the startling event. Previous case statements that also required is a showing of a lack of time to contrive, fabricate or misrepresent have been repudiated, it being said that this language is “simply a reformulation of the inquiry as to whether the statement was made when the witness was still under the influence of an overwhelming emotional condition,”

the question being whether there was a lack of *capacity* to fabricate, not a lack of *time*. See I (C)(6), *infra*.

References

People v Smith, 456 Mich 543 (1998)

People v Straight, 430 Mich 418, 425 (1988)

People v McLaughlin, 258 Mich App 635 (2003)

See also the analysis of *People v Verburg*, 170 Mich App 490 (1988)

1. **Theory.** The theory of “trustworthiness” with this exception is that a s shocking or startling event may produce a condition of excitement “which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”

References

Advisory Committee Note to FRE 803(2)

Michigan Court Rules Practice: Evidence, § 803.2

6 Wigmore, *Evidence* (Chadbourn rev), § 1747

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2

2. **Participant or bystander.** The declarant may be either a participant in the startling event, or simply a bystander. There is no requirement of participation.

References

Advisory Committee Note to FRE 803(1) (“*Participation* by the declarant is not required: ...one may be startled by an event in which he is not an actor”)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2

3. **Personal knowledge.** Though the scope of the statement may be broader than that when present sense impression is involved, in part because here the statement need only “relate” to the startling event or condition while with present sense impression the statement must “describe or explain” the event or condition (which need not be startling), see I(C) (4), *infra*, personal knowledge of that contained in the statement on the part of the *declarant* is still required, which may be established by the content and the context of the statement itself. There is, however, no requirement that the *witness on the stand recounting the statement* have any actual knowledge, and the rule does not require an available declarant.

References

People v Kent, 157 Mich App 780 (1987)

See *Bemis v Edwards*, 45 F3d 1369 (CA 9, 1995) (personal knowledge required on the part of the declarant; statement inadmissible where there was no showing that 911 caller had personal knowledge of that reported)

McLaughlin v Vinzant, 522 F2d 488 (CA 1, 1975)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2

4. “Relating to a startling event or condition”

- a. **Generally.** The statement in the Advisory Committee Note to FRE 803(1) that as compared to the excited utterance exception, present sense impression has a shorter permissible time lapse and a narrower breadth of subject matter, reveals also the other side of the coin; namely, the excited utterance exception includes a greater breadth of subject matter than present sense impression, because the statement need only “relate” to the startling event rather than “describe or explain it.”

References

Michigan Court Rules Practice: Evidence, § 803.2.3

Advisory Committee Note to FRE 803(2)

- b. **Evaluative statements and opinions.** Evaluative statements and opinions, not permissible under present sense impression, *do*, or at least, can, “relate” to a startling event, and can be admitted. As stated by Professor Graham, “that the statement contains an opinion, provides details of the event or condition, accuses someone of committing a crime, or is self serving” matters not in terms of whether or not it “relates” to the startling event.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2

Advisory Committee Note to FRE 803(2)

2 McCormick, *Evidence* (7th Ed.), § 272

McLaughlin v Vinzant, 522 F2d 488 (CA 1, 1975)

5. **Hearsay within hearsay.** Though unlikely, if the statement contains hearsay statements of others, a second hearsay exception would be required to justify admission of this “hearsay within hearsay.”

References

cf. *Michigan Court Rules Practice: Evidence*, § 803.1

6. **Timing and the “under the stress of excitement caused by the event or condition” requirement.** The Advisory Committee Note to FRE 803(2) observes that with respect to the time element “the standard of measure is the duration of the state of

excitement....Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.” Other factors include “the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or in response to a question,” none of which are determinative standing alone. The stress of excitement can last for hours, and even days. As stated in *Straight*, “The focus of MRE 803(2), given a startling event, is whether the declarant spoke while still under the stress caused by the startling event. Because the justification for this rule is ***lack of capacity to fabricate rather than the lack of time to fabricate***, which is the justification for the present sense impression exception...’the period of acceptable time will frequently be considerably longer’ under 803(2) than is acceptable under 803(1).”

References

People v Smith, 456 Mich 543 (1998)
People v Straight, 430 Mich 418, 425 (1988)
People v Bowman, 254 Mich App 142 (2002) (no “startling event” simply because one drug dealer was “upset” upon seeing another)
People v Snider, 239 Mich App 393 (2000) (declarant had been shot; statement admissible as either excited utterance or dying declaration)
People v Layher, 238 Mich App 573 (1999)
Advisory Committee Note to FRE 803(2)
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2
Michigan Court Rules Practice: Evidence, § 803.2.2

7. Timing Factors

- a. Generally.** The inquiry is one of the totality of the circumstances, considering such factors as the character of the transaction or event, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or in response to a question, none of which are determinative standing alone.

References

People v Smith, 456 Mich 543 (1998)
People v Straight, 430 Mich 418, 425 (1988)
Advisory Committee Note to FRE 803(2)
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2
Michigan Court Rules Practice: Evidence, § 803.2.2

- b. Passage of time.** The passage of time is an important factor in the inquiry.

References

See e.g. *People v Straight*, 430 Mich 418, 425 (1988)(one month, in combination with other factors, too long)
People v Smith, 456 Mich 543 (1998)(statement made 10 hours after the event upheld)
People v Jensen, 222 Mich App 575 (1997)
People v Anderson, 209 Mich App 527 (1995) (statements made by victim of shooting as soon as officers arrived)
People v Ellis, 174 Mich App 139 (1989)(statements made within moments of startling event held admissible)
People v Zysk, 149 Mich App 452 (1986) (statements made three hours after event upheld)
People v Sommerville, 100 Mich App 470 (1980) (24 hours too long under the facts)
United States v Winters, 33 F3d 720 (CA 6, 1994)(two days too long)
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2

- c. Passage of time/children.** A greater passage of time may be justified under all the circumstances when children are involved, as well as those of limited mental ability, or perhaps where there have been threats.

References

People v Hackney, 183 Mich App 516 (1990)
People v Houghteling, 183 Mich App 805 (1990)
People v Lee, 177 Mich App 382 (1989) (17 days too long)
People v Foreman, 161 Mich App 14 (1987)
People v Scobey, 153 Mich App 82 (1986) (too long)
People v Garland, 152 Mich 301 (1986)
People v Draper, 150 Mich App 481 (1986)
People v Soles, 143 Mich App 433 (1985)

- d. Questions.** That the statement was made in response to questions is a factor, but will not allow disqualify a statement as an excited utterance.

References

People v Smith, 456 Mich 543 (1998)(statement upheld under circumstances though question asked)
People v Straight, 430 Mich 418, 425 (1988)(statement inadmissible where questions asked, delay was one month)
People v Hungate, 27 Mich App 496 (1970)

Cf. *People v Creith*, 151 Mich App 217 (1986)
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2,

8. **Proof of the startling event.** Though proof of the startling event may be made circumstantially, Michigan had, in contravention of MRE 104(a), determined that the existence of the startling event cannot be proven *solely* through the excited utterance itself. This was inconsistent with the view in most of the country and with that of commentators, and has *now been overruled*.

