

## HEARSAY OBJECTIONS AND EXCEPTIONS

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The analysis of a hearsay problem—whether you’re thinking as the proponent of a statement or planning your objections—comes down to three questions. First, is the statement being offered to prove the truth of the matter asserted? If not, the statement is not hearsay. Second, is the statement a witness’s prior statement or a party admission that falls under Rule 801(d)? If so, the statement is again not hearsay. Finally, is the statement admissible as an exception? This paper covers the second and third questions.

### **I. FRE 801(d) Exceptions – Statements That Are Not Hearsay**

Aside from statements that are not offered to prove the truth of the matter asserted,<sup>1</sup> Rule 801(d) provides for two categories of statements that also not considered hearsay. If a proponent’s statement meets the conditions set forth in either, the statement is not considered hearsay at all.<sup>2</sup>

#### **1. Declarant’s Prior Statement**

The prior statement of a testifying declarant who is subject to cross examination is not hearsay under three circumstances. First, the prior statement is inconsistent with the declarant’s testimony and was given under oath.<sup>3</sup> Second, the prior statement is consistent with the declarant’s testimony and is offered in rebuttal of an implication that the declarant is lying or

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<sup>1</sup> Fed. R. Evid. 801(c)(2).

<sup>2</sup> Fed. R. Evid. 801(d).

<sup>3</sup> Fed. R. Evid. 801(d)(1)(A).

testifying due to an improper motive.<sup>4</sup> Third, the prior statement was one of identification of a person the declarant perceived at an earlier time.<sup>5</sup>

For example, in U.S. v. Brink,<sup>6</sup> a defendant accused of robbing a bank wanted to admit a bank teller's statement to the police when the teller testified at trial that she could not recall the robber's eye color. The defendant's eyes were light hazel while the teller's prior statement described them as dark. The trial court refused to admit the prior statement on hearsay grounds, but the Third Circuit disagreed.<sup>7</sup> The Third Circuit noted that statements of prior identification are admitted as substantive evidence because of "the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions."<sup>8</sup> The court found that generally statements of identification from lineups and photo spreads are admissible if the witness cannot make an identification at trial and that, since Rule 801 did not exclude exculpatory evidence, the same principles applied and the prior statement was admissible.<sup>9</sup>

## 2. Party Admission

A party's own statement offered against it by an opposing party is also not hearsay.<sup>10</sup>

This provision applies to the party individually or someone acting in a representative capacity, as

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<sup>4</sup> Fed. R. Evid. 801(d)(1)(B). See U.S. v. Payne, 944 F.2d 1458 (9th Cir. 1991) (upholding trial court's admission of child molestation victim's prior consistent statements to FBI where defendant had previously introduced inconsistent statements from the same FBI interviews to impeach victim).

<sup>5</sup> Fed. R. Evid. 801(d)(1)(C). See U.S. v. Brink, 39 F.3d 419 (3d Cir. 1994) (finding that non-testifying declarant's statement to testifying FBI agent the day after a robbery that the perpetrator had dark eyes not hearsay under this exception).

<sup>6</sup> 39 F.3d 419 (3d Cir. 1994).

<sup>7</sup> Id. at 424-25.

<sup>8</sup> Id. at 425.

<sup>9</sup> Id.

<sup>10</sup> Fed. R. Evid. 801(d)(2).

well as admissions by a person the party authorized to make a statement on the matter.<sup>11</sup>

Adoptive admissions are admitted where “the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.”<sup>12</sup> Co-conspirator statements are admitted only where the statement was made both during and in furtherance of the conspiracy.<sup>13</sup> Statement of any agent or employee of the party are not considered hearsay where the statement is within the scope of the agent or employee’s relationship with the party.<sup>14</sup>

For instance, in Coley v. Burger King,<sup>15</sup> the plaintiffs filed suit against Burger King after one of its employees hit them with his car.<sup>16</sup> In order to show that Burger King was liable, both plaintiffs testified that the employee told them he had been at home when someone from the restaurant called and asked him to pick up a CO2 canister for the restaurant’s soda machine.<sup>17</sup> Burger King argued this statement was hearsay, but the Fifth Circuit found it was admissible as a party admission.<sup>18</sup> The court noted that it was not disputed that the driver was the manager of a Burger King and that the statement was related to his work in that capacity.<sup>19</sup>

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<sup>11</sup> Fed. R. Evid. 801(d)(2)(A), (d)(2)(C).

