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CHAPTER 8 ARTICLE VIII. TENNESSEE LAW OF EVIDENCE—HEARSAY

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§ 8.01 Rule 801. Definitions

[1] Text of Rule

Rule 801 Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Advisory Commission Comment:

This rule, generally defining hearsay, is the first of a series covering hearsay evidence. The next provision, Rule 802, states the general rule that hearsay evidence is inadmissible unless otherwise provided by law. Rules 803 and 804 describe hearsay exceptions. Rule 805 deals with multiple hearsay, and Rule 806 provides a general rule for impeaching hearsay declarants.

Except for the definition of conduct as hearsay, Rule 801 restates Tennessee common law. Part (a) makes hearsay only such nonverbal conduct as the declarant actor intends as an assertion. The common law, stemming from *Wright v. Tatham*, 112 Eng. Rep. 488 (Exch. Ch. 1837), included in the hearsay definition assertions that might be inferred from the conduct but that were unintended by the actor. Consequently, Tennessee has defined flight from a crime scene as hearsay, although the courts admit the evidence through the exception for party admissions. Under the proposed rule, the evidence would be admissible as nonhearsay, the declarant obviously not intending to assert guilt by flight.

[2] Overview of Rules 801–806

Rules 801 to 806 cover the difficult topic of hearsay.[1] Rule 801 defines hearsay and the two key terms in the definition. Rule 802 states the general proposition that hearsay evidence is inadmissible unless an evidence rule or other law admits it. Rules 803 and 804 list twenty-six hearsay exceptions. Rule 805 provides the principle for assessing the admissibility of multiple hearsay, often referred to as hearsay within hearsay. Rule 806 authorizes impeachment of a hearsay declarant, even one who is absent from the trial.

[3] Policy Basis for Hearsay Rule and Exceptions

[a] In General

[1] *See below* Alfred H. Knight, III, *The Federal Influence on the Tennessee Hearsay Rule*, *57 Tenn. L. Rev. 117 (1989)*.

In the Anglo-American legal system, hearsay evidence has traditionally been excluded because of a fear that it is unreliable. By definition,[2] hearsay involves an out-of-court statement used in court to prove the truth of the matter asserted in the out-of-court statement. The primary concern is that the trier of fact will not be able to hear cross-examination of the declarant, who made the out-of-court hearsay statement. In addition, the hearsay declarant's statement is presented to the trier of fact, but the declarant often is not present and therefore not subject to the oath to tell the truth. Another concern is that, since the trier of fact will not be able to observe the demeanor of the declarant, it will be difficult to assess the accuracy of the declarant's statement.

[b] Four Hearsay Risks

Traditional evidence lore teaches that the lack of cross-examination, oath, and demeanor proof means that hearsay evidence may suffer from four inadequacies that cannot be evaluated by the trier of fact.

Sincerity. First, the hearsay declarant's *sincerity* cannot be assessed. Absent cross-examination and demeanor evidence, it may be difficult to determine whether the declarant was lying or shading the truth in order to achieve some personal objective.

Ambiguity in Communication. Second, the trier of fact may find it hard to discover whether there was some *ambiguity* (also referred to as *narration*) in the declarant's original statement. Perhaps the declarant accidentally misstated some facts. For example, the declarant may have said that the "blue car ran the red light" but really have meant that the "green car ran the red light."

Memory. Third, the declarant's *memory* (also referred to as *recordation* and *recollection*) cannot be tested by cross-examination. It is possible that the declarant's statement was inaccurate because the declarant's memory of the event described was faulty. Inaccuracy is especially likely to occur if the statement was about an event occurring days or weeks before the hearsay statement was made.

Perception. The final concern is that the declarant's *perception* may have been faulty. Perception occurs through the declarant's senses. Although the hearsay statement clearly said that the blue car ran the red light, did the declarant actually see the light change as the car passed through the intersection, or did the declarant see the car speed up and assume that the car ran the light?

[c] Rationale for Hearsay Exceptions

These four risks are traditionally used to explain both why hearsay evidence is generally inadmissible and why various hearsay exceptions exist. A hearsay exception often exists when one or more of the four hearsay risks is nonexistent or minimal. For example, the excited utterance hearsay exception[3] exists because the declarant is viewed as unlikely to be insincere when making a statement under stress. The presence of stress minimizes the risk of insincerity. Even though the other three risks remain, the lack of a substantial sincerity problem means that a statement that is an excited utterance is traditionally deemed sufficiently reliable to be heard by the trier of fact.

Another reason hearsay is frequently admitted is that the evidence is needed to provide the trier of fact with critical information. Sometimes the need is so great that a specific hearsay exception is recognized despite significant weaknesses in the likely accuracy of the hearsay evidence.

[4] Definitions of Hearsay, Statement, and Declarant

[a] In General

Hearsay involves an out-of-court *statement* by a *declarant*.

[b] Statement

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[2] *See below § 8.01[4].*

[3] *See below § 8.07[2].*

Rule 801(a) defines the key word *statement*. The rule actually embraces two varieties of statement: an oral or written assertion and nonverbal conduct intended as an assertion. The key concept is *assertion*.

Intentional Communication. In general terms, a statement is an assertion, a term of art which means an intentional communication.[4] The heart of this concept is that the statement must have been made for the purpose of communicating information. It can be in one of three forms: oral, written, or nonverbal. An oral statement ordinarily occurs in a conversation or speech. A written statement could be made in a letter, report, book, newspaper article, diary, chart, map, or any other writing.[5] A nonverbal statement would occur if a person makes a gesture or sign, such as pointing a finger or shaking a head in response to a question.[6]

If the words used are so ambiguous that it cannot be ascertained whether they constitute an intentional communication, ambiguous cases are resolved against the party arguing that the words are an assertion.[7] This means that the words will not be considered to be a statement and therefore are not barred by the hearsay rule.

A good illustration is *State v. Flood*[8] where the defendant was charged with child rape. The minor victim had asked her father whether Flood (the defendant) would have to go to jail if someone else were caught. The Tennessee Supreme Court held that it was unclear whether this question was a statement that someone else committed the sexual abuse or was just an innocent question not intended to assert anything. The ambiguity was resolved against the defendant (who argued that the words constituted a statement barred by the hearsay rule) because he failed to meet his burden of establishing that the victim's words were intended as an assertion.