References

People v Barrett, 480 Mich 125 (2008), overruling *People v Burton*, 433 Mich 268 (1989)

People v Kowalak, 215 Mich App 554 (1996)(proof of the event may be circumstantial, including such facts as the demeanor and appearance of the declarant)

People v Layher, 238 Mich App 573 (1999)(the prosecution put in evidence of a prior assault on the learning disabled child through an excited utterance made to the mother. The independent proof of the event was that the clothed child—she was then 5—was sent to retrieve a clothes basket, and was found hiding behind a door naked and crying, and that the hospital determined she had been molested)

McCallum v Department of Corrections, 197 Mich App 589 (1992) (no proof of any startling event)

Michigan Court Rules Practice: Evidence, § 803.2

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.2 (general rule is that the event may be proven by the statement)

Advisory Committee Note to FRE 803(2)

- C. **MRE 803(3)/Then Existing Mental, Emotional, or Physical Condition: The Rule.** “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.”

1. **Theory.** The theory of “trustworthiness” with this exception is that it is essentially a “specialized application of 803(1),” present sense impression, which is presented separately to “enhance its usefulness and accessibility.” “Statements of memory or belief to prove the fact remembered or believed” are excluded from the exception “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.”

References

Advisory Committee Note to FRE 803(3)

“The special assurance of reliability for statements of present state of mind rests, as in the case of statements of bodily condition, upon their spontaneity and resulting probable sincerity. This has been assured principally by the requirement that the statements must relate to a condition of mind or emotion *existing at the time of the statement*.” The evidentiary effect of the statement, however, is “broadened by the inference of continuity in time,” as the “then existing mental state, emotion, sensation, or physical condition may be inferred to exist into the future and to have existed in the past,” depending on the circumstances of the case.

References

2 McCormick (7th ed), *Evidence*, § 274

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.3

Michigan Court Rules Practice: Evidence, § 803.3.2

- 2. Distinguished from nonhearsay.** It may on occasion be argued that a statement which meets the requirements of MRE 803(3) is not hearsay at all, falling without the definition because offered for a different inference than the truth of the matter declared. Often, however, “theoretical difficulties abound” with the nonhearsay argument, but “fortunately whether a particular statement disclosing a then existing state of mind, emotion, sensation, or physical condition is not classified as hearsay is of no practical importance, since declarations of this nature are admissible in any event pursuant to Rule 803(3).”

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.3

- 3. Then-existing physical condition.** The key to the exception when employed as to physical condition is the requirement that the statement be *contemporaneous* with the physical condition expressed. Description of *currently experienced* physical pain or symptoms fall within the exception, but statements describing *past* pain or symptoms, or *explanations of the cause of the pain or symptoms* are *not* within the exception. For example, “That glass of water I drank tasted funny; I feel faint” would only be admissible for the statement “I feel faint.” Similarly, if a person were to fall to the ground, and upon getting up be asked what happened and respond “I felt faint,” the statement would not fall within the exception. It is true, however, that a statement of an existing sensation or physical condition may be inferred to exist for some time into the future and to have existed for some time prior to the statement of the declarant, depending on the circumstances. McCormick has stated that the “continuity” question in terms of its length “varies with the particular attitudes or feelings at issue and with the cause,” so that to employ a continuity inference the declaration must reveal a state of mind which, in light of all the circumstances, is “reasonably likely to have been the same condition

existing at the material time,” assuming it is important to show the existence of the condition or feeling at some time other than the precise time of the statement.

References

Michigan Court Rules Practice: Evidence, § 803.3.2

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.3

See e.g. *Holden v Ford Motor Co*, 185 Mich App 305 (1990), rev'd other grounds 439 Mich 257 (1992)

4. Then-existing mental or emotional condition.

- a. Then-existing/exclusion of Statements of Memory or Belief.** The state of mind expressed must be then existing, and the statement cannot include why the declarant held the particular state of mind. For example, “I’m scared,” but not “I’m scared because X threatened me.”

References

United States v Sherbondy, 70 F3d 1281 (CA 9, 1995)

United States v Arevalo-Gamboa, 69 Fd 545 (CA 9, 1995)

United States v Tome, 61 F3d 1446 (CA 10, 1995) (“I’m afraid sometimes” held admissible but not “because my husband has threatened to kill me”)

People v Moorer, 262 Mich App 64 (2004)

People v King, 215 Mich App 301 (1996) (“afraid” admissible as relevant to certain future conduct of victim)

See *People v Hackney*, 183 Mich App 516 (1990) (statement inadmissible as a statement of memory or belief rather than a then-existing physical condition)

See *People v Furman*, 158 Mich App 302 (1987) (statements by victim regarding number, frequency, length, and nature of *past* visits to male customer were statements of memory not admissible under 803(3))

See also *People v DeRushia*, 109 Mich App 419 (1981)

Important in this regard in Michigan is the *Moorer* case. Defense counsel moved prior to testimony to exclude certain testimony that the victim had made statements indicating he had been threatened by the defendant and was afraid of him. The prosecutor argued the statements were evidence of premeditation and deliberation, because “clearly, based on the comments he [defendant] made to the decedent leading up to his death, *he obviously was premeditating and planning it.*” The prosecutor, then, did not wish to show simply that the victim was “afraid,” but that he was afraid *because*, as a matter of actual fact, he had been threatened by the defendant, and these threats showed premeditation. The threats were shown through MRE 803(3), and argued as proven through the declarant’s statements. This is not consistent with the rule.

In *United States v Joe*, 8 F3d 1488, 1492 (CA 10, 1993) the court held that a homicide victim's statement to a physician not simply that she was "afraid sometimes," but including an assertion of the source of her fear (because she thought her husband might kill her) was "clearly a 'statement of memory or belief' expressly excluded by the Rule 803(3) exception" (the husband was on trial for the declarant's murder).

And see 2 McCormick, § 276 ("...even if the judgment is made that evidence of fear standing alone should be admitted, statements of fear are rarely stated pristinely....that state of mind usually assumes the form either of a statement that the accused has made threats, from which fear may be inferred, or perhaps more likely a statement of fear because of the defendant's threats....the cases have generally excluded the evidence").

- b. Statements of intent.** This is the use to which the exception is more often put, and which causes the most controversy. There are two categories of use of statements of intent: 1) to show the declarant's intent at the time of the statement, and 2) to demonstrate circumstantially that an event occurred subsequent to the statement; put another way, to demonstrate that the stated intent was *actually carried out*.

References

People v McDade, 301 Mich App 343 (2013)
Michigan Court Rules Practice: Evidence, § 803.3.2
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.3

- i. Declarant's intent.** Assuming relevance, use of this exception to show the intent of the declarant is unremarkable.

References

Michigan Court Rules Practice: Evidence, § 803.3.2

- ii. Carrying out of declarant's intent.** A statement of intention is admissible to prove *subsequent conduct*; that is, that the declarant actually carried out his or her stated intent. It is also admissible to prove motive; it is frequently used for this purpose in cases involving marital discord resulting in an assault or murder.

