Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) (Not used).

(2) Excited utterance. 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.

(3) Then existing mental, emotional, or physical condition. 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.

(4) Statements for purpose of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or 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 pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection 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.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, 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. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, 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.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices 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 and petty misdemeanors matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings except petty misdemeanors and against the State in criminal cases and petty misdemeanors, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurence 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.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations unless the sources of information or other circumstances indicate lack of trustworthiness.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

The exceptions to the hearsay rule of exclusion (Rule 802) are separated into two categories:

1. those exceptions which are not affected by the availability or unavailability of the declarant (Rule 803), and

2. those exceptions which require that the declarant be unavailable before the hearsay statement might be admissible (Rule 804).

The basis for the distinction is largely historical, and represents a judgment as to which hearsay statements are so trustworthy as to be admissible without requiring the production of the declarant when available.

Rules 803 and 804 provide certain exceptions to the general rule of exclusion for hearsay statements. A statement qualifying as an exception to the hearsay rule must satisfy other provisions in these rules before it is admissible. For example, a statement that qualifies as an exception to the hearsay rule must be relevant and admissible under Article 4 and be based on personal knowledge (Rule 602) before it can be admitted into evidence.

Rule 803(1)

The committee did not recommend adoption of Fed. R. Evid. 803(1) "Present sense impressions." However, if the declarant testifies at trial and is subject to cross-examination, the declarant's present sense impressions are treated as nonhearsay under these rules. Rule 801(d)(1)(D).

Rule 803(2)

The excited utterance exception is one which traditionally has been treated in terms of "res gestae" in Minnesota. The rules avoid use of the term "res gestae" which is considered to be a general catchall phrase sanctioning the admission of several types of hearsay statements. See gen. Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922). C. McCormick, Evidence section 288 (2d ed. 1972). The rules provide specific exceptions more clearly identifying the rationale and requirements of each. The major effect this rule will have

on existing practice is a change in terminology which hopefully will result in better analysis and understanding.

In order to qualify as an excited utterance, the following three requirements must be met:

1. there must be a startling event or condition;

2. the statement must relate to the startling event or condition; and

3. the declarant must be under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement.

The rationale stems from the belief that the excitement caused by the event eliminates the possibility of conscious fabrication and insures the trustworthiness of the statement. As the time lapse between the startling event and subsequent statement increases, so does the possibility for reflection and conscious fabrication. There can be no fixed guidelines. It is largely a matter for the trial judge to determine whether the statement was given at such a time when the aura of excitement was sufficient to insure a trustworthy statement. Rule 104(a). In reaching this decision, the judge must consider all relevant factors including the length of time elapsed, the nature of the event, the physical condition of the declarant, any possible motive to falsify, etc.

Rule 803(3)

The rule combines two traditional exceptions to the hearsay rule; the state of mind exception and the statement of present bodily condition. Both are based on the belief that spontaneous statements of this nature are sufficiently trustworthy to justify their admission into evidence. State of mind or bodily condition are difficult matters to prove. When they are in issue or otherwise relevant, hearsay statements of this type may be the best proof available.

The rule makes it clear that hearsay statements probative of the declarant's state of mind or emotion are not made inadmissible by the hearsay rule. The more difficult evidentiary problems arise in the determination as to whether state of mind is relevant to the issues in the lawsuit. Clearly, when state of mind is in issue there is no problem. State of mind may also be admitted to prove that the declarant subsequently acted in conformity with his state of mind. See Scott v. Prudential Ins. Co., 203 Minn. 547, 552, 282 N.W. 467, 470 (1938); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 296, 12 S.Ct. 909, 913, 36 L.Ed. 706, 710, 711 (1892). The rule does not permit evidence of a declarant's present state of mind to be admitted to establish the declarant's previous actions, unless dealing with the execution, revocation, identification, or terms of declarant's will. Cf. Troseth v. Troseth, 224 Minn. 35, 28 N.W.2d 65 (1947). (Present state of mind used to prove previous intent in effectuating gift.)

In considering the admissibility of statements of present sensation or bodily condition, the Court should examine the circumstances surrounding the statements to determine if they were spontaneous statements or statements designed with a view to making evidence. Statements of the latter type should be excluded under Rule 403. See C. McCormick, Evidence section 292 (2d ed. 1972).

