

Hearsay Exceptions - Rules 803 and 804

- These exceptions are allowed because the rules feel that they have inherent indicia of reliability. Therefore, they can be allowed even though they're hearsay.
- The exceptions are classified by availability of the declarant:
 - Rule 803 exceptions are allowable whether or not the declarant is available him/herself.
 - Rule 804 exceptions are available only if the proponent can show that the declarant is unavailable to testify.
 - This could be because the declarant refuses to testify, is dead, is out of town, etc.

Rule 803 “Statements” Exceptions 1

- Rule 803(1): Present Sense Impression
 - This means that the declarant made the statement while observing the action referenced in the statement without time for reflective thought.
 - This doesn't have to be during the event. Courts have held that as much as 15 minutes after the event could still be a present sense impression.
 - E.g., The 911 operator testifies, “John called and said ‘I see a car speeding through the school zone at 100 MPH’.”
- Rule 803(2): Excited Utterance
 - This applied to any statement made out of stress or excitement spontaneously at the time of the event.

Rule 803 “Statements” Exceptions 2

- Rule 803(3): Then Existing Mental Emotional or Physical Condition
 - This must be a description as to feeling now.
 - E.g. “John told me he had a headache”
 - Threats and statements that indicate motive to do something often fall under this exception.
- Rule 803(4): Statement for the Purpose of Medical Diagnosis or Treatment
 - This includes description of medical history, past or present symptoms.
 - The statement must be made to a person that the declarant thought was involved in providing him or her with medical care.

Rule 803 “Records and Reports” Exceptions 1

- Rule 803(5) Recorded Recollections
 - This is the exception that allowed the “past recollection recorded” technique discussed earlier in the course.
 - If the witness wrote something down when it was still fresh in his or her memory and, when on the stand, can’t remember, the notes can be read as evidence.
 - This does not mean that something that would otherwise be hearsay can be admitted just because it’s written down!
- Rule 803(6) and 803(7) Records of Regularly Conducted Activities or Lack Thereof.
 - This applies to records kept in the ordinary course of business; e.g.,
 - Police reports
 - Hospital and doctor’s records

Rule 803 “Records and Reports” Exceptions 2

- Other Rule 803 exceptions for records include:
 - (8) Public records and reports.
 - (9) Records of vital statistics.
 - (10) Absence of public record or entry.
 - (11) Records of religious organizations.
 - (12) Marriage, baptismal, and similar certificates.
 - (13) Family records.
 - (14) Records of documents affecting an interest in property.
 - (15) Statements in documents affecting an interest in property.
 - (16) Statements in ancient documents.
 - (17) Market reports, commercial publications.
 - (18) Learned treatises.

Rule 803: Other Exceptions

- The “reputation” exceptions:
 - (19) Reputation concerning personal or family history.
 - (20) Reputation concerning boundaries or general history.
 - (21) Reputation as to character.
- Note, of course, that evidence of reputation also may have a problem under Article 4 as being character evidence. This exception applies when an exception under Article 4 or 6 applies as well.
- The “judgment” exceptions
 - (22) Judgment of previous conviction.
 - Again, watch out for character evidence issues!
 - (23) Judgment as to personal, family or general history, or boundaries.

Rule 804: Declarant Unavailable

- Rule 804 exceptions only apply if the declarant is unavailable to testify. This is applicable if the declarant...
 - (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
 - (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
 - (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
 - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance

Rule 804 Exceptions 1

- Rule 804(b)(1): Former Testimony
 - Previously given sworn testimony can be introduced, but only if the other party had the chance to challenge that testimony by cross-examination or something similar,
 - Thus, grand jury testimony usually doesn't fit this exception.
- Rule 804(b)(1): Statement Under Belief of Impending Death
 - For this exception to apply, the person doesn't actually have to have died; nor does the person actually have had to have been in any real danger.
 - The key is the belief of the declarant!

Rule 804 Exceptions 2

- Other Rule 804(b) exceptions (applicable only when the declarant is unavailable) include:
 - (3) Statement against interest.
 - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, etc.
 - circumstances clearly indicate the trustworthiness of the statement.
 - (4) Statement of personal or family history.
 - A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, etc.
 - (6) Forfeiture by wrongdoing.
 - A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Hearsay - Other Rules

- Hearsay within Hearsay
 - E.g., “Sarah told me that Jim told her that Jane stabbed Jesse.”
 - For this to be admissible, there has to be a valid hearsay exception for *each* level of hearsay!
- “Catch-all” Hearsay Exception
 - Rule 807 allows hearsay to be admitted where:
 - The statement is offered as evidence of a material fact.
 - The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.
 - The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Hearsay - The Confrontation Clause

- The 6th Amendment guarantees a criminal defendant:
 - [the right] to be confronted with the witnesses against him.
- Admission of hearsay against a criminal defendant can be said to violate that right. Therefore, the Supreme Court has ruled that even if allowable under the hearsay rules, evidence can't be admitted against a criminal defendant unless:
 - The declarant is unavailable.
 - This applies even where there would be an 803 exception.
 - There are adequate indicia of reliability.
 - This can be satisfied by a showing that the statement falls within a "firmly rooted" hearsay exception or has "particularized guarantees of truthworthiness."

Hearsay - The Confrontation Clause 2

- An exception to the confrontation clause/hearsay rule is often made where a child is the alleged victim of sexual abuse. The child's out of court statement can be allowed where:
 - The statements concern the commission of sexual abuse.
 - The circumstances of the statement provide guarantees of trustworthiness.
 - The statement was not made in preparation for a legal proceeding.
 - The statement was made prior to the defendant's initial appearance in court.
- To protect a child/alleged abuse victim, the court can also force the defendant to watch the trial on closed circuit television monitors.