References

Michigan Court Rules Practice: Evidence, § 803.3.2
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.3

Advisory Committee Note to FRE 803(3) (“The rule ... allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed”)

People v Fisher, 449 Mich 441 (1995) (statements of intent to visit Germany to be with lover and to divorce defendant upon return admissible under rule as showing marital discord as motive for murder)

People v Riggs, 223 Mich App 662 (1997) (letters from victim to mother regarding marital discord admissible)

United States v Tokars, 95 F3d 1520 (CA 11, 1996) (statements of murder victim regarding intent to divorce defendant admissible and relevant to motive)

People v Howard, 226 Mich App 528 (1998) (admission of victim’s appointment book listing the address of defendant’s mother’s house on the page for the date, and beside the approximate time, that she was killed, admissible under rule)

People v Furman, 158 Mich App 302 (1987) (murder victim’s statement to deliver an order to a particular customer admissible under rule)

People v Knight, 122 Mich App 584 (1983) (statement of plan to leave on a trip admissible under rule)

People v Oaks, 94 Mich App 745 (1980)

See also *People v Brownridge*, 225 Mich App 291 (1997) (rev’d on other grounds)

- iii. **Carrying out of declarant’s intent to prove conduct of parties other than declarant.** This is the most problematic use of the exception. In *Mutual Life Insurance v Hillmon*, a pre-rules case, the United States Supreme Court had held such evidence admissible to prove the conduct of another (“I am going with a man by the name of Hillmon” to show not only that the declarant went someplace, but that he went with Hillmon, meaning Hillmon also went). No Michigan cases exist on the point, and there is a split of authority among modern case law. Federal authority tends to allow this use of the evidence; Dean Robinson argues against it.

References

Mutual Life Insurance v Hillmon, 145 US 285, 12 S Ct 909, 36 L d 706 (1892)

Michigan Court Rules Practice: Evidence, § 803.3.2

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.3

- D. MRE 803(4)/Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment: The Rule.** “Statements made for purposes of medical treatment or medical diagnosis in connection with 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 necessary to such diagnosis and treatment.”

1. **Theory.** The theory of “trustworthiness” with this exception is that the declarant will providing accurate information to treating medical personnel so as to receive effective treatment.

References

Advisory Committee Note to FRE 803(4)
Michigan Court Rules Practice: Evidence, § 803.4
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.4

2. **To whom made.** Need not be made to a physician, but may be made to other medical personnel, or even a psychiatric social worker, hospital attendant, ambulance driver, or even members of the family.

References

Advisory Committee Note to FRE 803(4)
Galli v Reutter, 148 Mich App 313 (1985)
In re Freiburger, 153 Mich App 251 (1986)

3. **More narrow than federal rule.** The federal rule includes statements leading to diagnosis for purposes of obtaining expert testimony for trial; the Michigan rule is limited to “medical diagnosis in connection with treatment,” thereby excluding diagnosis made for the purpose of testimony. But statements of then existing mental, emotional, or physical condition made to an expert examining the declarant for purposes of testimony would be admissible under 803(3).

References

Michigan Court Rules Practice: Evidence, § 803.4

4. **“Reasonably necessary” to diagnosis and treatment.** Because the statements must be “reasonable necessary” to diagnoses and treatment, statements as to the cause of injuries or symptoms may be admissible (“general character of the cause or external source thereof”), but statements of **fault** are not. For example, a statement to a doctor “I was hit by a car” would be admissible, but not “which ran through a red light.” A two part test is followed: 1)the declarant’s motive must be consistent with the purpose of the rule, and 2)it must be reasonable for the physician or medical personnel to rely on the information in diagnosis and treatment.

References

Michigan Court Rules Practice: Evidence, § 803.4
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.4

People v Matuszak, 263 Mich App 42 (2004)
People v Crump, 216 Mich App 210 (1996)
People v Zysk, 149 Mich App 452 (1986)
People v Creith, 151 Mich App 217 (1986)
People v James, 182 Mich App 295 (1990)
People v McElhaney, 215 Mich App 269 (1996)
United States v Iron Shell, 633 F2d 77 (CA 8, 1980)

5. “Reasonably necessary” to diagnosis and treatment; confrontation clause issues with SANE statements

Example. Suspecting some sexual abuse, the victim's mother took the 4-year-old child to the hospital, where the child was interviewed by a "Sexual Assault Nurse Examiner" (SANE). The nurse recorded statements the victim made:

Bear hurt it. He put his pee pee in my butt. It hurt. He turned the movie off and took my pop away. I touched his pee pee with my hand. He had me squish it. Water came out, yellow water. He said his pee pee is too dangerous. Let's call Bear. I want to tell him no. They babysit us.

Almost no record was made at the motion to suppress on the circumstances surrounding the making of the statement (it must be assumed the child was not going to testify at trial, or there would be no confrontation issue, only a hearsay issue). Defendant was arrested and gave both an oral and written confession. At the motion hearing the prosecution argued that because the statements were made to a nurse for the purpose of obtaining medical treatment, they were non-testimonial, but the trial judge suppressed without the making of any record as to the process of the examination, what prompted the complainant's statements, or how the forensic form was filled out.

The panel, after canvassing the cases of other jurisdictions, said "A majority of state courts considering this issue have determined that a sexual abuse victim's statements to a SANE, or similar examiner, were testimonial in nature and barred by the Confrontation Clause." Courts have held that "because the primary purpose of the SANE examination was 'to prove some past fact for use in a criminal trial rather than to meet an ongoing emergency,' the child victim's statements during the examination were testimonial." The panel agreed, and held that "in order to determine whether a sexual abuse victim's statements to a SANE are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and determine whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." That was not done here, and thus a remand was necessary (and again, if the child is going to testify the confrontation issue disappears, and this is not clear from the opinion).

People v Spangler, 285 Mich App 136 (2009)

But see *People v Garland*, 286 Mich App 1 (2009), where case statements made to a nurse were admitted where a record *was* made, and the panel determined that "The victim's statements to the nurse were reasonably necessary for her treatment and diagnosis. The victim went to the hospital for medical care the morning of the assault. She was directed to LACASA for such medical care. The nurse was the first person to take a history from the victim and examine the victim, which occurred at 6:00 p.m. on the day the assault occurred. The police investigation occurred subsequent to, and separate from, the nurse's taking of the history and examination. The nurse testified that the patient's history is very important because it tells her how to treat the patient and how to proceed with the examination. Then, based on the victim's history, the nurse provided medical treatment to the victim. . . . we have a factual record that sufficiently indicates that under the totality of the circumstances of the complainant's statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency....For the same reasons that the victim's statements to the nurse were reasonably necessary for her treatment and diagnosis, we find that the victim's statements were nontestimonial. Although the nurse does collect evidence during the course of the examination after taking a patient's history and the nurse is required to report the assault and turn over the evidence to law enforcement, the nurse is not involved in the police officer's interview of the victim after the examination and is not personally involved in the officer's investigation of the crime. . . .we hold that, on these facts, the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against defendant."