Another illustration of an ambiguous statement is *State v. Brown*[8.1] involving a conviction for multiple counts of child rape. While in jail before trial, the defendant asked a guard, "Do you honestly think there is anything wrong with raping a child?" Interpreting this question as if it really were a statement to the effect there is nothing wrong with raping a child, the trial court admitted the question as a party admission. The Court of Criminal Appeals agreed that it was a statement that was highly relevant on whether the defendant acted intentionally, knowingly, or recklessly with regard to his sexual activities with the child victim.

Silence. In certain situations silence may also constitute a statement. Sometimes silence is an intentional communication. For example, assume that the ringleader of a team of robbers has decided to rob either Bank *X* or Bank *Y*, depending on which bank has a lot of cash on hand. The ringleader scouts the banks

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[4] *See, e.g.*, State v. Land, 34 S.W.3d 516, 525 (Tenn. Crim. App. 2000) ("nothing is an assertion unless intended to be one"). *See also* State v. Webster, 2018 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App, 2018) (the Rules of Evidence do not define the term "assertion" but it has the connotation of a forceful or positive declaration, and nothing is an assertion unless intended to be one); State v. Osborne, 2015 Tenn. Crim. App. LEXIS 158 (Tenn. Crim. App. 2015) (in order to be an assertion, an utterance must "be offered with the intent to state that some factual proposition is true") (*quoting* State v. Land).

[5] *E.g.*, State v. Franklin, 308 S.W.3d 799 (Tenn. 2010) (bystander wrote down license tag of a van possibly involved in robbery; was a statement of the tag number). *See also*, State v. Cobb, 2018 Tenn. Crim. App. LEXIS 502 (Tenn. Crim. App. 2018) (trial court properly excluded doctor's resume because it was an out-of-court statement offered to prove the truth of the matter asserted—i.e., that the doctor had accomplished everything contained in the resume); State v. Hicks, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018) (temporary tag and bill of sale was introduced for the sole purpose of showing that defendant owned a vehicle and lived at a certain address, and thus, were hearsay; temporary tag also failed to meet the self-authentication requirements for admission under Tenn. R. Evid. 901).

[6] *See, e.g.*, United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) (video of physician demonstrating proper method of giving injections is a statement (by conduct) because it is an assertion; used to prove matter asserted: proper way to give injection).

[7] State v. Flood, 219 S.W.3d 307, 314 n.6 (Tenn. 2007) (*citing* United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1966)).

[8] State v. Flood, 219 S.W.3d 307, 314–315 (Tenn. 2007).

[8.1] State v. Brown, 373 S.W.3d 565 (Tenn. Crim. App. 2011).

and needs to inform the other robber of which bank was selected. The two robbers had agreed to pass one another on the street and use a code to communicate. If the ringleader does not speak to the other robber, they will rob the *X* bank, but if the ringleader says, "Good morning," they will rob the *Y* bank. The two robbers walk by one another and the ringleader does not speak. Clearly this silence is an intentional communication that satisfies the definition of "statement" and could constitute hearsay.

Unintentional Communication. If an utterance is not an intentional communication, it is not a "statement" and is therefore not hearsay. Sometimes it is difficult to tell whether an utterance qualifies as an intentional communication. In *State v. Burns*,[9] for example, the defendant was charged with aggravated child abuse for subjecting a child to scalding bath water. An investigator, who testified at trial, visited the child in the hospital and read a list of names to the child. The child was silent until the defendant's name was presented. At that moment the victim began screaming and crying. At trial, the defendant objected to the investigator's testimony as hearsay. The appellate court assessed whether a hearsay exception was present. Another approach was to ask whether the child's utterance was a "statement" at all. If it were an involuntary reflex rather than an intentional communication, then it was not hearsay and no exception was needed to satisfy the hearsay rule.

[c] Declarant

Rule 801(b) defines the word *declarant*, which is used in the definition of hearsay discussed in the next paragraph. A declarant is a "person who makes a statement." This includes a person who performs nonverbal conduct intended as an assertion, such as the robber discussed above. A declarant is not an animal[10] or machine.[11] If hearsay is present, the trier of fact will hear or otherwise learn about the declarant's statement. The trier of fact is asked to believe the truth of the declarant's statement.

[d] Witness

Although Rule 801 does not use or define the term *witness*, it will be helpful for future discussions to note that a witness is the person who is in court and relates the declarant's statement to the trier of fact. While often the witness and the declarant are different people, they do not have to be. If a person repeats his or her earlier statement, the person is both the declarant and the witness. In this case when the witness is also the declarant, the normal hearsay rules apply, contrary to some misconceptions to the contrary. The witness may repeat his or her earlier statement only if the previous statement is nonhearsay or, if it is hearsay, if some hearsay exception applies.[11.1]

Written and Recorded Statements. If the hearsay is written and the writing is introduced into evidence, the writing itself serves as the witness in the sense that it presents the hearsay statement to the trier of fact.[12]

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[9] *29 S.W.3d 40 (Tenn. Crim. App. 1999)*.

[10] The admissibility of animal behavior is based on reliability. *See above § 4.06[4]*.

[11] *See, e.g.*, *United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003)* (fax machine's date stamping and placing a header on a fax is not hearsay since a machine is not a declarant); *United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008)* (machine-generated data not hearsay).

[11.1] *See, e.g.*, *State v. Ward, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2019)* (witness's testimony about the contents of her recorded statement to a detective, as opposed to her recollection of prior events after having refreshed her recollection by reviewing the statement, was inadmissible hearsay, because it was evidence of the contents of her prior statement and was offered to prove the truth of the matter asserted).

[12] *See Wilder v. Tennessee Farmers Mut. Ins. Co., 912 S.W.2d 722 (Tenn. Ct. App. 1995)* (in arson case, trial court properly excluded plaintiff insured's pretrial sworn statement as hearsay; mere fact that it was a party's statement does not make it per se admissible; portion might have been admitted as an admission exception to the hearsay rule under Rule 803(1.2) or been used for impeachment under Rule 613).