<sup>12</sup> Fed. R. Evid. 801(d)(2)(B). U.S. v. Carter, 760 F.2d 1568, 1579 (11th Cir. 1985).

<sup>13</sup> Fed. R. Evid. 801(d)(2)(E).

<sup>14</sup> Fed. R. Evid. 801(d)(2)(D).

<sup>15</sup> 56 F.3d 709 (5th Cir. 1995).

<sup>16</sup> Id. at 709.

<sup>17</sup> Id. at 710.

<sup>18</sup> Id.

<sup>19</sup> Id.

Any statement offered as a party admission under Rule 801(d)(2) is still subject to Rule 403's prohibition on evidence whose relevance is substantially outweighed by its prejudicial effect.<sup>20</sup>

Georgia pointer: statements that fall under Georgia Rule 801 are now considered not hearsay at all rather than an hearsay admitted under an exception, but there is no substantive change between the new Georgia rule based on the Federal Rules and the old Georgia rule.<sup>21</sup>

## **II. Exceptions to Hearsay**

Federal Rules 803, 804, and 807 provide numerous exceptions that permit introduction into evidence of statements that would otherwise be prohibited as hearsay. Each of the rules is subject to different conditions regarding declarant availability and sometimes other conditions, as well.

### **A. Rule 803**

Rule 803 provides a number of exceptions that are available to an attorney regardless of the declarant's availability.<sup>22</sup> The drafters of the Rules felt that these exceptions were permissible because the circumstances of the exceptions generally gave the statements "circumstantial guarantees of trustworthiness" sufficient to justify the admission of the statement even if the declarant did not appear at trial.<sup>23</sup> The following are some of the most commonly

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<sup>20</sup> Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756, 763 (7th Cir. 2003) ("Rule 403 clearly applies to admissions, and a trial judge can exclude admission evidence if its probative value is substantially outweighed by the danger of unfair prejudice.").

<sup>21</sup> O.C.G.A. § 25-8-801(d).

<sup>22</sup> Fed. R. Evid. 803.

<sup>23</sup> Fed. R. Evid. 803 advisory committee's note.

used Rule 803 exceptions. It is important to note that the declarant must still be speaking based on firsthand knowledge.<sup>24</sup>

### 1. Present Sense Impression

The hearsay rule does not exclude any statement describing or explaining an event or condition made while the declarant was still perceiving the event or immediately after.<sup>25</sup> For a statement to qualify as a present sense impression, it must meet three characteristics: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous.<sup>26</sup>

### 2. Excited Utterance

An excited utterance is a statement relating to a startling event or condition made while the declarant was still under the stress of the event or condition.<sup>27</sup> Any such statement is excepted from the hearsay rule.<sup>28</sup>

For instance, in U.S. v. Pursley,<sup>29</sup> the defendant was charged with beating a witness who had testified against him while the witness was in federal custody. The state sought to introduce testimony from the marshal on duty regarding statements made by the victim about the circumstances of the attack.<sup>30</sup> The Tenth Circuit found these statements were excited utterances

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<sup>24</sup> Id.

<sup>25</sup> Fed. R. Evid. 803(1).

<sup>26</sup> U.S. v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998).

<sup>27</sup> Fed. R. Evid. 803(2).

<sup>28</sup> Id.

<sup>29</sup> 577 F.3d 1204 (10th Cir. 2009).