See *People v Mahone*, 294 Mich App 298 (2011)

6. **“Reasonably necessary” to diagnosis and treatment/children and identification of the perpetrator.** Michigan allows a statement by a child of the identity of the perpetrator in a case of sexual abuse as reasonably necessary to diagnosis and treatment, so long as the statement is “sufficiently reliable to support the exception’s rationale.” The Michigan Supreme Court has identified a 10 factor analysis on the question.

- 1)the age and maturity of the declarant;
- 2)the manner in which the statements were elicited (leading questions, for example, undermine trustworthiness);
- 3)the manner in which the statements are phrased (“childlike” use of words and phrases supports trustworthiness)
- 4)use of terminology unexpected of a child of similar age (the “flip side” of 3), which undermines trustworthiness);
- 5)who initiated the examination (if initiated by prosecution examination may not be for diagnosis and treatment);
- 6)timing of the examination in relation to assault (closer in time supports genuineness);
- 7)timing of examination in relation to trial (going to purpose of examination);

- 8)type of examination (statements in course of treatment of a psychological injury may not be as reliable);
- 9)relation of the declarant to the person identified as the perpetrator (viewed as evidence of lack of mistake);
- 10)existence of or lack of motive to fabricate.

References

People v Meeboer, 439 Mich 310 (1992)
People v Duenez, 306 Mich App 85 (2014)
People v Hyland, 212 Mich App 701 (1995)
See MRE 803(A)

E. MRE 803A¹/Child’s Statement About Sexual Act: The Rule. “A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.”

¹ Though a “subset” of the rules of MRE 803 where the availability of the declarant is immaterial, in fact for this rule it is not the case that the declarant must be *unavailable*, as with the rules under MRE 804, but rather the declarant must be *available* under this rule, which analytically fits for discussion at this point though not one of the rules contained in MRE 803.

1. **Theory.** The Note to the rule states that the rule “reinstates the Michigan common law hearsay exception known as the tender years rule.” This is true only in part, as the rule is more narrow than the common law rule. The rule is premised on a theory of reliability under the circumstances, coupled with a theory of necessity.

References

Note to Rule 803A

Michigan Court Rules Practice: Evidence, § 803A

2. **Age limitation.** Unlike the former common law rule, which had no age limitation, there is a requirement that the declarant be under the age of 10 *when the statement was made*, not at the time of trial.
3. **Corroborative use only; only first statement admissible.** The rule states that the hearsay statement is only admissible “to the extent that it corroborates testimony given by the declarant...” It is thus *not* sufficient simply that the declarant take the stand and be available for cross-examination. If the victim-declarant is unable to give a reasonable detailed account of what occurred, then the statement is not corroborative, but a *substitute* for in-court testimony, and not within the rule. Note that use of multiple statements to corroborate is prohibited; *only the first may be used*.

References

People v Douglas, 496 Mich 557 (2014)

Michigan Court Rules Practice: Evidence, § 803A

Cf. *People v Kreiner*, 415 Mich 372 (1982)

4. **Excusable delay.** Whether a delay is excusable as having been caused “by fear or other equally effective circumstance” depends on the facts of the case. Threats of consequences made to the child if he or she “tells” should be sufficient, even to justify delays of days or even months.

References

Michigan Court Rules Practice: Evidence, § 803A

People v Hammons, 210 Mich App 554 (1995)

People v Dunham, 220 Mich App 268 (1996) (delay of 8 or 9 months justified)

5. **Spontaneity.** Spontaneity, said the court, requires that the child must bring up the subject of sexual abuse. Any followup questioning or prompts from adults must be nonleading and open-ended, so that it is clear that the statement is the creation of the child.

People v Gursky, 486 Mich 596 (2010)

See also *People v Dunham*, 220 Mich App 268 (1996) (admissible when made in response to open-ended questions asked of all children of divorcing parents by friend of the court mediator)

6. **Notice.** No specific time frame is given; the notice must simply be adequate to allow the opposing side to prepare to meet the statement.

References

See *People v Dunham*, 220 Mich App 268 (1996)

III. “PREMEDITATED” STATEMENTS: RECORDED STATEMENTS, RECORDS, AND REPORTS

- A. **MRE 803(5)/Recorded Recollection: The Rule:** “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.”

1. **Theory.** The theory of “trustworthiness” with this exception is that the declarant made the record while the event which precipitated it was still fresh in his or her mind so that the statement is likely to be reliable and accurate.

References

Advisory Committee Note to FRE 803(5)

2. **“Insufficient recollection.”** Unlike the common law statements of the rule, the rule as adopted does not require an “exhausted” present recollection, but clearly states that the foundation is laid if it is demonstrated that the witness now has “insufficient recollection to enable him to testify fully and accurately.” Nor is it required under the rule that there be a failed attempt to “refresh recollection” by reference to the document in question; however, the most effective method of demonstrating a lack of sufficient memory is to show that the document fails to “jog” the memory of the witness.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.5

Michigan Court Rules Practice: Evidence, § 803.5

People v Chelmicki, 305 Mich App 58 (2014)

See *People v Jenkins*, 450 Mich 249 (1995)

- 3. Prepared or adopted when fresh in the memory, and accurate.** The witness need not have prepared the document in question, but may have “adopted it” when it was made. For example, a witness statement may be written or typed by a police officer, and then signed by the witness, who adopts it at that time. The witness must testify that the record was accurate when made or adopted; it is possible, in cases where the witness has forgotten completely the precise situation when the record was made for the witness to testify that he or she is “confident from the circumstances that he would not have written or adopted such description of the facts unless that description truly described his observations at the time.”

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.5
Michigan Court Rules Practice: Evidence, § 803.5
People v Clark, 106 Mich App 610 (1981)
People v Williams, 117 Mich App 505 (1982)
United States v Wimberly, 60 F3d 281 (CA 7, 1995)

- 4. Personal knowledge.** The document must consist of otherwise admissible testimony; it is required that it be record of a matter about which the witness “once had knowledge”—that is, at the time of the preparation of the document.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.5

- 5. Police reports.** Given the limitation of MRE 803(8), the Public Records exception, excluding, as to “matters observed pursuant to duty imposed by law as to which matters *there was a duty to report*,” “in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.....” there is some concern as to whether the exception applies to police reports. With regard to notes of witness statements, confessions, and the like, the exception should apply; with regard to PCR’s and the like the exception may not apply. *Note: an officer’s notes of a defendant’s confession, which the defendant does not sign, are not the confession of the defendant, but the notes of the officer, which must be admitted via two hearsay exceptions: 1)past recollection recorded, and 2)admissions. Where the statement is signed, it is the statement of the defendant and admitted as an admission.*

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.5
People v Rosborough, 387 Mich 183 (1972)

And see *People v Dinardo*, 290 Mich App 280 (2010) (officer's report regarding results of defendant's alcohol-breath-test results was admissible in drunk driving prosecution under recorded recollection exception to hearsay rule; officer saw the breath-test machine report and therefore had personal knowledge of the breath-test results at the time he recorded them onto his report, officer indicated that he no longer had any independent recollection of the specific results printed on the machine report, and it was undisputed that officer personally prepared his report)

- 6. Original notes.** Where a report is prepared from contemporaneous notes, and the report employed as past recollection recorded, the notes must also be read, if available. The report is not inadmissible where the notes are not available.