Often some human being will testify in order to lay a foundation for the introduction of the written hearsay statement. A videotape or audiotape recording may effectively be a "witness," and is admissible if testimony of the conversation or event would be admissible[13] and the recording is properly authenticated.[14]

[e] Hearsay Elements

In general terms, hearsay under Rule 801(c) involves four elements:

1. A declarant's out-of-court

2. Statement

3. Used in court

4. To prove the truth of the matter asserted in the statement.

Ordinarily, hearsay occurs when a declarant makes an out-of-court statement to a witness who repeats it in court. Schematically, the relationship is as follows:

Declarant → Witness → Trier of Fact

[f] Out-of-Court

Rule 801(c) states that hearsay involves a declarant's *out-of-court* statement. This means that the declarant's statement must have been made at some other time than while the witness was testifying in this case. It may have been made while testifying in another case or in a deposition.[15] More likely, it will have been made in a non-legal context.

[g] Used in Court

Hearsay involves a statement *used in court*. For oral hearsay, ordinarily a person who heard the statement recounts what he or she heard. Oral statements may also be recorded on video and played for the trier of fact.[15.1] Proof of written statements may be made by producing and authenticating the actual writing.

[h] Prove Truth of Matter Asserted

Hearsay is present only if the statement is used *to prove the truth of the matter asserted in the statement*,[15.2] and only then is the declarant's credibility at issue. In order to determine whether this situation occurs, one must know two things:

1. What is the matter asserted?

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[13] *See* Mimms v. Mimms, 780 S.W.2d 739, 743 (Tenn. Ct. App. 1989) (admitting tape recording that husband made of wife's part of telephone conversation between wife and third party). *See also*, Bottorff v. Sears, ___ S.W.3d ___, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. 2018) (excluding videos where no hearsay exception applied); State v. Henry, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 790 (Tenn. Crim. App. 2018) (admitting recorded 911 call). A statute may also admit video evidence. *See, e.g.*, Tenn. Code Ann. § 24-7-123 (video of forensic interview of child sex abuse victim).

[14] *See below* §§ 9.01[3], 9.01[6]–9.01[8].

[15] In such case, it may qualify for admission under the former testimony hearsay exception. Tenn. R. Evid. 804(b)(1).

[15.1] *See, e.g.*, State v. McCoy, 459 S.W.3d 1 (Tenn. 2014).

[15.2] *See, e.g.*, State v. Henry, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 790 (Tenn. Crim. App. 2018) (recorded 911 call was not inadmissible hearsay, since it was offered to show why police officers went to a liquor store in response to the call, not for the recording's truth, ie., that defendant was passed out in a car behind the liquor store as a liquor store employee stated in the 911 telephone call).

2. What is the evidence used to prove?

The matter asserted in a statement is the message the declarant intended to communicate. In the statement, "The black van ran the red light," the assertion is that a particular vehicle ran a red light.

In this example, the matter asserted is clear, but sometimes the matter asserted may also include more than what was directly asserted. It also includes what was implicitly asserted. According to Professor Graham:

> The term "matter asserted" as employed in [Federal] Rule 801(c) and at common law includes both matters directly expressed and matters the declarant necessarily implicitly intended to assert. When the declarant necessarily intended to assert the inference for which the statement is offered, the statement is tantamount to a direct assertion and therefore is hearsay … . To illustrate, the question "Do you think it will stop raining in one hour?" contains the implicit assertion that it is currently raining. The fact that it is currently raining is a necessary foundation fact which must be assumed true for the question asked to make sense.[16]

The legislative history of the identical federal rule indicates that the burden is on the party who contends that the assertion is intended.[17] Therefore the party who claims that evidence is hearsay will have the burden of establishing that it involves an intentional communication. The determination of whether a statement is hearsay and whether it is admissible through a hearsay exception is left to the trial court's sound discretion.[18]

Since hearsay involves proof of the truth of the statement, a statement offered to prove its falsity is not hearsay. For example, in a mail fraud case a letter introduced to prove its falsity is not hearsay.[19] Similarly, testimony that nothing was found after a diligent search is not hearsay since the lack of information is not a statement.[20]

Where a party offers evidence that contains multiple hearsay statements (such as an affidavit with attached supporting documents), the court will assess each statement independently to determine its admissibility.[20.1]

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[16] MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE 546–47 (6th ed. 2006). *See also* State v. Land, 34 S.W.3d 516 (Tenn. Crim. App. 2000) (adopting view that indirect assertions are "statements" for purposes of hearsay rule; examples of indirect hearsay are "Why did you stab me, Brutus?" as impliedly asserting that Brutus stabbed the declarant, and "Do you need change?" as impliedly asserting that the declarant has change).

[17] FED. R. EVID. 801(A) Advisory Commission Note.

[18] State v. Stout, 46 S.W.3d 689 (Tenn. 2001); State v. Long, 2017 Tenn. Crim. App. LEXIS 609 (Tenn. Crim. App. 2017); Logan v. Estate of Cannon, 2016 Tenn. App. LEXIS 708 (Tenn. Ct. App. 2016).

[19] *See*, *e.g.*, United States v. Barraza, 576 F.3d 798 (8th Cir. 2009); State v. Jones, 598 S.W.2d 209 (Tenn. 1980) (pre-rules decision; many of the statements were admittedly false and the state did not want or ask the jury to believe them as true; not hearsay).

[20] *See, e.g.*, ***Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. 2009)*** (testimony that witness had reviewed documents and did not find certain notices was not hearsay).

[20.1] *See* Lawrence v. Broadnax, 2015 Tenn. App. LEXIS 623 (Tenn. Ct. App. 2015) (in parental relocation determining custody and visitation rights, the mother attempted to admit supporting documents to establish that she had been offered a job in another state, for a certain salary, as evidence supporting her decision to move; these documents were ruled inadmissible under Rule 803© since they constituted a statement made out of court, by one other than the declarant, to prove the matter asserted (that she had been offered a job); in contrast, her attached affidavit in which she explained her reason for relocating, and attested that she had accepted a job offer in another state, was ruled admissible; it was offered to explain her decision to relocate, which was relevant under the relocation statute, which required the court to determine if the relocating parent's decision was "reasonable"); Monypeny v. Kheiv, 2015 Tenn. App. LEXIS 187 (Tenn. Ct. App. 2015) (simply because certain portions of a hearsay document are allowed into evidence does not, ipso facto, mean that the entire document will qualify for admission under the Tennessee Rules of Evidence).

