

# HEARSAY (KEY SLIDES)

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# FOR THE TRUTH

Out-of-court statement

+ Offered to prove the truth of what was said

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The value of the evidence depends on the credibility of the out-of-court declarant.

To test the declarant's credibility,

- i. the declarant must be subject to cross-examination, or
- ii. the statement must satisfy a hearsay exception.

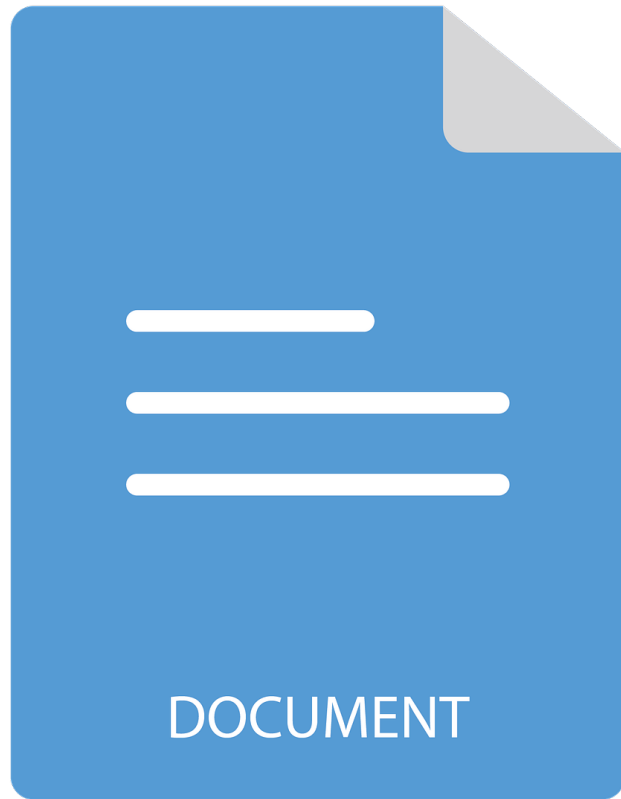
Out-of-court statement

+ Offered for reasons other than the truth

The value of the evidence usually depends on the credibility of the in-court witness.

An in-court witness' credibility is tested by being subject to cross-examination.

(E.g., bias and memory).



## Business Records Exception

- Is it a (i) business (ii) record?
- Prepared in ordinary course of business?
- At/near the time of the event?
- Made by (or using info from) someone w/ knowledge?
- With a duty to report accurately?
- Sworn to by
  - Testimony, or
  - Affidavit with notice to parties?



"The simple fact that something qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial. Trustworthiness is the foundation of the business record exception."

*State v. Galloway*, 145 N.C. App. 555 (2001) (citations omitted)



Imagine that the records are being called as a witness. If the records meet the requirements of Rule 803(6), then the records are competent to testify. But just like a human witness, being competent to testify does not mean that the records can say anything they want. Additional individual hearsay statements contained within the records should be analyzed for admissibility.



# POLICE REPORTS

- Public Records/Reports exception R. 803(8)
- Writings of public offices or agencies documenting required activities or observations
- Explicitly excludes police reports in criminal trials from being admissible under this exception



# MEDICAL DIAGNOSIS OR TREATMENT EXCEPTION

Rule 803(4)

- Did the declarant understand the statement would lead to medical d/t?
- Was the statement reasonably pertinent to medical d/t?

What if the...

1. Examination was in preparation for litigation? Exception does not apply.
2. Declarant was not the injured or sick person (e.g., a child's parent? *J.M.*, 255 N.C. App. 483 (2017))? OK if requirements are met (e.g., similar treatment motive)
3. Listener was not a medical professional? OK if requirements are still met (e.g., made w/ understanding statement would lead to diagnosis and treatment)
4. Declarant is a young child?
  - Voire dire not required. Circumstances inform whether the declarant had the requisite understanding.
  - Proponent has affirmative duty to show declarant's understanding.

# CIRCUMSTANCES INDICATE A YOUNG DECLARANT'S MOTIVE.



## Purpose of Examination

- Explained to child
- In age-appropriate manner



## The Truth

- Importance of being truthful
- Demonstrated ability to differentiate truth & lies



## The Interview

- Medical or non-medical interviewer
- Leading nature of questions



## The Interview Setting

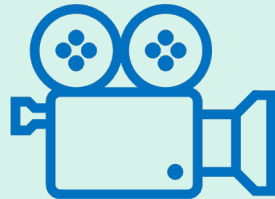
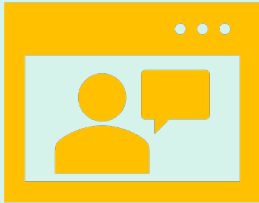
- Medical?
- Child friendly?
- Private?