References

People v Rosborough, 387 Mich 183 (1972)

Echols v Rule, 105 Mich App 405 (1981) (record admissible where notes lost)

- 7. Admission of document.** A very common error is for the proponent of the evidence to move the admission of the document. The rule clearly states that the document is to be *read* not admitted; it is only admissible upon motion of the *opposing party*.

References

See 7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.5

B. MRE 803(6)/Records of Regularly Conducted Activity: The Rule: “A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

- 1. Theory.** The theory of “trustworthiness” with this exception is that those who rely on records of a regularly conducted activity will maintain those records in an accurate and trustworthy fashion.

References

Michigan Court Rules Practice: Evidence, § 803.6

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.6

- 2. Authentication.** The records are admitted through the custodian of the records, or some other qualified witness. This person need have no knowledge whatever of the content of the records.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.6 (person need only understand the record-keeping system)

- 3. Opinions or diagnoses.** It is important to note that the rule *has been amended* so that like its federal counterpart it includes opinions or diagnoses. This would now allow not only the underlying factual data, but the conclusions of the medical examiner, in an autopsy report, in effect overruling in part *People v Shipp*, 175 Mich App 332 (1989), decided before the amendment.

References

See *People v Shipp*, 175 Mich App 332 (1989)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.6

- 4. Timing/"at or near the time":** This requirement is viewed with reasonable flexibility, taking into account practical considerations.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.6

- 5. Records.** The definition of records is very broad. As Dean Robinson has pointed out, this includes bank account records, court and prison records, accounting records, profit receipts, trucking logs, and computer records. PCR's have been held to be business records.

References

Michigan Court Rules Practice: Evidence, § 803.6

People v Harajili, 170 Mich App 794 (1988)

People v Miller, 88 Mich App 210 (1979)

- 6. Regular activity/regular practice to record.** The rule requires that the record be made of a regular business activity, *and* that it be the regular practice of the business to make the record. Dean Robinson takes the view that "non-routine" records, perhaps of some internal investigation, should not be admitted, even if prepared in the regular course of business, because the records are not themselves "regularly" made.

References

Michigan Court Rules Practice: Evidence, § 803.6

See *People v Huyser*, 221 Mich App 293 (1997)(medical expert's report prepared at request of prosecution in CSC case not admissible under rule)

C. MRE 803(7)/Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6): The Rule: “Evidence that a matter is not included in the memoranda, report, 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.”

1. **Theory.** This exception is simply the “negative counterpart” to 803(6), relying on the same theory of reliability, and applied in very much the same way.

References

Michigan Court Rules Practice: Evidence, § 803.7

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.7

2. **Diligent search.** Michigan has not interpreted this rule. Federal law requires a foundational showing of a “diligent search” for the entry or record.

References

Michigan Court Rules Practice: Evidence, § 803.7

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.7

Cf. MRE 803(10)

D. MRE 803(8)/Public Records and Reports: The Rule: “Records, reports, statements, or data compilations, in any form, of public officers 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, and subject to the limitations of MCL 257.624; MSA 9.22324.”

1. **Theory.** This theory of “trustworthiness” for this exception is akin to that of the business record exception--a public report is assumed to be accurate and reliable because maintained and relied upon in the course of a regularly conducted activity by public officers who lack a motive to falsify. Further, the public interest is viewed as served by not bringing public officials to court to testify regarding matters recorded accurately, and

regarding which the record is more likely reliable than the memory of the official in any event.

References

Michigan Court Rules Practice: Evidence, § 803.8
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.8
Advisory Committee Note to FRE 803(8)

2. **Authentication.** See MRE 901 and 902
3. **Limitation as compared to federal rule.** Michigan has not adopted subsection (C) of the federal rule, including “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.” Investigative reports are not admissible in Michigan.

References

Michigan Court Rules Practice: Evidence, § 803.8
Bradbury v Ford Motor, 419 Mich 550 (1984)

4. **Evaluative or investigative reports.** The decision not to include subsection (C) in Michigan also means that subsection (B) cannot be employed to admit investigative reports; that provision is limited to objective data observed pursuant to a duty imposed by law and reported and recorded pursuant to said duty.

References

Bradbury v Ford Motor, 419 Mich 550 (1984)

5. **Personal knowledge.** Though unlike MRE 803(6) there is no requirement that the report be made “at or near the time by, or from information transmitted by, a person with knowledge,” this does *not* mean that every report prepared pursuant to a statutory duty is admissible. With regard to “matters observed pursuant to duty imposed by law as to which matters there was a duty to report” there must be not only a duty to *record*, but the information must be supplied by one who has ***observed*** *it pursuant to a duty imposed by law*, and ***reported*** *it pursuant to a duty imposed by law*. As one commentator has put it, “if the supplier of the information is not under a duty to do so, an essential link is broken....An illustration is the report of a police officer incorporating information from a bystander: the police officer qualifies as acting pursuant to an official duty but the bystander does not.” Subsection (A) is limited to reports and data compilations regarding the general or overall activities of the public agency, and not records and reports based on otherwise inadmissible double hearsay.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.8
Michigan Court Rules Practice: Evidence, § 803.8
See *In re Freiburger*, 153 Mich App 251 (1986)

- 6. Exclusion of police reports under subsection (B).** The Congressional legislative history, which added the exclusion on the use of police reports, is based on Confrontation Clause concerns. This does not preclude, in certain circumstances, the use of police reports as business records, or as past recollection recorded, or under subsection (A), where appropriate.

References

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.8 (legislative history)
Michigan Court Rules Practice: Evidence, § 803.8

The “bottom line” appears to be that “investigative” police reports fall outside of MRE 803(8)(B), whereas police documents “recording routine matters fall within” the rule, it being arguable that any routine police report made in a nonadversarial setting is admissible under the rule.

Solomon v Shuell, 435 Mich 104 (1990) (opinion of Justice Boyle)(PCR’s and homicide investigation reports prepared with knowledge of possible litigation inadmissible)
People v Tanner, 222 Mich App 626 (1997)(search warrant affidavit not admissible)
People v Bell, 178 Mich App 351 (1989) (fire incident report prepared to give information to arson unit not admissible)
People v Stacey, 193 Mich App 19 (1992)(allowing routine reports made in nonadversarial setting)
People v Jobson, 205 Mich App 708§1994) (allowing activity log sheet officers were required to complete against officer charged with entering without owners permission)
2 McCormick, *Evidence* (7th Ed.), § 296
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.8

- 7. Offered by the defendant.** Though there is nothing in the rule which allows an investigative police report falling within the prohibition of subsection (B) to be offered by the defendant, some cases and commentators hold that, despite the express language of the rule, the prohibition does not apply to the defendant.