[i] Examples

Some examples will serve to illustrate the hearsay concept. To prove the declarant was driving a car too fast when it was involved in a wreck, a witness testifies in court, “Right after the accident I heard the declarant say, ‘My car was exceeding the speed limit when the accident happened.’ ” For this purpose, the declarant’s words are hearsay. All four elements of hearsay are satisfied: (1) Clearly the declarant made an out-of-court utterance; (2) The utterance was a statement because it was an intentional communication; (3) The statement was used in court; and (4) Because the purpose of the offer was to “prove the truth of the matter asserted” in the statement, the statement is hearsay. Here the matter asserted was that the car exceeded the speed limit, and the matter proven is that the car was driving too fast.

This example illustrates one of the features of hearsay: hearsay is present if the out-of-court statement must be true to be relevant. Thus, for hearsay it is important whether the declarant is telling the truth. Returning to the above example, unless the statement is true, it is not relevant to the material issue for which it is offered—speed. The reason for this principle is that hearsay evidence is excluded because of concerns that the declarant’s credibility cannot be adequately tested. If the declarant’s credibility is irrelevant because it does not matter whether the declarant is telling the truth, the dangers of hearsay are not present and the statement is not viewed as hearsay.

Another example involves written hearsay. Assume that at issue in a construction lawsuit is whether the concrete called for by plans and specifications actually was poured. The proponent offers a work record stating a particular type and amount of concrete was poured on a given day. That record is hearsay to prove the concrete was poured. The declarant who wrote the asserted fact must have been telling the truth or else the paper is not relevant. The declarant’s credibility is on the line. The record was made out-of-court, was a statement (an intentional communication), was used in court, and was used to prove the truth of the matter asserted in the statement (how much concrete was poured).[21]

A frequently encountered example of hearsay is the guardian ad litem’s report. In many cases involving the rights of children or incompetent individuals, such as those dealing with custody, termination of parental rights, and conservatorship, a court will appoint a guardian ad litem to investigate and protect the rights of the child or incompetent person. Frequently, the guardian ad litem is an attorney. For many years, some courts have allowed the guardian to enter into evidence a report setting forth the steps involved in his or her investigation, describing the information obtained, including numerous hearsay statements and documents, and making a recommendation regarding what resolution is appropriate.

In the case of *Toms v. Toms,*[22] the Tennessee Supreme Court properly held that the guardian ad litem’s report is hearsay, and an objection to its entry should be sustained.[23] The court held in that case that the guardian ad litem may testify regarding his or her observations, but there must be a hearsay exception applicable to any hearsay sought to be admitted.[24] Thus, testimony of a party’s admission would be admissible, while simply repeating what a neighbor told the guardian would not.

Another illustration involves an extortion case where the court held that instructions to falsify information and not report money recovered in raids were not hearsay.[25] The instructions were important in the case

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[21] *See, e.g.*, State v. Franklin, 308 S.W.3d 799, 811 (Tenn. 2010) (bystander wrote down license tag number of van possibly involved in robbery; this written document was hearsay when offered at trial to prove the tag number of that particular van; was used to prove truth of matter asserted); Lawrence v. Broadnax, 2015 Tenn. App. LEXIS 623 (Tenn. Ct. App. 2015) (written documents supporting mother’s affidavit in parental relocation case, which were offered to show mother had been offered a job in another state, were held inadmissible hearsay).

[22] 98 S.W.3d 140 (Tenn. 2003).

[23] Id. at 144. Despite the fact that the report is not admissible into evidence, the court held that the report may be reviewed by the trial court. *Id.* The court did not elaborate on the legal basis for the review of inadmissible evidence by the court.

[24] Id. at 144.

because they were given, irrespective of their truth. Thus, the instructions, though clearly "statements," were not hearsay because they were not offered to prove their truth.

An excellent example was a case where a girl alleged that her gymnastic instructor sexually assaulted her.[26] The defendant offered testimony that he had told the victim that she could not move to the next gymnastic level unless she could perform a specific movement. The state objected that the prior statement was hearsay, but the Tennessee Court of Criminal Appeals correctly held that it was not hearsay because it was not offered for its truth (that the victim could not advance without additional skills). Rather, the testimony was presented for the nonhearsay use of showing circumstantially that the relationship between the defendant and the victim was strained for reasons other than the alleged sexual abuse. In other words, the relevance of the testimony was that the prior statement was said, not its truth.

Another illustration is a case where an insurance company denied a claim for damages to property.[26.1] The claimant sought to introduce letters to the insurance company to prove the damages. The trial court excluded the letters as hearsay, but the appellate court held the letters were not hearsay. They were admitted to prove why the insurance company denied the claim (because it could not tell when the damages occurred), not to prove the truth of the facts asserted in the letters.

[j] Helpful Tests

The foregoing examples suggest several simple tests helpful to the lawyer or judge faced with distinguishing hearsay from nonhearsay. First, must the statement be true to be relevant? If so, the extrajudicial declaration may be hearsay; if not, it is nonhearsay. For this initial test, simply match the assertion with the stated or obvious purpose of the offer. In other words, determine what the declarant intended to communicate and ascertain whether it is being used to prove that communication.[27]

A good illustration is *State v. Gibson*,[28] where the prosecution was permitted to introduce two secretly-recorded audio tapes of the defendant talking with his wife. During the recorded conversation, the defendant admitted to several sex offenses with the wife's child. The Tennessee Court of Criminal Appeals upheld the admission of the tapes despite the defendant's argument that the wife's statements on the tapes were hearsay. The appellate court held that the wife's recorded statements were not hearsay because they were not offered for their truth. They were offered only because they elicited statements from the defendant. The jury was not asked to believe the truth of the wife's statements. The jury heard the wife's statements only because they were necessary to present the defendant's recorded admissions.

Second, must the declarant have been telling the truth for the statement to be relevant? Or, stated more starkly, is the statement relevant even if the declarant lied? If the declaration is relevant to a material issue regardless of the declarant's truthfulness, it is not hearsay. The evils of hearsay are not present since the declarant's veracity is of no consequence.

As discussed above,[29] the lack of effective cross-examination is an important reason behind the hearsay exclusionary rule. We prefer that the trier of fact be presented with evidence that is both cross-examined

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[25] *United States v. Murphy, 193 F.3d 1 (1st Cir. 1999)*. *See also Harvey v. Farmers Ins. Exch., 286 S.W.3d 298, 303–04 (Tenn. Ct. App. 2008)* (insurance agent's statement that van would be covered by insurance policy was not hearsay in estoppel case because admissible to prove statement was said, not that it was true).