## Time Between Incident and Exam



# VIDEO- RECORDED EXAMS



To be admissible, must:

- ✓ Satisfy medical d/t exceptions (understanding and pertinence), and
- ✓ Be authenticated by
  - a witness who was present, or, if unavailable,
  - proof of recording circumstances.



# ONE OF THESE THINGS IS (NOT QUITE) LIKE THE OTHER

## 803(1), Present Sense Impressions

A statement describing or explaining an event or condition made while the declarant was perceiving it, or immediately thereafter.

## 803(2), Excited Utterances

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.

The passage of time is relevant in both exceptions, but Excited Utterance focuses more on the duration of stress and excitement.

# PRESENT SENSE IMPRESSION (R. 803(1))

*State v. Pennix*, 222 N.C. App. 318 (2012) (unpublished)

- When found injured in parking lot, D gave no statement to police about what happened.
- 2 hours later at hospital, D tells police he was victim of an assault and robbery. Admissible?
- Held: Inadmissible. Passage of time between altercation and statement provided opportunity for fabrication.

*Contrast with:*

- Woman who walked next door to tell neighbor D just stated he intended to kill V. *Clark*, 128 N.C. App. 722 (1998) (no rigid rule re: time interval and how long is too long)
- Statement by V who drove 30 minutes to mother's house, crying, and said D kicked her out. *Cummings*, 326 N.C. 298 (1990) (sufficiently close in proximity)

# EXCITED UTTERANCE (R. 803(2))

*State v. Pennix*, 222 N.C. App. 318 (2012) (unpublished)

- D did not make statement until **2 hours** after being found hurt.
- Held: Statement must be (1) result of a sufficiently startling experience to suspend reflective thought, and (2) a spontaneous reaction - not result of reflection or fabrication.

*State v. Lowery*, 278 N.C. App. 333 (2021)

- Victim of assault lying on ground, bleeding, injured, and shaking (dying soon after).
- Assault took place **up to 90 min.** before Victim identified D to Passerby.
- Held: time is relevant, but not always material. Modern trend considers if the context (including continued stress/excitement) suggests declarant had opportunity to lie.

## EXCITED UTTERANCES AND CHILDREN

*Young*, 233 N.C. App. 207 (2014)

(overturned on other grounds)

- 2 ½-year-old child at daycare, 6 days after mother was killed.
- Playing with dolls. Spoke without prompting.
- Mommy had "boo-boos" and "red stuff all over."



*McLaughlin*, 246 N.C. App. 306 (2016)

- Statement made 10 days after Dad's sexual abuse, after custody exchanged.
- Child came home frantic and shaking.
- "You got to call the police right now." What's wrong? "It's [Dad]."



*Blankenship*, 259 N.C. App. 102 (2018)

- Dad sexually abused Child early one morning.
- Child spontaneously told grandparents Dad sexually abused her after a.m. pickup.
- Child was "normal" and "happy" when she made the statement.



## Rule 803(3), Then Existing Mental/Emotional/Physical Condition

A STATEMENT OF DECLARANT'S THEN EXISTING STATE OF MIND (E.G., INTENT OR PLAN), EMOTION, SENSATION, OR PHYSICAL CONDITION BUT NOT A MEMORY OR BELIEF TO PROVE THE FACT REMEMBERED OR BELIEVED.

*MCELRAITH*, 322 N.C. 1 (1988)

- D accused of 1<sup>st</sup> Degree Murder for killing his soon-to-be ex-son-in-law.
- V warned friend he'd be driving with D that day.
- Admissible under exception? For what purpose?
  - Yes, to show Victim was with Defendant the afternoon he was killed.
  - A statement of intent can be used to prove subsequent conduct as intended, if the time lapse is not so great that the statement is too remote to be relevant.

Victim's state of mind, including their emotional condition, is relevant if it relates directly to the circumstances that gave rise to a potential confrontation with the defendant and the status of the victim and defendant's relationship.