References

2 McCormick, *Evidence* (7th Ed.), § 296
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.8

E. MRE 803(9)/Records of Vital Statistics: The Rule: “Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public officer pursuant to requirements of law.”

- 1. Theory.** This theory of “trustworthiness” for this exception is akin to that of the public records exception, and also that the one reporting the birth, death, or marriage is commonly a disinterested professional with no motive to misrepresent, or some other person under circumstances which demonstrate reliability.
- 2. Application.** While this exception has been employed to allow the statement of cause of death in a death certificate, this is very likely not permissible in a criminal case.

References

Greek v Bassett, 112 Mich Ap 556 (1982)
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.8

F. MRE 803(10)/Absence of Public Record or Entry: The Rule: “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.”

- 1. Theory.** This exception is simply the to 803(7), relying on the same theory of reliability, and applied in very much the same way.

References

Michigan Court Rules Practice: Evidence, § 803.10
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.10
Becker-Witt v Board of Examiners of Social Workers, 256 Mich App 359 (2003)

- 2. Diligent Search.** The rule requires a diligent search.

References

Michigan Court Rules Practice: Evidence, § 803.7
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.10

IV. MISCELLANEOUS EXCEPTIONS

The remaining exceptions under MRE 803 have to do with specific kinds of records, and are wholly uncontroversial in that they are connected to other rules (i.e. testimony regarding reputation

as to character, and judgments of conviction). Of importance, however, is the “catch-all” exception in MRE 803(24), also replicated in MRE 804(b)(6), and discussed below.

V. THE CATCH-ALL EXCEPTION: “EQUIVALENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS”

A. MRE 803(24)/Other Exceptions: The Rule. “A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, 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 that 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. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.”

1. **Theory.** The theory of this rule is to provide flexibility to the law of evidence, while providing a requirement that any otherwise hearsay statement admitted under the rule must be as trustworthy as the recognized exceptions, and that there must be a special need for use of the statement. It is intended that the rule be used only rarely.

References

Michigan Court Rules Practice: Evidence, § 803.24
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.22

2. **Equivalent guarantee of trustworthiness.** One must look to the circumstances which surround the making of the statement which would render the declarant under those circumstances particularly worthy of belief. Among factors, none of them determinative, are whether the statement was under oath; whether there is an assurance that the declarant spoke with personal knowledge of the underlying event; the practical availability of the declarant to testify and be cross-examined at trial regarding the underlying event, and any other factors viewed on a case-by-case basis, considered in the light of the reliability assurances of the other exceptions (e.g. bias or interest or coercion, presence or absence of time to fabricate, suggestiveness, recantations or corroborative statements). At least in a criminal case, circumstances corroborating the *truth* of the statement may not be employed to justify its admissibility.

References

Michigan Court Rules Practice: Evidence, § 803.24

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.24 (see many federal cases cited)

People v Douglas, 496 Mich 557 (2014)

Augustine v Allstate Ins. Co., 292 Mich App 408 (2011)

People v Geno, 261 Mich App 624 (2004)

See *People v Welch*, 226 Mich App 451 1997)(holding exclusion of statement offered by defendant proper; relying on federal cases)

- a. **Near misses.** The Michigan Supreme Court has said “we agree with the majority of the federal courts and conclude that a hearsay statement is ‘specifically covered’ by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adopt the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24). In our view, the arguments in favor of the near-miss theory are unpersuasive and do not conform to the language of the rule.”

References

People v. Katt, 468 Mich. 272 (2003)

Michigan Court Rules Practice: Evidence, § 803.24

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.24

See e.g. *United States v Earles*, 113 F3d 796 (CA 8, 1997)

- b. **Establishing admissibility.** “If a near-miss statement is deficient in one or more requirements of a categorical exception, those deficiencies must be made up by alternate indicia of trustworthiness. To be admitted, residual hearsay must reach the same quantum of reliability as categorical hearsay; simply, it must do so in different ways.”

References

People v. Katt, 468 Mich 272 (2003)

Michigan Court Rules Practice: Evidence, § 803.24

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.24

3. **“More probative”:** The rule requires that the statement must be more probative than any other evidence which may reasonably be procured by the proponent of the evidence.

References

Michigan Court Rules Practice: Evidence, § 803.24

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.24

4. **Material facts.** All facts must be “material” in that under MRE 401 they must be “of consequence to the action; what is meant here is something more--that the fact sought to be proven must be “truly important” in the case.

References

Michigan Court Rules Practice: Evidence, § 803.24
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.24

5. **Notice.** In advance of trial, unless need arises later, notice must be given sufficient to allow the opponent to contest the admissibility of the statement and to meet it at trial.

References

Michigan Court Rules Practice: Evidence, § 803.24
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 803.24

- B. **MRE 804(b)(6).** This rule is identical to 803(24), except that the declarant is required to be unavailable.

**HEARSAY, PART III:
EXCEPTIONS TO THE HEARSAY RULE
WHERE UNAVAILABILITY OF THE DECLARANT IS REQUIRED**

Presented: 2015

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I. THE FOUNDATIONAL PREREQUISITE OF UNAVAILABILITY: DEFINITION AND PROOF

A. MRE 804 and Hearsay Exceptions Requiring Unavailability of the Declarant: The Rule.

(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) has 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, and in a criminal case, due diligence is shown.

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.

1. Summary. Unavailability is shown by demonstrating the declarant’s absence due to:

- a valid claim of *privilege*; or
- a *refusal* to testify; or
- a *lack of memory* (including “selective recall”); or
- a *physical or mental inability* (including, but not limited to, death); or
- an *inability by the proponent to produce the witness* despite, in a criminal case, the use of “*due diligence*.”

2. **Ruling of court/burden of persuasion.** The determination of the unavailability of a witness is not left to the party offering the out-of-court statement but must be made by the court. The proponent of the statement has the burden of demonstrating unavailability. Unavailability cannot be demonstrated if any of the circumstances constituting unavailability are due to the procurement or other wrongdoing of the proponent of the statement.

References

United States v Eufracio-Torres, 890 F2d 266, 269 (CA 10, 1989)
Kirk v Raymark Industries, 61 F3d 147 (CA 3, 1993)
Ohio v Roberts, 448 US 56, 65, 100 S Ct 2531, 2538-39, 65 L Ed 2d 597 (1980)
2 McCormick, *Evidence* (7th ed. 1992), § 253, at 134
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00
MRE 804(a)

- B. Unavailability By Exemption Due to a Valid Claim of Privilege.** “. . . is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement....”

1. **Ruling of the court required.** A witness is not the judge of his or her own claim of privilege; rather, the rule requires that the witness be exempted on the ground of privilege by a “ruling of the court.”

References

MRE 804(a)
MRE 104(a)
Advisory Committee Note to FRE 804(a)(1)

2. **Determination must be made out of the presence of the jury.** The determination of whether the witness has a valid claim of privilege must be had out of the presence of the jury.

