**HEARSAY OBJECTIONS AND EXCEPTIONS**

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.

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

Aside from statements that are not offered to prove the truth of the matter asserted,[[1]](#footnote-1) 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.[[2]](#footnote-2)

 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.[[3]](#footnote-3) 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 testifying due to an improper motive.[[4]](#footnote-4) Third, the prior statement was one of identification of a person the declarant perceived at an earlier time.[[5]](#footnote-5)

For example, in U.S. v. Brink,[[6]](#footnote-6) 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.[[7]](#footnote-7) 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.”[[8]](#footnote-8) 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.[[9]](#footnote-9)

 2. Party Admission

A party’s own statement offered against it by an opposing party is also not hearsay.[[10]](#footnote-10) This provision applies to the party individually or someone acting in a representative capacity, as well as admissions by a person the party authorized to make a statement on the matter.[[11]](#footnote-11) 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.”[[12]](#footnote-12) Co-conspirator statements are admitted only where the statement was made both during and in furtherance of the conspiracy.[[13]](#footnote-13) 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.[[14]](#footnote-14)

For instance, in Coley v. Burger King,[[15]](#footnote-15) the plaintiffs filed suit against Burger King after one of its employees hit them with his car.[[16]](#footnote-16) 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.[[17]](#footnote-17) Burger King argued this statement was hearsay, but the Fifth Circuit found it was admissible as a party admission.[[18]](#footnote-18) 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.[[19]](#footnote-19)

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.[[20]](#footnote-20)

 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.[[21]](#footnote-21)

1. **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.

1. **Rule 803**

Rule 803 provides a number of exceptions that are available to an attorney regardless of the declarant’s availability.[[22]](#footnote-22) 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.[[23]](#footnote-23) The following are some of the most commonly used Rule 803 exceptions. It is important to note that the declarant must still be speaking based on firsthand knowledge.[[24]](#footnote-24)

* 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.[[25]](#footnote-25) 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.[[26]](#footnote-26)

* 1. 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.[[27]](#footnote-27) Any such statement is excepted from the hearsay rule.[[28]](#footnote-28)

For instance, in U.S. v. Pursley,[[29]](#footnote-29) 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.[[30]](#footnote-30) The Tenth Circuit found these statements were excited utterances and admissible as a hearsay exception.[[31]](#footnote-31) 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.[[32]](#footnote-32) 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.[[33]](#footnote-33)

* 1. 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.[[34]](#footnote-34) Examples given in the statute include intent, plan, motive, mental feeling, and pain or bodily health.[[35]](#footnote-35) The statute expressly excludes any statement that covers the declarant’s memory, unless the statement related solely to the declarant’s will.[[36]](#footnote-36) The statute also excludes any statement regarding the intent of another person.[[37]](#footnote-37) Courts have found that the three factors governing foundation of statements under this exception are contemporaneousness, chance for reflection, and relevance.[[38]](#footnote-38)

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.[[39]](#footnote-39)

* 1. 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.[[40]](#footnote-40) The record must have been either made or adopted by the witness while the matter was still fresh in the witness’s memory.[[41]](#footnote-41) Additionally, the record must accurately reflect the witness’s knowledge.[[42]](#footnote-42) The memorandum or record cannot itself be made an exhibit under this exception unless offered by the other party.[[43]](#footnote-43) This exception can be successfully utilized even where the witness does not recall making the record being used.[[44]](#footnote-44)

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.[[45]](#footnote-45)

* 1. Business Records

Business records will be admitted if certain conditions are met:[[46]](#footnote-46) (1) the record must have been made at or near the time of the matter it covers;[[47]](#footnote-47) (2) it must have been either made by or based off information transmitted by someone with firsthand knowledge;[[48]](#footnote-48) (3) the record must be of the sort kept in the regular course of business; and (4) it must have been the regular practice of the business to keep the manner of record being produced.[[49]](#footnote-49) Each of these conditions must be proven by testimony of a witness qualified to speak regarding the record.[[50]](#footnote-50) 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.[[51]](#footnote-51)

In U-Haul Internat’l, Inc. v. Lumbermens Mutual Cas. Co.,[[52]](#footnote-52) 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.[[53]](#footnote-53) 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.[[54]](#footnote-54) 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.[[55]](#footnote-55)

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 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.

* 1. Public Records

Public records like police reports and other governmental investigations can also be admitted under a hearsay exception in certain circumstances.[[56]](#footnote-56) 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.