Rule 803(4)

Statements to treating physicians traditionally have been admissible as an exception to the hearsay rule if reasonably pertinent to diagnosis and treatment. This includes statements as to present matters as well as past conditions. See Peterson v. Richfield Plaza, Inc., 252 Minn. 215, 228, 89 N.W.2d 712, 722 (1958). In Minnesota, they have been admissible if the physician bases an opinion on the statement.

The rule extends this exception to cover statements made to a nontreating physician if made for the purpose of diagnosis. This rule is the logical outgrowth of Rule 703 which permits a nontreating physician to base an opinion on such a statement if it is the type of statement upon which experts in the field reasonably rely.

Rule 803(5)

The introduction of hearsay documents under this exception must be distinguished from the use of documents to refresh the recollection of a witness. See Rule 612. Only when a witness has insufficient present recollection of the event and attempts to read a hearsay document into the record are the requirements of this rule applicable.

The rule does not require a total lack of memory. If the present recollection of the witness is impaired to such an extent that he is unable to testify fully and accurately, he may resort to a memorandum or record if it satisfies the other provisions of the rule. In these situations, the previously recorded statement will often be the best available evidence. See Walker v. Larson, 284 Minn. 99, 105, 169 N.W.2d 737, 741, 742 (1969). The provision that the hearsay document will not be received as an exhibit is intended to prevent the jury from placing undue emphasis on the statement.

Rule 803(6)

This provision will replace the existing statutory scheme dealing with the introduction of business records and shop records. See Minnesota Statutes 1974, sections 600.01 to 600.06. Minnesota had previously adopted the Uniform Business Records as Evidence Act to bring state law in this area into conformity with other states adopting the Uniform Act. In recommending the federal rule, it was the committee's view that in the years to come it is of greater importance that the state rule corresponds to the rule in force in the federal courts.

The rule should be read broadly to accomplish the purposes set out in Rule 102 as well as to ensure that only trustworthy evidence is admitted. The application of the rule should not cause a substantive change in existing practice. Past decisions of the Minnesota Supreme Court should serve as guidelines for the proper interpretation of this rule. See gen. Brown v. St. Paul Ry., 241 Minn. 15, 62 N.W.2d 688, 44 A.L.R.2d 535 (1954); City of Fairmont v. Sjostrom, 280 Minn. 87, 157 N.W.2d 849 (1968).

Documents prepared solely for litigation purposes do not qualify under this exception. If the document is prepared in part for business purposes but with an eye toward litigation the court must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission. See Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943), cited with approval in Brown v. St. Paul Ry. Co., 241 Minn. 15, 36, 62 N.W.2d 688, 702 (dictum).

Rule 803(7)

Absence of an entry in a business record is not made inadmissible by the hearsay rule. The admissibility of such evidence is governed by rules of relevancy. See Article 4.

Rule 803(8)

The rationale for this exception rests in:

1. a belief in the trustworthiness of the work product of government agents operating pursuant to official duty;

2. the necessity for introducing the full reports as opposed to testimony of government agents whose memory may be faulty; and

3. a concern for the disruption that would result in government agencies if its employees were continually required to testify in trials. See United States Supreme Court Advisory Committee Note. See also C. McCormick, Evidence section 315 (2d ed. 1972). Subdivisions (A) and (B) are consistent with existing practice.

The rule was amended to clarify that records and reports qualifying under each subdivision (A), (B), and (C) should be excluded if the report is not trustworthy. Among other matters, the court should consider the qualifications, bias, and motivation of the authors, the timeliness and methods of investigation or hearing procedures, and the reliability of the foundation upon which any factual finding, opinion, or conclusion is based.

Subdivision (C) permits introduction of factual findings resulting from investigations made pursuant to authority granted by law except when offered against the accused in criminal cases. Prior to the Minnesota Rules of Evidence, Minnesota courts did not admit reports which included discretionary conclusions and opinions. Barnes v. Northwest Airlines, Inc. 233 Minn. 410, 433, 47 N.W.2d 180, 193 (1951); Clancy v. Daily News Corp., 202 Minn. 1, 7, 277 N.W. 264, 268 (1938). The rule makes no distinction among findings of historical fact, factual conclusions, or opinions. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) (investigator's report on cause of airplane crash was not excludable because it included investigator's opinion or conclusion). See also Pipestone v. Halbersma, 294 N.W.2d 271 (Minn. 1980). The primary concern of the rule is a determination of whether the factual finding, conclusion, or opinion is trustworthy and helpful to the resolution of the issues. Considerations of whether the document contains historical facts as opposed to conclusions or discretionary factual findings is subordinate to this primary consideration.