References

People v Dyer, 425 Mich 572 (1986)
People v Paasche, 207 Mich App 698 (1994)
People v Gearns, 457 Mich 1 (1998)(overruled on other grounds)
People v Avant, 235 Mich 499 (1999)
MRE 103(c)
MRE 104(c)

- 3. Exercise of Fifth Amendment.** This is the most frequent ground of unavailability in criminal cases. NOTE: persistence in an *invalid* claim of Fifth Amendment privilege constitutes refusal to testify. See below.

References

See *Michigan Court Rules Practice: Evidence*, § 804.1.1
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00
People v Moore, 78 Mich App 294 (1977)
People v Castaneda, 81 Mich App 453 (1978)
People v Meredith, 459 Mich 62 (1998)

- 4. Exercise of spousal bar.** The “spousal bar” absolutely prevents the calling of a spouse when no exception exists. MCL 600.2162. Assertion of the spousal bar is unavailability, so that if, for example, the witness testified at the preliminary examination *prior* to the marriage, the assertion of the bar at trial would constitute unavailability so as to allow the prior recorded testimony. *Note that now the witness-spouse and not the defendant holds the privilege.* Further, where the cause of action arises out of a cause of action arising out of a personal injury done the victim-spouse by the defendant spouse, or done a child of both or either, there *is no privilege for the victim-spouse to assert* (MCL 600.2162(3), the privilege “do[es] not apply”).

References

People v Szabo, 303 Mich App 737 (2014)
People v Ellis, 174 Mich App 139 (1988)

- C. Unavailability By Refusal of Witness to Testify.** “. . . persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so...”

- 1. Refusal to testify.** A refusal of the witness to testify constitutes unavailability.

References

People v Burgess, 96 Mich App 390 (1980)
Michigan Court Rules Practice: Evidence, § 804.1.1
7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00,
People v Pickett, 339 Mich 294 (1954)

2. **Invalid claim of privilege.** Persistence in a claim of privilege that the court has not accepted constitutes a refusal to testify.

References

United States v Mobley, 421 F2d 345 (CA 5, 1979)

D. Unavailability By Lack of Memory. “. . . has a lack of memory of the subject matter of the declarant’s statement...”

1. **Reason for lack of memory immaterial.** Whether the reason for the lack of memory is physical, psychological, or whether the lack of memory is arguably feigned, lack of memory is unavailability.

References

People v Hayward, 127 Mich App 50 (1983)

People v Williams, 117 Mich App 505 (1982)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00

2. **“Selective” memory loss.** It is not required that the failure of memory be total; rather, a loss of memory regarding the “subject matter” of the declarant’s out-of-court statement is all that is required, even if the witness testifies to other events.

References

McDonnell v United States, 472 F2d 1153 (CA 8, 1973)

People v Walton, 76 Mich App 1 (1977)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00

E. Unavailability By Mental or Physical Infirmary. “...is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity...”

1. **Both inability to be present, and presence but inability to testify, are included.** The proponent of the evidence need not show that the witness cannot be present, but that *either* the witness cannot be present, or, if present, cannot testify, so long as either is the result of death or *then existing* physical or mental illness or infirmity.

References

Michigan Court Rules Practice: Evidence, § 804.1.4

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00

People v Garland, 286 Mich App 1 (2009)

People v Lytal, 119 Mich App 562 (1982)

People v Murry, 106 Mich App 257 (1981)(testifying would have been harmful to infirm witness's health)

2. **Incompetence as witness.** One who is incompetent to testify Under MRE 601 is unavailable. Incompetence under MRE 601 is a sufficient but not necessary condition of unavailability under MRE 804(a)(4).

References

People v Duncan, 494 Mich 713 (2013) (that a witness is incompetent at trial does not mean the witness was incompetent when testifying at the preliminary examination)

People v Karelse, 143 Mich App 712 (1985)(rev'd on ground that finding of incompetency was factually erroneous, 428 Mich 872 (1987))

People v Edgar, 113 Mich App 528 (1982)

- (3) **Temporary inability.** In criminal cases, where the testimony of the witness can predictably be obtained within a reasonably short time, Confrontation Clause concerns counsel in favor of a continuance, rather than a finding of unavailability, particularly if the testimony is critical.

References

Barber v Page, 390 US 719, 88 S Ct 1318, 20 L Ed 2d 255 (1968)

Peterson v United States, 344 F 2d 419 (A 5, 1965) (temporary illness or disability of a witness is not sufficient to justify admission of prior testimony without a showing that a continuance would not resolve the problem)

Ecker v Scott, 69 F3d 69 (CA 5, 1995)

Michigan Court Rules Practice: Evidence, § 804.1.4

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00

- F. **Unavailability Because of Inability To Procure Attendance.** "...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, and in a criminal case, due diligence is shown..."

1. **Due diligence.** "... the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." Mere service of a subpoena may not be not adequate.

References

Hardy v Cross, 132 S Ct 490, 181 L Ed 2d 468 (2011) (When a witness disappears before trial, it is always possible to think of additional steps that might have been taken to secure the witness's presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising)

People v Bean, 457 Mich 677 (1998)

People v Dye, 431 Mich 58 (1988)

People v Adams, 233 Mich App 652)

Michigan Court Rules Practice: Evidence, § 804.1.5

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.00

- 2. Out-of-state witnesses.** Though older authority holds that there is no requirement that a witness who is out of the jurisdiction be produced, it is likely the case now that Confrontation Clause principles require use of the Uniform Rendition of Witnesses Act to procure the attendance of a witness whose location is known.

References

People v Serra, 301 Mich 124 (1942)(no duty)

People v Kim, 124 Mich App 421 (1983)(no duty)

Contra People v Freedland, 101 Mich App 501 (1980)

See *Barber v Page*, 390 US 719, 88 S Ct 1318, 20 L Ed 2d 255 (1968)

- 3. Flight of witness after appearance.** In a case the victim appeared at court on the day of trial to testify, and discussed the case was the prosecutor trying it. However, when trial began she had disappeared, and a search for her was unsuccessful. The Court of Appeals held that the 11th hour decision of a witness to leave the courthouse rather than testify is “unavailability.”

References

People v Adams, 233 Mich App 652 (1999)

II. THE EXCEPTIONS: PRIOR RECORDED TESTIMONY

- A. The Rule.** Excluded from operation of the hearsay rule is “Testimony given as a witness at another hearing of the same or a different 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.”

References

MRE 804(b)(1)

Note: where prior recorded testimony is the only testimony on an element, it may be sufficient standing alone; there is no “corroboration” requirement. *People v Chavies*, 234 Mich 274 (1999)

- B. Opportunity.** The opposing party must at the prior hearing have had an opportunity to develop the testimony by direct, cross, or redirect examination; it matters not that the party chose not to take advantage of the opportunity. Unless counsel is curtailed by the judge, a preliminary examination provides the necessary opportunity, even if strategic reasons might counsel against exercise of the opportunity.