[26] ***State v. Schiefelbein, 230 S.W.3d 88, 131 (Tenn. Crim. App. 2007)***.

[26.1] *Riad v. Erie Ins. Exch., 436 S.W.3d 256 (Tenn. Ct. App. 2013)* (*superseded by statute, as stated in, Lindenberg v. Jackson Nat'l Life Ins. Co., 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. 2014))*. At the time *Riad* was decided, punitive damages were available in breach of insurance claim cases. *Tenn. Code Ann. § 56-8-113* now governs damages in such claims.

[27] These two factors were applied in *Cary v. Arrowsmith, 777 S.W.2d 8, 19 (Tenn. Ct. App. 1989)* (results of mail survey inadmissible hearsay).

[28] *973 S.W.2d 231, 243 (Tenn. Crim. App. 1997)*.

and under oath. But it is a mistake to believe cross-examination is always helpful to the trier of fact. If we do not care whether the evidence is true or false, extensive cross-examination will not improve the relevancy of evidence. Accordingly, it is often useful in analyzing whether a particular statement is hearsay to ask what questions one would pose on cross-examination if the declarant were in court. If the only inquiry would be to ask the witness what words the declarant spoke out-of-court, the cross-examination is useless. A witness who repeats the declarant's statement can tell us just as well as the declarant precisely what words were spoken by the declarant. In fact, a hearer may be more likely to remember accurately than a speaker.

[5] Conduct as Hearsay

Conduct deserves separate treatment. At common law, conduct could be hearsay regardless of whether the declarant actor intended to assert the precise message which the statement was used to prove. The classic British precedent[30] excluded business letters written to a deceased that impliedly suggested the deceased was mentally competent. The declarant authors intended no such assertion, but their collective conduct of writing letters on weighty matters was classified as hearsay and the letters were excluded on the issue of the deceased's mental status.

Rule 801(a)(2) changes the common law. Recall that under Rule 801(c), hearsay is defined as a "statement" that is "offered in evidence to prove the truth of the matter asserted." Moreover, Rule 801(a)(2) makes "nonverbal conduct" a "statement" only if the nonverbal conduct "is intended by the person as an assertion." The letter writing conduct in the English case above would be admissible nonhearsay today because it was being used to prove an issue (whether the deceased was mentally capable of executing a will) that was not asserted by the declarants who wrote the letters. In other words, the matter asserted in the letter was not the matter which the letters were used to prove.

Sometimes conduct is not hearsay because it is not an intentional communication, as defined in Rule 801(a)(2), and is therefore not a "statement."[30.1] For example, a person's flight from a crime scene is probably not hearsay, as noted in the Tennessee Advisory Commission Comment to Rule 801, because the criminal did not intend to communicate anything by fleeing.[31] Similarly, a child's non-verbal reactions to a telephone call were not statements and not hearsay.[31.1]

When conduct is evidence, occasionally its relevance hinges on whether it is an intentional communication. For example, in *Hulsey v. Bush*,[32] one party, Mr. Bush, sought to present testimony that when Bush told Parker he planned to build a garage on Parker's property, Parker simply walked away. Bush claimed the walking away showed Parker's agreement to the construction of the garage. The trial court properly precluded the introduction of this nonverbal conduct because, if assertive as alleged, it was hearsay. If it was not assertive

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[29] *See above* *§ 8.01[3]*.

[30] Wright v. Tatham, 112 Eng. Rep. 488 (Exch. Ch. 1837).

[30.1] *See, e.g.*, *State v. Amail John Land, 2018 Tenn. Crim. App. LEXIS 665 (Tenn. Crim. App. 2018)* (video surveillance recording showing the defendant committing theft at a store did not qualify as a "statement" under *Tenn. R. Evid. 801*, because the video was not an oral or written assertion and there was no evidence suggesting that the defendant's conduct on the video was intended as an assertion; accordingly, trial court did not err by permitting the store's owner and a detective to testify as to what they observed when they watched the video).

[31] *See above* *§ 4.01[10]*.

[31.1] *H.A.S. v. H.D.S., 414 S.W.3d 115, 125 (Tenn. Ct. App. 2013)* (witness testified about child's reactions, such as not coming to the phone or not wanting to talk, when father called to speak with child; not hearsay because child did not make a statement).

[32] *839 S.W.2d 411 (Tenn. Ct. App. 1992)*.

conduct, as here, where the court found no evidence of an assertion, it was not hearsay, but it was also not probative on the issue of whether Parker agreed to the construction.[33]

In *State v. Sexton*,[33.1] a detective testified that, three days after the victims' bodies were found, the wife of the defendant (charged with two homicides) called the detective handling the case to arrange an interview and "sounded desperate." Though the wife did not testify, the detective testified that he met with the wife for 30 minutes, then the defendant arrived and talked with his wife. Police took her to a safe house shortly thereafter. The Tennessee Supreme Court held that the detective's testimony about the wife's call to arrange an interview did not involve hearsay because the call was nonverbal conduct not intended as a communication (hence, not a "statement") and therefore not hearsay. It is submitted that a better approach may have been to find the call was a verbal statement to the effect that the wife wanted to meet with the detective, but was not used to prove her desire to meet with the detective and therefore was not hearsay. Another possible interpretation of the facts is that the conduct analyzed under the hearsay rule was the fact that the wife met with the detectives then was taken to a safe house. This testimony is not hearsay since neither the fact that the meeting occurred nor that the wife was taken to a safe house was a statement (an intentional communication) by the wife and was therefore not hearsay.[33.2]

Evidence of a person's willingness or unwillingness to take a polygraph has been held inadmissible in Tennessee.[33.3] Thus, where the state offers such evidence, even for a reason "other than the truth of the matter", a trial court commits plain error by admitting the evidence.[33.4]

[6] Nonhearsay Operative Facts

[a] In General

One of the more difficult, though infrequently encountered, categories of nonhearsay evidence encompasses *operative facts*, sometimes referred to as *verbal acts*.[34] Operative facts are words that operate, by force of law, to cause legal consequences wholly apart from the truth or falsity of the words.[34.1] Substantive law may make the utterance of words an event that causes a change in legal relationships, irrespective of the truth or falsity of the words or the credibility of the speaker. Such words are not hearsay

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[33] The *Hulsey* court excluded the evidence under Rule 403 because of its minimal or nonexistent probative value.