<sup>30</sup> Id. at 1219.

and admissible as a hearsay exception.<sup>31</sup> The court noted that the statements were obviously about a startling event and that the statements were made while still under the influence of the attack.<sup>32</sup> The statements were made one hour after the attack, no intervening events occurred between the victim's removal from their cell and the conversation with the marshal, and the victim made the statements about a minute after removal from his cell.<sup>33</sup>

### 3. Then-Existing Mental, Emotional, or Physical Condition

This exception covers a statement made regarding the declarant's contemporaneous state of mind or emotional, sensational or physical condition.<sup>34</sup> Examples given in the statute include intent, plan, motive, mental feeling, and pain or bodily health.<sup>35</sup> The statute expressly excludes any statement that covers the declarant's memory, unless the statement related solely to the declarant's will.<sup>36</sup> The statute also excludes any statement regarding the intent of another person.<sup>37</sup> Courts have found that the three factors governing foundation of statements under this exception are contemporaneousness, chance for reflection, and relevance.<sup>38</sup>

Georgia pointer: under the new Georgia rules, exceptions 803(1), 803(2), and 803(3) replace Georgia's old res gestae rule. Unlike the old rule, statements under these exceptions must be made contemporaneously with the event or condition.<sup>39</sup>

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<sup>31</sup> Id. at 1220.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Fed. R. Evid. 803(3).

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> U.S. v. Miller, 874 F.2d 1255, 1264 (9th Cir. 1989).

<sup>39</sup> O.C.G.A. § 28-8-803.

#### 4. Recorded Recollection

This exception permits reading into evidence any record regarding a matter about which the witness once had knowledge but which the witness can no longer remember well enough to testify fully or accurately.<sup>40</sup> The record must have been either made or adopted by the witness while the matter was still fresh in the witness's memory.<sup>41</sup> Additionally, the record must accurately reflect the witness's knowledge.<sup>42</sup> The memorandum or record cannot itself be made an exhibit under this exception unless offered by the other party.<sup>43</sup> This exception can be successfully utilized even where the witness does not recall making the record being used.<sup>44</sup>

This hearsay exception should not be confused with Rule 612, which permits an attorney to use a prior writing simply to refresh a forgetful witness's memory but not does permit introduction of the writing into evidence.<sup>45</sup>

#### 5. Business Records

Business records will be admitted if certain conditions are met:<sup>46</sup> (1) the record must have been made at or near the time of the matter it covers;<sup>47</sup> (2) it must have been either made by or based off information transmitted by someone with firsthand knowledge;<sup>48</sup> (3) the record must be of the sort kept in the regular course of business; and (4) it must have been the regular

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<sup>40</sup> Fed. R. Evid. 803(5)(A).

<sup>41</sup> Fed. R. Evid. 803(5)(B).

<sup>42</sup> Fed. R. Evid. 803(5)(C).

<sup>43</sup> Fed. R. Evid. 803(5).

<sup>44</sup> Parker v. Reda, 327 F.3d 211, 214 (2d Cir. 2003).

<sup>45</sup> Fed. R. Evid. 612.

<sup>46</sup> Fed. R. Evid. 803(6).

<sup>47</sup> Fed. R. Evid. 803(6)(A).

<sup>48</sup> Id.

practice of the business to keep the manner of record being produced.<sup>49</sup> Each of these conditions must be proven by testimony of a witness qualified to speak regarding the record.<sup>50</sup> Finally, a record will not be admitted under this exception if the source of the information or the circumstances of the record's creation indicate a lack of trustworthiness.<sup>51</sup>

In U-Haul Internat'l, Inc. v. Lumbermens Mutual Cas. Co.,<sup>52</sup> the parties disputed whether an excess insurance provider had paid the proper amounts on claims. The trial court admitted an exhibit containing computer generated summaries of the excess insurer's payments for claims under the policy.<sup>53</sup> The excess insurer appealed the admission, arguing the exhibit contained hearsay. The Ninth Circuit disagreed, finding that the evidence contained in the exhibit fell under the business records exception.<sup>54</sup> The court found that: the data was entered into the insurer's database at or near the time of each event; the employees who entered the data had knowledge of the payment events; the data was kept in the course regularly conducted business activity of the insurer; the company's business manager was qualified to testify about the information contained in the computer-generated report; and the company kept the computer database in the regular course of its business as well as regularly compiled payment summaries like the one admitted.<sup>55</sup>