Statements that merely relate to factual events are provable by better evidence (e.g., witness testimony), and thus exception does not apply.



Witness 1



- V called me crying and said D was "very jealous".

Witness 2



- She said, "I'm afraid [he] is going to whip me later."

Witness 3



- She said, "He makes me come home early and I can't have visitors."

Witness 4



- She said, "We fought. That mark is from a hot gun he put to my face."

Witness 5



- She said, "I am going to leave him when school is done in May."

Witness 6



- She said that he beat her and added, "I'm going to leave and stay with my brother."

Witness 7



- She said, "He doesn't let me wear shorts in public. He'd kill me if I left."

Witness 8



- She grew quiet and introverted and then said, "he beat me."

*Lathan*, 138 N.C.  
App. 234 (2000)



- Allows *some* otherwise inadmissible hearsay
- Must possess "equivalent circumstantial guarantees of trustworthiness"
- Court must also determine:
  - Offered to prove material facts
  - More probative than other reasonably available evidence
  - Admission serves Rule and justice
  - Written notice of intention and particulars given, sufficient to provide party with "fair opportunity" to prepare
  - Witness availability?



RESIDUAL HEARSAY Rule 803(24)

# ADMISSION OF PARTY OPPONENT

- Assertion (oral or written statement) or nonverbal conduct
- Declared or endorsed (affirmatively or impliedly, e.g., by omission)
- By a party-opponent, or rep/agent
  - Or an acting co-conspirator
- Offered against that party-opponent

Rule 801

## Hearsay Exceptions: Admissions by Party- Opponents



November 12, 2013 [Jessica Smith](#)

Print

Evidence Rule 801(d) sets out a hearsay exception for “Admissions by a Party-Opponent.” If you’re not clear on that rule, read on.

The rule says that a statement is admissible under this exception if it is “offered against a party” and is

(A) his or her own statement, in an individual or representative capacity;

(B) a statement that the party has manifested an adoption of or a belief in its truth;



Unavailable means the declarant is

- I. privileged from testifying,
- II. refusing to testify despite a court order to do so,
- III. claiming, under oath, a lack of memory about the statement,
- IV. unable to testify because of a physical or mental illness, or death, or is
- V. absent and reasonable means to procure the declarant have been unsuccessful.

# Unavailability and the Court's Role

*State v. Finney*, 358 N.C. 79 (2004)

Did not respond to DA's questions (sat silently)

Cried + told court, "I do not wish to testify"

Threatened w/ arrest in closed room

Harassed; lost job as a result

Later refused to retake stand until lawyer arrives

## Court of Appeals:

- "Wish"  $\neq$  "won't"
- Never definitively refused + did not persist
- More than hostility required
- Responsive + cooperative to court's questions (capable of being a responsive witness)
- Mid-trial response implied willingness
- Court must make greater efforts to:
  - Inquire about refusal
  - Encourage witness
  - Explain constitutional significance

## FORMER TESTIMONY

Applies to testimony:

- (i) by a witness who testified in the same or a different proceeding;
- (ii) that is now offered against the same party or a different party who had similar opportunity and motive to question; and
- (iii) given by a witness who is now unavailable under the Rule.

Trial 1: Alibi testified in support of D's claim they were together

Post-Trial: Alibi charged as co-conspirator

Trial 2: D's new strategy is to avoid connection w/ co-conspirator, who pleads 5th

NSCS: Alibi unavailable; D had similar motive & opportunity

*Hunt*, 339 N.C. 622 (1995)

Rule 804(b)(1)

## Rule 804(b)(2), Statement Under Belief of Impending Death

A STATEMENT MADE BY A DECLARANT WHILE BELIEVING THAT HIS DEATH WAS IMMINENT, CONCERNING THE CAUSE OR CIRCUMSTANCES OF WHAT HE BELIEVED TO BE HIS IMPENDING DEATH.

V's chest fluids drained and lungs reinflated

Doc told V no risk of death; would recover

V to police repeatedly: "D shot me, I'm dying"

8 days later, V developed infection and died

### Court of Appeals: Admissible.

- Doc's assurances relevant but not dispositive.
- Declarant's mental state + belief control.
  - Words were supported (bullet pierced organs)
  - Conscious and able to feel.
- Personal (non-professional) assessment OK.
  - A dying declaration is worthy of belief not because it was scientifically arrived at, but because it was sincerely and steadfastly held.