[33.1] *State v. Sexton, 368 S.W.3d 371, 412 (Tenn. 2012)*.

[33.2] A similar result occurred in *State v. Webster, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. 2018)*, where an officer and confidential informant testified that the informant's wife was searched before she and the informant met with defendant to attempt to purchase drugs, to confirm that she was not in possession of drugs at that time. Defense counsel objected, claiming that their testimony included an "assertion" by the wife that she was "not in possession of drugs" when she met with defendant. The appellate court disagreed, holding that the officer and informant merely testified as to the circumstances and outcome of the search, which they were both present for, and there was nothing in the record showing a "non-verbal assertion" by the wife.

[33.3] *State v. Sexton, 368 S.W.3d 371 (Tenn. 2012)*.

[33.4] *State v. Reed, 2017 Tenn. Crim. App. LEXIS 367 (Tenn. Crim. App. 2017)* (where trial court allowed witness to state that he had offered to take a polygraph exam, and that the interviewing officer had told him that "the other guy [defendant] didn't want to take one," defense counsel's hearsay objection should have been sustained; even though it might be arguable as to whether such testimony was being offered for the truth of the matter—an argument the appellate court rejected—testimony about a polygraph exam is inadmissible for any purpose in Tennessee, and the admission constituted plain error requiring reversal).

[34] McCormick On Evidence 425 (6th ed. 2006).

[34.1] *Logan v. Estate of Cannon, 2016 Tenn. App. LEXIS 708 (Tenn. Ct. App. 2016)*.

by definition since they are not being used to prove their truth. Indeed, the truth or falsity of the words is irrelevant; what matters is that the words were uttered.

[b] Contracts

The most common example involves contract law. If the issue is whether a contract was formed, it is not hearsay for a witness to testify that the declarant offeree was heard to say, "I accept." Under contract law, an acceptance of an offer (as well as the offer itself) is viewed as having legal significance irrespective of the truthfulness of the declarant.[35] The details of the conversation are important in determining whether the particular words used constitute the formation of a contract, however. Thus, where an affidavit was offered as evidence to support the formation of a contract between the parties, but failed to describe in detail the conversation that allegedly occurred, and instead included just the witness' conclusory statement that the parties had entered into a contract, the statement was insufficient evidence of an operative fact and, therefore, constituted inadmissible hearsay.[35.1]

[c] Gifts

Similarly, if a declarant hands over a chattel and says, "I give you this," the declaration is not hearsay. Under the law of gifts, a gift is made only when the object is delivered with the requisite intent, an event which occurs when the item is transferred and the words "I give you this" are spoken. This manifestation is a verbal act. In both instances the mere uttering of the words has legal significance, and the declarant's credibility is entirely immaterial.

[d] Defamation

Likewise, in a defamation action, the plaintiff must prove that the defendant spoke or wrote the defamatory words. There is no hearsay problem if the plaintiff offers a libelous newspaper article. Even though the article is an unsworn, uncross-examined, out-of-court statement, the plaintiff is not offering it to prove the truth of the matter asserted in the statement. The plaintiff's purpose is to establish that the statement was made, not that it was true. To the contrary, the plaintiff maintains the statement is false.

[e] Tortious Interference

A related illustration was suggested in *Collins v. Greene County Bank*[36] involving a suit between a plaintiff businessman-borrower and a defendant bank-lender. One ground for the suit was the tortious interference with a business relationship. An officer of the defendant bank told the plaintiff's business associate that the plaintiff was stealing the associate blind. The associate then withdrew financial and other support from the plaintiff, whose business ultimately folded. Defendant bank argued that its officer's statement to plaintiff's business associate was justified and even required under a duty to protect the welfare of the business associate, who was also a customer and stockholder of the bank. Defendant argued that the bank officer's statements about "stealing the business associate blind" were inadmissible hearsay. The Tennessee Court of Appeals disagreed, suggesting as an alternative ground that the statement "could be nonhearsay operative facts" in a suit for tortious interference with a business relationship.[37] The Court of Appeals drew an analogy from defamation cases where the plaintiff must only prove that the words were spoken, not that they were accurate.

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[35] *See, e.g.*, *Cloverland-Green Spring Dairies v. Pennsylvania Milk Marketing Board, 298 F.3d 201, 218 (3d. Cir. 2002)* (offer to sell a product at a specific price is a verbal act that has legal effect and is not hearsay).

[35.1] *Logan v. Estate of Cannon, 2016 Tenn. App. LEXIS 708 (Tenn. Ct. App. 2016)*.

[36] *916 S.W.2d 941 (Tenn. Ct. App. 1995)*.

[37] *Id. at 947*.

[f] Title by Prescription

Another illustration is provided by *Brown v. Daly*,[38] involving a claim of title by prescription. The claim of title by prescription would be defeated under Tennessee law by proof that the co-tenant claimant lived on the property in question for twenty-two years with the permission of the other co-tenant. The Tennessee Court of Appeals correctly permitted the other co-tenant to testify that the claimant was given specific permission to live on the property. This testimony was characterized as non-hearsay, having legal significance and effectuating legal consequences, irrespective of its truth or falsity.

[g] Designations

A related category of nonhearsay involves statements that accompany and give meaning to physical acts. For example, if *A* hands over money to *B* and states, "I'm repaying the money you loaned me," traditional lore characterizes the statement as nonhearsay, although an argument can be made that it satisfies the definition of hearsay.

[h] Consent

Another category of a nonhearsay verbal act is consent, which by its very utterance authorizes conduct.[39]

[7] Nonhearsay Declarations to Prove the Hearer's or Reader's Mental State; Effect on Listener

A lawyer may offer extrajudicial declarations to prove the effect on the hearer or reader. Since relevance does not depend on truth or falsity, such statements are nonhearsay and admissible. Assume, for example, that the government charges the accused with murder; her position is that she killed in self-defense. A defense witness ascends the stand and testifies: "I heard the deceased say to Ms. Defendant, 'I intend to kill you.' " If the issue is whether the deceased intended to kill Ms. Defendant, the statement is hearsay. If the issue is whether Ms. Defendant was in fear of the deceased at the time of the homicide, however, the statement is not hearsay. Obviously the accused's mental state is at issue. Even if the threat were untrue, it may well have placed the listener, Ms. Defendant, in mortal fear. Thus, the victim's statement is used to prove the effect on the listener rather than the truth of its contents.