* 1. 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.[[57]](#footnote-57) The Federal Rules generally provide that evidence about a person’s character or traits is not admissible to prove behavior in a particular instance.[[58]](#footnote-58) However, in criminal cases, a defendant may offer evidence of a pertinent character trait.[[59]](#footnote-59) If he does, the state may similarly offer evidence in rebuttal.[[60]](#footnote-60) In some circumstances, a defendant may also offer evidence of an alleged victim’s pertinent trait, and the state again may rebut.[[61]](#footnote-61) Prosecutors may also offer evidence of an alleged homicide victim’s “trait of peacefulness” to rebut an assertion that the victim was the aggressor.[[62]](#footnote-62) Evidence of a prior 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.[[63]](#footnote-63)

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.[[64]](#footnote-64) 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.[[65]](#footnote-65)

1. **Rule 804**

This Rule provides exceptions that are only available if the declarant is unavailable to testify at trial.[[66]](#footnote-66) 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 despite a court order to do so; (3) the declarant says they cannot recall the matter; (4) the declarant is dead or prevented from testifying due to some physical or mental condition; or (5) the declarant is absent for trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procedure: (A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6), or (B) the declarant’s attendance or testimony, in the case of a hearsay exception Rule 804(b)(2), (3), or (4).[[67]](#footnote-67) Unavailability may also be found if the witness is beyond the court’s subpoena power.[[68]](#footnote-68)

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.[[69]](#footnote-69)

For instance, in U.S. v. Sklena,[[70]](#footnote-70) 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.[[71]](#footnote-71) 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.”[[72]](#footnote-72) 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.[[73]](#footnote-73)

In civil cases, this exception is also available if the opportunity to question the declarant was available to a predecessor in interest.[[74]](#footnote-74)

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.[[75]](#footnote-75) 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.[[76]](#footnote-76)

As with Rule 803, the declarant’s statement must be based on firsthand knowledge.[[77]](#footnote-77)

1. **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 substance and the declarant’s name.[[78]](#footnote-78) The notice must be in writing before the trial or hearing, or in any form during the trial or hearing if the court, for good cause, excuses the lack of earlier notice.

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 supported by sufficient guarantees of trustworthiness, after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement.[[79]](#footnote-79) 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.”[[80]](#footnote-80)

Rule 807 was revised in 2019, and many believe it now provides a more available avenue for admissibility of hearsay evidence. For example, the court will now review the “totality of the circumstances,” rather than requiring an “equivalent” indicia of trustworthiness found under Rules 803 and 804. The court is also expressly allowed to consider other corroborating evidence in showing trustworthiness, where the permissibility or requirement to consider corroborating evidence was previously unclear. In addition, before the 2019 revisions Rule 807 required notice prior to trial or hearing, but now notice can be given during trial, if the court excuses the failure to give notice for good cause.

The existence of the residential exception under Rule 807 and its recent updates, however, does not mean a party may proceed directly to this exception. The 2019 Advisory Committee Notes provide that while the Court does not have to make a finding that no other hearsay application is applicable, an opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

Georgia pointer: under the old rule, notice to the other party was not required, but Georgia’s new rule has now adopted a notice requirement.[[81]](#footnote-81)

1. **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.

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).

1. **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 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.