At present, public records are admitted pursuant to specific statutes. See e.g., Minnesota Statutes 1974, section 600.13. This rule is not intended to supersede the many statutes that specifically provide for the admission or exclusion of certain public documents. E.g., Minnesota Statutes 1974, section 169.09, subdivision 13.

Rule 803(9)

Minnesota has adopted the Uniform Vital Statistics Act, Minnesota Statutes 1974, sections 144.151 to 144.204, and 144.49, which requires certain individuals to make reports to the State Board of Health concerning births, deaths, etc. Similarly Minnesota Statutes 1974, section 517.10, requires the filing of marriage certificates. Minnesota Statutes 1974, sections 144.167 and 600.20. However, not all statements included in such certificates are admissible. See Backstrom v. New York Life Ins. Co., 183 Minn. 384, 236 N.W. 708 (1931). This rule should not change existing Minnesota practice.

Rule 803(10)

The absence of a public record or entry, like the absence of a business record, is not made inadmissible by the hearsay rule. The admissibility would depend on principles of relevancy. See Article 4. The rule provides for proof by way of certification that a diligent search failed to disclose the record or entry. See Minn. R. Civ. P. 44.02.

Rule 803(11)

The rule is an extension of the business records exception. See Rule 803(6). This exception is somewhat broader since there is no explicit directive that the court inquire into the trustworthiness

of the statement. Unlike the business record exception, the person furnishing the statement is not required to have a business or religious duty to report the information. Contra. Houlton v. Manteuffel, 51 Minn. 185, 187, 53 N.W. 541, 542 (1892).

Rule 803(12)

This provision excepts certain certificates from the hearsay rule. In cases where the certificate is filed or maintained in a church record, this provision provides an alternative method of proof. See Rule 803(8) and (10). See also Minnesota Statutes 1974, section 600.20.

Rule 803(13)

The exception for family records is consistent with common law tradition, although at common law they were admissible only when the declarant was unavailable. See C. McCormick, Evidence section 322 (2d ed. 1972). See also Geisler v. Geisler, 160 Minn. 463, 467, 200 N.W. 742, 744 (1924). Cf. Rule 804(b)(4).

Rule 803(14)

In many cases, the proper recording of an interest in property requires or permits statements on the face of the record which assert proper execution and delivery of the document. See e.g., Uniform Conveyancing Blanks prepared under authority granted by Minnesota Statutes 1975 Supplement, section 507.09. The rule is intended to allow this record to be used as proof of proper execution and delivery of the document, as well as proving the contents of the record. This procedure is consistent with Minnesota practice. See Minnesota Statutes 1974, section 600.13.

Rule 803(15)

The circumstances under which most dispositive documents are made will normally assure the reliability of statements relevant to the purpose of the document. Absent a showing that subsequent dealings with the property have been inconsistent with these statements, there is sufficient indicia of trustworthiness to warrant an exception to the general rule against hearsay.

Rule 803(16)

The admissibility of ancient documents will normally raise problems of authentication and hearsay. The requirements of proper authentication are set forth in Rule 901(b)(8). If properly authenticated, these hearsay documents are deemed to be sufficiently trustworthy to warrant admission as evidence because:

1. they were compiled at a time prior to the litigation when there was no motive to falsify;

2. the documentary form of the evidence reduces the possibility of error in transmission;

3. it is unlikely that present testimony concerning these prior matters will be significantly more probative. Furthermore, in most instances witnesses with firsthand knowledge will not be available.

If the Court has reason to suspect the trustworthiness of the ancient document, it may exercise its discretion under Rule 403 to exclude the evidence.

Rule 803(17)

Many commercial publications and market quotations are highly trustworthy and are relied upon by the general public as well as specialized groups.