The declaration to prove notice[40] or knowledge[41] provides another example. The plaintiff falls to the floor at the grocery. He alleges spilled olive oil caused him to slip. If the store management knew about the hazard, the plaintiff's negligence claim may be proven because of the failure to clean up the known spill. The plaintiff's witness is prepared to testify that, hours earlier, the witness heard the declarant (another customer in the store) tell the store manager, "A bottle of olive oil broke over by the spaghetti." If the declarant's statement is used to prove that a broken bottle of olive oil was on the floor near the spaghetti, the statement is hearsay since it is

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[38] *968 S.W.2d 814 (Tenn. Ct. App. 1997)*.

[39] *See e.g.*, *United States v. Moreno, 233 F.3d 937, 939 (7th Cir. 2000)* (consent to search is a nonhearsay verbal act).

[40] *See*, *e.g.*, *Rogers v. Ingersoll-Rand Co., 144 F.3d 841 (D.C. Cir. 1998)* (in product liability action, was not hearsay to introduce coroner's inquest of another incident involving same machine in order to establish manufacturer of machine had no notice of design defect).

[41] *See, e.g.*, *Bush v. Dictaphone Corp., 161 F.3d 363, 367 (6th Cir. 1998)* (wrongful termination case; not hearsay to admit statements by unidentified workers that plaintiff was abusive or unstable; statements were made to defendant's personnel who made decisions to demote, then fire, the plaintiff; statements showed knowledge of plaintiff's job performance); *Pylant v. State, 263 S.W.3d 854, 870 (Tenn. 2008)* (in post-conviction relief case involving allegation of ineffective assistance of counsel for failure to call a key witness, trial court erroneously held that a number of statements that a third party confessed to committing the homicide were hearsay; however, the statements were not hearsay on the issue of whether trial counsel should have called as a witness the person who allegedly confessed to the homicide; statements were not admitted for their truth but to prove trial counsel had knowledge that a potential witness had confessed to the homicide and should have called that person as a witness).

being used to prove its truth. But the statement is not hearsay if offered to prove that the store manager had received notice of the spill. The statement does not depend on the truthfulness of the declarant; the store manager was put on notice of the dangerous condition irrespective of the veracity of the declarant.

Another explanation is that the statement was not used to prove the truth of the matter asserted in the statement. This is illustrated by a series of older cases that permit a police officer to testify that he or she did a certain act (such as drove to a specific apartment) because an undercover agent told the officer that something (such as a drug sale) occurred at that location. The testimony about the undercover agent's statement is considered to be nonhearsay because it is used only to prove why the officer went to the location, not that what the undercover agent said was true.[42] However, the testimony about why the officer did a certain act may be irrelevant or barely relevant in the case, and the more recent trend is to rule such testimony inadmissible under Rule 403.[43]

A related illustration involves the simple question whether a plaintiff-patient in a medical malpractice case may introduce medical bills to establish damages. Resisting the obvious temptation to classify the bills as hearsay, the Tennessee Court of Appeals held that the bills were not hearsay since they were used to prove the "charges incurred," *i.e.*, how much the patient was billed, not the truth of the bills themselves.[44]

There are many other cases where hearsay has been admitted to prove the effect on the person hearing or reading the statement.[44.1]

In short, any time the statement is used to prove the hearer or reader's mental state upon hearing the declaration, words repeated from the witness chair do not fall within the hearsay exclusion. The statement fails the test of hearsay because it is not used to prove the truth of the matter asserted in the statement.[44.2]

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[42] *See*, *e.g.*, State v. Miller, 737 S.W.2d 556, 559 (Tenn. Crim. App. 1987). *See also* State v. Bowen, 2016 Tenn. Crim. App. LEXIS 859 (Tenn. Crim. App. 2016) (trial court did not err by admitting testimony concerning the anonymous tip, because the statement was not offered for the truth of the matter asserted, but rather, to show why investigators focused their attention on defendant); State v. Jones, 2016 Tenn. Crim. App. LEXIS 25 (Tenn. Crim. App. 2016) (officer's testimony about the victim's mother's statements to him explaining why she called 911 was not inadmissible hearsay, because it was not offered for the truth of the matter asserted but to explain the officer's actions in assessing the domestic disturbance call that precipitated his arrival at the residence).

[43] *See*, *e.g.*, State v. Brown, 915 S.W.2d 3, 6 (Tenn. Crim. App. 1995) (under Rule 403, officer should not have been permitted to testify that he stopped the defendant's car because an undercover agent had told the officer that the defendant had cocaine in it; probative value was substantially outweighed by the danger of unfair prejudice). *See above* § 4.03[2].

[44] Russell v. Crutchfield, 988 S.W.2d 168 (Tenn. Ct. App. 1998). Of course the same bills could have been introduced by the doctors or hospitals as business records under Rule 803(6). Another possible approach would have been to categorize the bills as part of the patient's personal business records, if the household records could so qualify.

[44.1] *See, e.g.,* State v. Hill-Williams, 2017 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 2017) (no error where trial court held that text messages received by defendant were not hearsay, because the state introduced them not for their truth, but to put the defendant's responding texts in context and show his state of mind); In re Envy J., 2016 Tenn. App. LEXIS 705 (Tenn. Ct. App. 2016) (documents from a prior juvenile court proceeding were relevant in the mother's termination case in explaining how and why the investigator took the steps she did when contacting the mother, and were not offered for the truth of the matter; thus, the documents were not hearsay); State v. Tate, 2016 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. 2016) (statements were offered to prove that both victims were attempting to de-escalate the confrontation and to get defendant to leave them alone, and to show defendant's conduct or lack thereof after he heard those statements, which was probative as to his mental state at the time, and was the primary point of contention during the trial; the statements were not hearsay since they were not offered for the truth of the matter asserted); Davis v. State, 2016 Tenn. Crim. App. LEXIS 864 (Tenn. Crim. App. 2016) (testimony admitted was to explain why the witness took the victim to the hospital, not to prove petitioner's conduct toward the victim, and thus, petitioner failed to show that his trial attorneys provided deficient performance when they did not make a hearsay objection); State v. Hawkins, 2015 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. 2015) (statements admitted through children's testimonies were properly admitted as non-hearsay and were probative of the effect they had on defendant as the listener).