Georgia pointer: Milich notes three major changes between the old Georgia rule and the new. First, the new rule permits statements of opinion, such as medical prognoses, to be admitted. Second, a proponent is permitted to use an affidavit to lay foundation for the

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<sup>49</sup> Fed. R. Evid. 803(6)(B)-(C).

<sup>50</sup> Fed. R. Evid. 803(6)(D).

<sup>51</sup> Fed. R. Evid. 803(6)(E).

<sup>52</sup> 576 F.3d 1040 (9th Cir. 2009).

<sup>53</sup> Id.

<sup>54</sup> Id. at 1043-44.

<sup>55</sup> Id.

exception. Third, a trial judge is allowed to reject records if the judge finds that the source or method of preparation of the record lacks trustworthiness.

## 6. Public Records

Public records like police reports and other governmental investigations can also be admitted under a hearsay exception in certain circumstances.<sup>56</sup> Attorneys attempting to utilize this and the preceding exception will need to keep in mind the authentication requirements discussed in other chapters of the Rules.

## 7. Character Reputation

Evidence of person's community reputation is an exception to the hearsay rule, provided it also passes muster under the new character evidence rules.<sup>57</sup> The Federal Rules generally provide that evidence about a person's character or traits is not admissible to prove behavior in a particular instance.<sup>58</sup> However, in criminal cases, a defendant may offer evidence of a pertinent character trait.<sup>59</sup> If he does, the state may similarly offer evidence in rebuttal.<sup>60</sup> In some circumstances, a defendant may also offer evidence of an alleged victim's pertinent trait, and the state again may rebut.<sup>61</sup> Prosecutors may also offer evidence of an alleged homicide victim's "trait of peacefulness" to rebut an assertion that the victim was the aggressor.<sup>62</sup> Additionally, evidence of a witness's character may be offered to impeach the witness.<sup>63</sup> Evidence of a prior

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<sup>56</sup> Fed. R. Evid. 803(8).

<sup>57</sup> Fed. R. Evid. 803(21); Fed. R. Evid. 404..

<sup>58</sup> Fed. R. Evid. 404(a)(1).

<sup>59</sup> Fed. R. Evid. 404(a)(2)(A).

<sup>60</sup> Id.

<sup>61</sup> Fed. R. Evid. 404(a)(2)(B).

<sup>62</sup> Fed. R. Evid. 404(a)(2)(C).

<sup>63</sup> Fed. R. Evid. 404(a)(2)(D).

crime or bad act is generally not admissible as character evidence, but may be admitted for another reason, such as motive, intent, preparation, plan, knowledge, or identity.<sup>64</sup>

Generally, evidence about a person's character can be shown by opinion testimony on direct, but on cross-examination, an attorney may inquire about specific acts or instances.<sup>65</sup> However, if a person's character or trait is an essential element of any charge, claim, or defense, specific instances may be used without prior introduction of general opinion testimony.<sup>66</sup>

## **B. Rule 804**

This Rule provides exceptions that are only available if the declarant is unavailable to testify at trial.<sup>67</sup> Under the Rules, unavailability means one of the following: (1) the declarant cannot testify because the court has found that the matter is privileged in some way; (2) the declarant refuses to testify; (3) the declarant says they cannot recall the matter; or (4) the declarant is dead or prevented from testifying due to some physical or mental condition.<sup>68</sup> Unavailability may also be found if the witness is beyond the court's subpoena power.<sup>69</sup>

Once the declarant has been found unavailable, the statement will be admitted if the proponent offers it under certain, enumerated conditions. One of the most common is former testimony that (a) was given at a trial, hearing, or sworn deposition, and (b) is offered against a party that had the motive and opportunity to question the declarant at that time.<sup>70</sup>

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<sup>64</sup> Fed. R. Evid. 404(b)(2).