The committee was concerned that this exception might permit certain credit reports, etc., reflecting unreliable hearsay to be received as substantive evidence. The distinction between the

Minnesota rule and its federal counterpart is intended to emphasize that this exception will not be a universal sanction for the admission of market reports or commercial publications.

The rule makes it clear that the Court retains the power to exclude evidence offered pursuant to this exception if the evidence is not trustworthy. See gen. J. Weinstein & M. Berger, 4 Weinstein's Evidence section 803(17(01)) (1975). This provision is consistent with the authority given the Court under Rule 403.

Rule 803(18)

The circumstances under which learned treatises will be admitted as substantive evidence are set forth by the rule. These limitations should serve to avoid dangers of misunderstanding or misapplication of this evidence.

The rule will expand the use of learned treatises in Minnesota courts. See gen. Briggs v. Chicago Great Western Ry., 238 Minn. 472, 57 N.W.2d 572 (1953); but see Ruud v. Hendrickson, 176 Minn. 138, 222 N.W. 904 (1929); see also Comment, 39 Minn.L.Rev. 905 (1955).

Rule 803(19)

The rationale for the hearsay exception for reputation evidence is explained in the United States Supreme Court Advisory Committee Note:

> *Trustworthiness in reputation evidence is found when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community conclusion, if any has been formed, is likely to be a trustworthy one. (citations omitted)*

When dealing with reputation concerning personal or family history, the community includes the family, associates, or general community. This may be somewhat broader than the traditional pedigree exception in Minnesota. See Houlton v. Manteuffel, 51 Minn. 185, 53 N.W. 541 (1892). See Minnesota Statutes 1974, section 602.02, which permits reputation evidence to prove the fact of marriage.

Rule 803(20)

Subdivision 20 codifies a common law exception to the hearsay rule. C. McCormick, Evidence section 324 (2d ed. 1972).

Rule 803(21)

Subdivision 21 provides that reputation as to character is not excluded by the hearsay rule. The admissibility of this type of evidence is governed by Rules 404, 405, and 608.

Rule 803(22)

Prior to this rule, convictions have not been admissible as substantive evidence. Guilty pleas could be received in a subsequent civil action as party admissions. Otherwise a conviction would be admissible in a subsequent civil case only for impeachment purposes. In addition, it is possible that a criminal conviction might serve as an estoppel in the civil action. See Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968). The rule gives evidentiary effect to criminal felony convictions, altering existing practice.

The rule is consistent with the modern trend in this area and has much to commend it. See Annot., 18 A.L.R.2d 1287 (1951). It represents a belief in the trustworthiness of verdicts based on the reasonable doubt standard. The rule is limited to convictions for serious crimes to insure that

there was sufficient motivation to defend the criminal prosecution. To the extent that the defendant believes the criminal conviction was not accurate for any reason, e.g., new evidence, lack of discovery at the criminal trial, restrictive evidentiary rulings, etc., these matters can be explained at the civil trial. The burden is placed on the party offering the prior conviction to establish what facts were essential to sustain the criminal conviction.

Rule 803(23)

This provision deals with the evidentiary effect to be given a judgment in a civil case concerning matters of personal, family, or general history and boundaries. At one time jury verdicts were essentially the equivalent of reputation. Although the historical rationale for this exception is no longer valid, judgments of this nature have continued to be admitted as an exception to the hearsay rule since such judgments are at least as trustworthy as reputation evidence. Rules 803(19) and (20). See United States Supreme Court Advisory Committee Note.

Rule 803(24)

This exception allows for the continued development of exceptions to the hearsay rule. It provides for sufficient flexibility to carry out the goals set out in Rule 102. The rule defines the common law power of the judge to fashion new exceptions to the hearsay doctrine. For hearsay to qualify under this provision, it must be established that there is some need for the evidence and that the evidence has guarantees of trustworthiness equivalent to the specific exceptions set out in Rule 803.

Furthermore, there is a notice requirement to avoid the possibility of surprise and to lend more predictability to the litigation process. The Committee considered and rejected the federal cases that applied a less restrictive notice requirement. United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) cert. denied 431 U.S. 914, 97 S. Ct. 2174, 53 L.Ed.2d 224; United States v. Leslie, 542 F.2d 285 (5th Cir. 1976).

Committee Comment - 2006

Rule 803(24)

The substance of this rule is combined with Rule 804(b)(5) in new Rule 807.