1. Fed. R. Evid. 801(c)(2). [↑](#footnote-ref-1)
2. Fed. R. Evid. 801(d). [↑](#footnote-ref-2)
3. Fed. R. Evid. 801(d)(1)(A). [↑](#footnote-ref-3)
4. 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). [↑](#footnote-ref-4)
5. 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). [↑](#footnote-ref-5)
6. 39 F.3d 419 (3d Cir. 1994). [↑](#footnote-ref-6)
7. Id. at 424-25. [↑](#footnote-ref-7)
8. Id. at 425. [↑](#footnote-ref-8)
9. Id. [↑](#footnote-ref-9)
10. Fed. R. Evid. 801(d)(2). [↑](#footnote-ref-10)
11. Fed. R. Evid. 801(d)(2)(A), (d)(2)(C). [↑](#footnote-ref-11)
12. Fed. R. Evid. 801(d)(2)(B). U.S. v. Carter, 760 F.2d 1568, 1579 (11th Cir. 1985). [↑](#footnote-ref-12)
13. Fed. R. Evid. 801(d)(2)(E). [↑](#footnote-ref-13)
14. Fed. R. Evid. 801(d)(2)(D). [↑](#footnote-ref-14)
15. 56 F.3d 709 (5th Cir. 1995). [↑](#footnote-ref-15)
16. Id. at 709. [↑](#footnote-ref-16)
17. Id. at 710. [↑](#footnote-ref-17)
18. Id. [↑](#footnote-ref-18)
19. Id. [↑](#footnote-ref-19)
20. 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.”). [↑](#footnote-ref-20)
21. O.C.G.A. § 25-8-801(d). [↑](#footnote-ref-21)
22. Fed. R. Evid. 803. [↑](#footnote-ref-22)
23. Fed. R. Evid. 803 advisory committee’s note. [↑](#footnote-ref-23)
24. Id. [↑](#footnote-ref-24)
25. Fed. R. Evid. 803(1). [↑](#footnote-ref-25)
26. U.S. v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998). [↑](#footnote-ref-26)
27. Fed. R. Evid. 803(2). [↑](#footnote-ref-27)
28. Id. [↑](#footnote-ref-28)
29. 577 F.3d 1204 (10th Cir. 2009). [↑](#footnote-ref-29)
30. Id. at 1219. [↑](#footnote-ref-30)
31. Id. at 1220. [↑](#footnote-ref-31)
32. Id. [↑](#footnote-ref-32)
33. Id, [↑](#footnote-ref-33)
34. Fed. R. Evid. 803(3). [↑](#footnote-ref-34)
35. Id. [↑](#footnote-ref-35)
36. Id. [↑](#footnote-ref-36)
37. Id. [↑](#footnote-ref-37)
38. U.S. v. Miller, 874 F.2d 1255, 1264 (9th Cir. 1989). [↑](#footnote-ref-38)
39. O.C.G.A. § 28-8-803. [↑](#footnote-ref-39)
40. Fed. R. Evid. 803(5)(A). [↑](#footnote-ref-40)
41. Fed. R. Evid. 803(5)(B). [↑](#footnote-ref-41)
42. Fed. R. Evid. 803(5)(C). [↑](#footnote-ref-42)
43. Fed. R. Evid. 803(5). [↑](#footnote-ref-43)
44. Parker v. Reda, 327 F.3d 211, 214 (2d Cir. 2003). [↑](#footnote-ref-44)
45. Fed. R. Evid. 612. [↑](#footnote-ref-45)
46. Fed. R. Evid. 803(6). [↑](#footnote-ref-46)
47. Fed. R. Evid. 803(6)(A). [↑](#footnote-ref-47)
48. Id. [↑](#footnote-ref-48)
49. Fed. R. Evid. 803(6)(B)-(C). [↑](#footnote-ref-49)
50. Fed. R. Evid. 803(6)(D). [↑](#footnote-ref-50)
51. Fed. R. Evid. 803(6)(E). [↑](#footnote-ref-51)
52. 576 F.3d 1040 (9th Cir. 2009). [↑](#footnote-ref-52)
53. Id. [↑](#footnote-ref-53)
54. Id. at 1043-44. [↑](#footnote-ref-54)
55. Id. [↑](#footnote-ref-55)
56. Fed. R. Evid. 803(8). [↑](#footnote-ref-56)
57. Fed. R. Evid. 803(21); Fed. R. Evid. 404. [↑](#footnote-ref-57)
58. Fed. R. Evid. 404(a)(1). [↑](#footnote-ref-58)
59. Fed. R. Evid. 404(a)(2)(A). [↑](#footnote-ref-59)
60. Id. [↑](#footnote-ref-60)
61. Fed. R. Evid. 404(a)(2)(B). [↑](#footnote-ref-61)
62. Fed. R. Evid. 404(a)(2)(C). [↑](#footnote-ref-62)
63. Fed. R. Evid. 404(b)(2). [↑](#footnote-ref-63)
64. Fed. R. Evid. 405(a). [↑](#footnote-ref-64)
65. Fed. R. Evid. 405(b). [↑](#footnote-ref-65)
66. Fed. R. Evid. 804. [↑](#footnote-ref-66)
67. Fed. Rl. Evid. 804(a)(1)-(a)(5). [↑](#footnote-ref-67)
68. United States v. Marchese, 842 F. Supp. 1307, 1309 (D. Colo. 1994). [↑](#footnote-ref-68)
69. Fed. R. Evid. 803(b)(1). [↑](#footnote-ref-69)
70. 692 F.3d 725 (7th Cir. 2012). [↑](#footnote-ref-70)
71. Id. at 730. [↑](#footnote-ref-71)
72. Id. at 732. [↑](#footnote-ref-72)
73. Id. [↑](#footnote-ref-73)
74. Fed. R. Evid. 803(b)(1)(B). [↑](#footnote-ref-74)
75. Fed. R. Evid. 803(b)(3)(A). [↑](#footnote-ref-75)
76. Fed. R. Evid. 803(b)(3)(B). [↑](#footnote-ref-76)
77. Fed. R. Evid. 803 advisory committee’s notes. [↑](#footnote-ref-77)
78. Fed. R. Evid. 807(b). [↑](#footnote-ref-78)
79. Fed. R. Evid. 807(a)(1). [↑](#footnote-ref-79)
80. Fed. R. Evid. 807(a)(2). [↑](#footnote-ref-80)
81. O.C.G.A. 24-8-807. [↑](#footnote-ref-81)