<sup>65</sup> Fed. R. Evid. 405(a).

<sup>66</sup> Fed. R. Evid. 405(b).

<sup>67</sup> Fed. R. Evid. 804.

<sup>68</sup> Fed. R. Evid. 804(a)(1)-(a)(4).

<sup>69</sup> United States v. Marchese, 842 F. Supp. 1307, 1309 (D. Colo. 1994).

<sup>70</sup> Fed. R. Evid. 803(b)(1).

For instance, in U.S. v. Sklena,<sup>71</sup> the defendant in a US Commodity Future Trading Commission proceeding attempted to introduce deposition testimony from one of a co-conspirator's deposition testimony in an earlier US Department of Justice proceeding. The testimony was excluded, which the Seventh Circuit held was error entitling the defendant to a new trial.<sup>72</sup> The district court had found that a) the DOJ and the CFTC were not the same party and b) the DOJ did not have the same motive to develop the testimony as the CFTC would. The Seventh Circuit disagreed with both. The court found that the agencies are interdependent and "play closely coordinated roles on behalf of the United States in the overall enforcement of a single statutory scheme."<sup>73</sup> The court also found that both agencies were investigating the same underlying conduct with an eventual goal of enforcement action and both had similar penalties, so their motives were sufficiently related for the hearsay exception.<sup>74</sup>

In civil cases, this exception is also available if the opportunity to question the declarant was available to a predecessor in interest.<sup>75</sup>

Another common exception available under Rule 804 is a statement that is so against the declarant's interest that a reasonable person would only have made it if the statement were true.<sup>76</sup> In a criminal case, any such statement must be corroborated by some other evidence or circumstances that give the statement a circumstantial guarantee of trustworthiness.<sup>77</sup>

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<sup>71</sup> 692 F.3d 725 (7th Cir. 2012).

<sup>72</sup> Id. at 730.

<sup>73</sup> Id. at 732.

<sup>74</sup> Id.

<sup>75</sup> Fed. R. Evid. 803(b)(1)(B).

<sup>76</sup> Fed. R. Evid. 803(b)(3)(A).

<sup>77</sup> Fed. R. Evid. 803(b)(3)(B).

As with Rule 803, the declarant's statement must be based on firsthand knowledge.<sup>78</sup>

Georgia pointer: the new Georgia rule based on the Federal Rules of Evidence is explicit in its requirement that the statement must have been made in furtherance of the conspiracy.

### C. Rule 807

Rule 807 is called the "Residual Exception" but is also known to many practitioners as the "Necessity Exception." This is the catch-all exception that a proponent who has been unable to get a statement admitted under any other exception can use as a last-ditch effort—provided, of course, that certain conditions are met.

Procedurally, this exception can only be utilized if the proponent gives any adverse parties notice of the particulars of the statement, including the declarant's name and address.<sup>79</sup> Since the policy of the hearsay rules is to only admit evidence that is considered sufficiently trustworthy, any statement admitted under Rule 807 must be accompanied by equivalent circumstantial guarantees of trustworthiness as that given to the exceptions under Rules 803 and 804.<sup>80</sup> The statement must be offered as evidence of a material fact<sup>81</sup> and its admission must "best serve" the interests of justice and the purposes behind the Rules.<sup>82</sup> Additionally, the evidence must be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."<sup>83</sup>

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<sup>78</sup> Fed. R. Evid. 803 advisory committee's notes.

<sup>79</sup> Fed. R. Evid. 807(b).

<sup>80</sup> Fed. R. Evid. 807(a)(1).

<sup>81</sup> Fed. R. Evid. 807(a)(2). See United States v. Gaitan-Acevedo, 148 F.3d 577, 589 (6th Cir. 1998) (upholding lower court ruling that in prosecution for drug distribution, evidence about a notation in a notebook that law enforcement said showed that the defendant had bought property with drug money was not evidence pertaining to a material fact).