References

People v Goldman, 349 Mich 77 (1957)

People v Vera, 153 Mich App 411 (1986)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.1

- C. Similar Motive.** The motive to develop the testimony by direct, cross, or redirect examination needs only be similar to that at trial, not identical. Again, ordinarily the motive at a preliminary examination is sufficiently similar.

References

See *United States v Salerno*, 505 US 317, 112 S Ct 2503, 120 L.Ed.2d 255 (1992)

People v Morris, 139 Mich App 550 (1984)

See also *Peole v Farquharson*, 274 Mich App 268 (2007)

United States v Lombard, 72 F3d 170 (CA 1, 1995)

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.1

- D. Appearance of Witness After Recorded Testimony Admitted.** If the witness appears after prior recorded testimony has been admitted, the live testimony of the witness should be taken.

References

People v Hill, 167 Mich App 756 (1988) (jury to be instructed to disregard to recorded testimony)

III. THE EXCEPTIONS: STATEMENT UNDER BELIEF OF IMPENDING DEATH

- A. The Rule.** Excluded from operation of the hearsay rule is “In a prosecution for homicide . . . 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.”

References

MRE 804(b)(2)

- B. Case Law Foundation.** PreMRE cases, which have been followed uncritically in several postMRE cases, posit the following foundational requirements:

- (1) The declarant must have been conscious or in fear of impending death.
- (2) The declarant must have actually died.
- (3) The statements must be sought to be admitted in a criminal prosecution against the individual who killed the declarant.
- (4) The statements must relate to the circumstances of the killing.

References

People v Parney, 98 Mich App 571 (1979)

People v Siler, 171 Mich App 246 (1988)

C. Differences Under MRE. Though the pre-rules foundational requirements are applicable 99.9% of the time, technically they are no longer accurate. Under the language of the rule, if a declarant gave a statement under fear of impending death, which the prosecution sought to admit in a homicide case, concerning the cause of the circumstances which lead to the declarant's fear of impending death, the statement would be admissible even if the declarant did not die and the homicide prosecution was not concerning the death of the declarant, so long as the declarant was shown unavailable. For example, if the declarant and a companion were both shot, and the companion died, and the declarant gave a statement under fear of impending death concerning the identity of the shooter, and the declarant then recovered, but was unavailable for other reasons—such as mental incompetency, or death from some other cause—under the rule the statement would be admissible.

References

People v Orr, 275 Mich App 587 (2007)

See *Michigan Court Rules Practice: Evidence*, § 804.4

D. Fear of Impending Death. Most cases are litigated on this question. The belief in the imminence of death may be shown by the statements of the declarant him or herself, or circumstantially, from the nature of the injuries, statements made in the presence of the declarant, or testimony from a physician or medical examiner.

References

People v Wilborn, 57 Mich App 277 (1975)

People v Parney 98 Mich App 246 (1979)

People v Siler, 171 Mich App 246 (1988)

See *Michigan Court Rules Practice: Evidence*, § 804.4

7 Graham, *Handbook of Federal Evidence* (7th Ed), § 804.2

E. Fear of Impending Death; Children. Whether a child was conscious of impending death is to be determined on a case-by-case basis; there is no rule that a young child cannot appreciate that death may be impending.

References

People v Stamper, 480 Mich 1 (2007) (statements of 4-year-old child held admissible)

- F. **“Failed” Dying Declaration.** A “failed” dying declaration may often meet the foundational requirements for an excited utterance.

References

People v Schinzel, 86 Mich App 337 (1978)(rev’d in part on other grounds, 406 Mich 888)

IV. THE EXCEPTIONS: DECLARATIONS AGAINST PENAL INTEREST

- A. **The Rule.** Excluded from operation of the hearsay rule is “a statement which...so far tended to subject the declarant to . . . criminal liability . . . , 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.” MRE 804(b)(3)
- B. **Defense Use.** The Michigan Supreme Court has held that the “corroborating circumstances” which must “clearly indicate the trustworthiness of the statement” must be considered in an “inverse proportion” to the defendant’s *need* for the evidence, so that “the more crucial the statement is to the defendant’s theory of defense, the less corroboration a court may constitutionally require for its admission.”

References

People v Barrera, 451 Mich 261 (1996)

See also *People v Blankenship*, 108 Mich App 794 (1981)

See also *People v Miller*, 141 Mich App 637 (1985)

See also *People v Sanders*, 163 Mich App 6-6 (1986)

See also *People v Underwood*, 184 Mich App 784 (1990)

See also *Carson v Peters*, 42 F3d 384 (CA 7, 1994)(insistence on compliance with requirements of rule does not violate the constitution)

- C. **Prosecution Use.** In Michigan, where the statement of one defendant fits the foundation requirements of the rule and implicates a codefendant it is admissible against the codefendant, even if arguably the “carry-over” portion which incriminates the codefendant is not directly against the declarant’s penal interest. The foundation is rigorous, and it is difficult to meet the foundation with statements made in-custody to a police officer, though not impossible.

1. **Generally.** In Michigan, where the statement of one defendant fits the foundation requirements of the rule and implicates a codefendant it is admissible against the codefendant, even if arguably the “carry-over” portion which incriminates the codefendant is not directly against the declarant’s penal interest. The foundation is rigorous, and it is difficult to meet the foundation with statements made in-custody to a police officer, though not impossible.

References

People v Poole, 444 Mich 151 (1993)

Contra Williamson v United States, 512 US 594, 114 S Ct 2431, 129 L Ed 2d 476 (1994)(interpreting FRE—not a constitutionally based decision)

People v Deshazo, 469 Mich App 1044 (2004) (no confrontation issue where statement not made to government officials)

People v Taylor, 482 Mich 368 (2008) (same)

See also *People v Sheperd*, 263 Mich App 665,, rev’d on other grounds, 472 Mich 343 (2005)

2. **Foundation.** The foundation is rigorous. The foundation is rigorous, and it is difficult to meet the foundation with statements made in-custody to a police officer, though not impossible. Better candidates are statements made to third parties while not in police custody. The factors to consider are, in a totality of the circumstances inquiry:

- Was the statement voluntarily given.
- Was it made contemporaneously with the events.
- Was it custodial, or made to family, friends, colleagues, or confederates.
- Was it uttered spontaneously at the initiation of the declarant.
- Did it shift blame or attempt to minimize the role of the declarant
- Did the declarant have a motive to falsify or curry favor.

References

People v Poole, 444 Mich 151 (1993)

People v Petros, 198 Mich App 401 (1993)

People v Ortiz-Kehoe, 237 Mich App 508 (1999)(codefendant’s statement admissible where made spontaneously, while not in custody, to someone other than the police)

People v Rodriguez, 251 Mich App 10 (2002)

People v Washington, 468 Mich 667 (2003)(no “carryover” portion naming defendant; statement relevant)

But see *Lilly v Virginia*, 527 US 116, 144 L Ed 2d 117 (1999)(under the circumstances the statement was not reliable so as to satisfy confrontation clause concerns, where made in custody, minimizing role and shifting blame)