<sup>82</sup> Fed. R. Evid. 807(a)(4).

<sup>83</sup> Fed. R. Evid. 807(a)(3).

For instance, in Lovejoy v. U.S.,<sup>84</sup> the Eighth Circuit found that statements of the mother of a juvenile, sexual abuse victim to a nurse regarding finding the situation in which the mother found her daughter and the defendant were admissible under this exception. The court found that the statements were trustworthy because the declarant was the mother of the victim, were clearly material, were more probative than any other evidence because the mother was the only witness and the child could not testify herself, and because “the general purposes of the Rules of Evidence and the interests of justice will best be served by admission of the testimony into evidence.”<sup>85</sup>

Georgia pointer: under the old rule, notice to the other party was not required, but Georgia’s new rule has now adopted this requirement from the Federal Rules.<sup>86</sup>

### **III. Anticipating and Minimizing Hearsay Objections**

The best way to minimize hearsay objections is through proper groundwork and homework. The key is knowing what questions you plan to ask, what answers you expect to get, what documents you want in (or out), and how all of this evidence is impacted by the rule against hearsay. Once you have this figured out, you next develop a plan to get your evidence in past or over a hearsay objection. When utilizing an exception to the hearsay rule, lay your groundwork first. For instance, when you are introducing a statement from a business record, establish the necessary facts around the record’s creation and retention before you ask the witness to read the record to the jury.

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<sup>84</sup> 92 F.3d 628 (8th Cir. 1996).

<sup>85</sup> Id. at 732.

<sup>86</sup> O.C.G.A. 24-8-807.

Know each piece of evidence you want to get in and how you will get it in. Ideally, you'll have more than one way (for instance, records of diagnosis are admissible as business records and the statements contained in them are statements made for the purpose of medical treatment).

#### **IV. Hearsay in Direct Examination: How to Elicit What You Need Without Inviting Hearsay**

With your own witness, preparation is key. Run through the questions you will ask with your witness, and identify the source of each piece of evidence. If any of the evidence is based on hearsay, ask if there is any other way they know the evidence. Explore the circumstances of what they know and how to learn what other sources allow them to know the evidence. For instance, they may have first learned of a party's misconduct by hearing it from another party, but perhaps later they saw an official report describing the incident.

Prep the heck out of your witness on the front end about how to answer using statements that do not rely upon knowledge learned from other sources. If your witness must testify about a hearsay statement, be sure again to lay proper groundwork for the exception you will use to get it in. Is it an excited utterance? Introduce why the declarant was excited.

In the end, you may simply need to call other witnesses. If the evidence is necessary, do everything you must in order to get it in.

## V. Hearsay Problems When Your Client or Opposing Party Is Deceased

While the fact that a witness is dead doesn't immediately exempt their prior statements from the prohibition against hearsay, it will have an effect on admissibility of the statement. To begin with, a dead declarant automatically qualifies for unavailability under Rule 804.<sup>87</sup>

Contrary to popular misnomer, the dying declaration exception does not allow anything said by the now-deceased to be brought into evidence. The knife must be in the body for the exception to apply. The Rule 804 exception permits, in a homicide case or any civil proceeding, a statement the declarant made under a legitimate belief of imminent death that was made about the cause or circumstances of the apparently imminent death.<sup>88</sup>

For instance, in U.S. v. Shields,<sup>89</sup> a defendant convicted of second-degree murder and assault tried to admit evidence that the deceased victim had shaken his head when asked in the hospital whether the defendant had caused his injuries. The Eighth Circuit found that the headshake was not admissible as a dying declaration because, while the victim's injuries were severe and he did later die, the injuries were limited and everyone, including the victim, manifested a belief at the time that the victim would survive.<sup>90</sup>

If qualifying for that exception proves too onerous, Rule 804 also provides that where a party has intentionally caused a declarant's unavailability, any statement of the declarant against that party may be admitted.<sup>91</sup>

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<sup>87</sup> Fed. R. Evid. 804(a)(4). See Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276, 282-83 (4th Cir. 1993) (finding that where proponent of statement stated in court that he believed the witness was dead and opposing party never contested fact, trial court implicitly recognized unavailability of declarant).

<sup>88</sup> Fed. R. Evid. 803(b)(2).

<sup>89</sup> 497 F.3d 789 (8th Cir. 2007).

<sup>90</sup> Id. at 793.

<sup>91</sup> Fed. R. Evid. 804(b)(6)

## **VI. Hearsay in Medical Records: When it Comes in, When it Does Not**

Medical records are excepted from the hearsay rule under two provisions. The first is the business records exception, under which records showing diagnosis are admissible (if, of course, the records meet the remaining provisions of this exception).<sup>92</sup>

Additionally, Rule 803(4) provides that any statement made for medical diagnosis or treatment is admissible where the statement: (1) is made for and is “reasonably pertinent” to medical diagnosis or treatment;<sup>93</sup> and (2) describes either medical history, past or present symptoms or sensation, the inception of any such symptoms or sensations, or their general cause.<sup>94</sup>

Proponents hoping to submit a statement under this exception must keep several things in mind. First, it is generally agreed that the statement must one that would be relied on by physicians or experts in the field.<sup>95</sup> Additionally, while the declarant is not required to be the patient, the statement generally must be made by someone with a special relationship to the patient.<sup>96</sup>

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<sup>92</sup> Fed. R. Evid. 803(6).

<sup>93</sup> Fed. R. Evid. 803(4)(A).

<sup>94</sup> Fed. R. Evid. 803(4)(B).

<sup>95</sup> Gong v. Hirsch, 913 F.2d 1269, 1273-74 (7th Cir. 1990) (finding a statement not the sort that would be relied on by experts where it “does not reveal symptoms, objective data, surrounding circumstances or any similar factual data that a reasonable physician would consider relevant in the treatment or even diagnosis of a medical condition”).

<sup>96</sup> Stull v. Fuqua Indus., Inc., 906 F.2d 1271, 1273-74 (8th Cir. 1990) (statement that victim “apparently” jumped off lawnmower inadmissible where there was no indication as to source).

## VII. Recent Case Law

### A. U.S. v. Gupta<sup>97</sup>

This case from the Second Circuit dealt with several hearsay questions. The defendant, Mr. Gupta, was a Goldman Sachs director convicted of a handful of securities-fraud-related crimes.<sup>98</sup> Mr. Gupta was also involved in several financial ventures with a Mr. Rajaratnam. Chief among the evidence against Mr. Gupta was a series of wiretapped phone calls including Mr. Rajaratnam that Mr. Gupta sought to have excluded as hearsay.<sup>99</sup> The conversations were between Mr. Rajaratnam and employees of his company to whom he conveyed confidential information that Mr. Gupta had learned at Goldman. The government argued that the statements were admissible pursuant to three exceptions: statements of coconspirators, statements against penal interest, and statements admissible under the residual exception (the third exception was dismissed outright by the trial judge and not addressed on appeal).<sup>100</sup> The district court admitted the statements as statements of coconspirators but expressed some doubt that they were statements against interest.<sup>101</sup>

The Second Circuit agreed that the statements were admissible under the coconspirator exception of 801(d)(2)(E).<sup>102</sup> The court said that in order to be “in furtherance of” a conspiracy, the statement must be more than a “merely narrative” statement by one co-conspirator describing the acts of another. Additionally, “idle chatter” between coconspirators does not further any conspiracy.<sup>103</sup> However, “statements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the

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<sup>97</sup> 12-4448, 2014 WL 1193411 (2d Cir. Mar. 25, 2014).

<sup>98</sup> *Id.* at \*1.

<sup>99</sup> *Id.* at \*7-8.

<sup>100</sup> *Id.* at \*8.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*9.

<sup>103</sup> *Id.*

conspiracy, further the ends of a conspiracy.”<sup>104</sup> The court found that the wiretapped calls in which Mr. Rajaratnam passed confidential Goldman information from Mr. Gupta to employees of Mr. Rajaratnam’s outside company for that company’s profit were in furtherance of a conspiracy involving Mr. Gupta.<sup>105</sup>

The court went on to state that Mr. Rajaratnam’s statements were also admissible as statements against penal interest under Rule 804(b)(3).<sup>106</sup> The court found that Mr. Rajaratnam’s statements were clearly among the category of statements that were so incriminatory that a person would not make them unless they were true. Additionally, the statements about specific calls Mr. Rajaratnam made and received regarding particular stock were corroborated by phone records such as calls around the time Mr. Gupta received confidential information and statements under oath from other coconspirators regarding the same stock.<sup>107</sup>

#### **B. *Connearny v. Miss Shauna, LLC***<sup>108</sup>

The plaintiff in this case was the sister of a man who died after suffering a toe injury on a boat owned by the defendant LLC.<sup>109</sup> The injury eventually led to the amputation of his leg below the knee and he passed away while the case was pending. The defendant argued that because the victim passed away without providing any statements under oath, nothing he said regarding his injury or subsequent condition was admissible in court.<sup>110</sup> The plaintiff attempted to introduce the statements under several hearsay exceptions.<sup>111</sup>

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<sup>104</sup> *Id.* (internal citations and punctuation omitted).

<sup>105</sup> *Id.* at \*10-12.

<sup>106</sup> *Id.* at \*14.

<sup>107</sup> *Id.*

<sup>108</sup> CIV.A. 11-11686-GAO, 2014 WL 936418 (D. Mass. Mar. 11, 2014).

<sup>109</sup> *Id.* at \*1.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*2.

First, the plaintiff argued the statements were dying declarations under 804(b)(2).<sup>112</sup> The court disagreed, finding that at the time of injury, the victim did not have “a settled hopeless expectation” that he was near death. Since the plaintiff also admitted that she and the victim did not speak of the incident while he was on his deathbed, the statements were not admissible under 804(b)(2).

Second, the plaintiff tried to offer her own affidavit, containing averments regarding statements of the victim, as an opposing party’s statement under 801(d)(2).<sup>113</sup> The court said this would only permit introduction of an affidavit against her, which had not happened.

The court next ruled that the victim’s statement’s about the injury and its circumstances were not statements of personal or family history that could be admitted under 804(b)(4).<sup>114</sup> Though the plaintiff and the victim were blood relatives, the subject matter of the victim’s statements was not “the declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history” as would make the statements fall under the exception.<sup>115</sup> The court even went so far as to note that this exception is rooted in the common-law pedigree exception, but the statements did not relate to pedigree either.

Fourth, the plaintiff went for 803(4)’s exception for statements made for medical diagnosis or treatment.<sup>116</sup> With this, she finally had some success. The plaintiff sought to introduce medical records that included the victim’s statement that his injuries occurred on a boat. The defendant argued that such statements were inadmissible as “details of the injury not necessary for treatment but serving only to suggest fault,” which would ordinarily be

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<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Fed. R. Evid. 804(b)(4).

<sup>116</sup> Id.

inadmissible. However, the court stated that the fact that the injury occurred on a boat could be relevant to the diagnosis of the victim's infection, so the medical records could be admitted past the hearsay objection.

Finally, the plaintiff sought to use the residual exception, but the court found the statements inadmissible.<sup>117</sup> The court found that the statements were self-serving, were made to a party who was interested in the outcome of the case, and were not accompanied by any circumstances indicating the trustworthiness of the statements. Thus Rule 807 did not apply.

This case is a perfect example of trial counsel that did their homework, analyzed the rules, and laid the groundwork for admitted evidence key to their case. If at first you don't succeed, try, try, try again.

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<sup>117</sup> Id. at \*3.