[8] Nonhearsay Declarations to Prove Circumstantially the Declarant's Mental State

Another category of nonhearsay is a declaration to prove the speaker or writer's mental state, as opposed to the mental states of those who heard or read the statements. A word of caution and cross-reference may be in order. If the declaration expressly states the declarant's mental state, the statement may well be hearsay if offered to prove the content. For example, the declarant may say, "I love Karen." If used to prove that the declarant loved Karen at the time of the statement, it is hearsay, but admissible under the mental state hearsay exception.[45] This section, on the other hand, considers only those utterances offered for the underlying implied assertion that is circumstantially implicit in the literal spoken or written words. This use is often viewed as nonhearsay.[46]

The classic hypothetical illustrating this nonhearsay category features Childe Harold who is involved in a will contest. Assume that shortly before signing his will the testator said, "Harold is the finest of my children." If the issue is whether Harold was the finest of his children, the statement is hearsay. However, what if the issue is whether the testator had affection for Harold at the time the will was executed and the above statement was made? For purposes of determining whether the testator had affection for Harold, the truth of the statement is irrelevant in the sense that it is not what the statement is introduced to prove. The point is that the statement circumstantially proves the declarant's love for Harold—and consequently the testamentary inclusion of Harold and exclusion of siblings—even though Harold is, upon objective analysis, a jerk.[47]

[9] Impeachment and Rehabilitation

Sometimes a witness's prior inconsistent statement is introduced to impeach the witness,[48] or a prior consistent statement is admitted to rehabilitate the witness.[49] Statements used solely for these purposes are not hearsay, for they are not used to prove the truth of the matter asserted in the statement.[50] Thus, a prior inconsistent

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[44.2] *State v. Tate, 2016 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. 2016)*; *State v. Jones, 2010 Tenn. Crim. App. LEXIS 826 (Tenn. Crim. 2010)*.

[45] *See below § 8.08[2]*.

[46] *See, e.g.*, *State v. Caughron, 855 S.W.2d 526 (Tenn. 1993)* (accomplice testified that homicide victim said several things that angered the accomplice; the victim's statement was not hearsay because it was used to show the accomplice's state of mind—why accomplice killed victim—and not for the truth of the statements the victim uttered); *State v. Cravens, 764 S.W.2d 754 (Tenn. 1989)* (deceased declarant's statement admissible to show declarant's state of mind shortly before declarant's death; statement showed declarant's fear; admissible on issue of self-defense).

[47] Not everyone agrees with this analysis. For example, Professor Graham believes the statement should not be taken literally, but rather for its obvious and implied assertion. MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE 632–33 (6th ed. 2006). *But see* MCCORMICK ON EVIDENCE 591 (2d ed. 1972) (this example was omitted in later editions of MCCORMICK ON EVIDENCE) suggesting the Childe Harold example, and 6 WIGMORE ON EVIDENCE 320 (Chadbourn rev. 1976).

[48] *See above § 6.13[2]*.

[49] *See*, *e.g.*, *Davidson v. Holtzman, 47 S.W.3d 445, 455 (Tenn. Ct. App. 2000)* (prior consistent statement is admissible to corroborate witness's testimony after witness's credibility is attacked by suggestion the testimony is fabricated or is a deliberate falsehood); *State v. Sherrod, 2017 Tenn. Crim. App. LEXIS 361 (Tenn. Crim. App. 2017)*; *State v. Pompa, 2017 Tenn. Crim. App. LEXIS 196 (Tenn. Crim. App. 2017)*; *State v. Rogers, 2016 Tenn. Crim. App. LEXIS 98 (Tenn. Crim. App. 2016)*; *State v. Pilate, 2016 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. 2016)*; *State v. Heng Lac Liu, 2015 Tenn. Crim. App. LEXIS 378 (Tenn. Crim. App. 2015)*.

[50] *See*, *e.g.*, *State v. Price, 46 S.W.3d 785, 807 (Tenn. Crim. App. 2000)* (out-of-court statement offered not for its truth but for impeachment purposes is not hearsay). Federal evidence law differs from Tennessee and admits a prior consistent statement to rehabilitate. FED. *R. Evid 801(d)(1)(B)*. It is substantive evidence rather than only nonhearsay rehabilitative proof as it is in Tennessee.

statement used to impeach is admitted to prove that the witness's credibility is suspect because the witness has made conflicting statements, irrespective of the truth of either statement. The prior statement is not admissible to prove its truth, absent some hearsay exception.[51]

A prior consistent statement may be used to rehabilitate a witness only after his or her credibility has been attacked.[51.1] In the absence of an impeaching attack on the witness' testimony, however, a prior consistent statement may not be used to bolster a witness' credibility.[51.2]

Impeachment for bias is another area where Tennessee courts have found a nonhearsay use of evidence, where the proper evidentiary foundation is laid.[51.3] In *State v. Belser*[52] the criminal defendant sought to cross-

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[51] *See*, *e.g.*, State v. Howell, 868 S.W.2d 238 (Tenn. 1993) (prior inconsistent statements used for impeachment purposes are not hearsay because not admitted for their truth; they are admissible to show that the credibility of the witness is suspect).

Federal hearsay law, like Tennessee, recognizes a hearsay exception for some prior inconsistent statements. *See* FED. R. EVID. 801(D)(1)(A); *above* § 6.13[2].

Tennessee evidence law provides a hearsay exception for some prior inconsistent statements, allowing them to be used as substantive evidence. Rule 803(26) admits as substantive evidence prior inconsistent statements contained in certain recordings, signed documents, or made under oath when the declarant testifies at trial and is subject to cross examination. *See below* § 8.31.

[51.1] *See*, *e.g.,* State v. Sherrod, 2017 Tenn. Crim. App. LEXIS 361 (Tenn. Crim. App. 2017) (prior consistent statement was not hearsay, because it was being offered to show the credibility of the witness and not for the truth of the matter asserted; the witness had also identified both of the defendants, which put his credibility at issue and allowed the state to introduce prior consistent statements by him); State v. Pompa, 2017 Tenn. Crim. App. LEXIS 196 (Tenn. Crim. App. 2017) (trial court did not abuse its discretion by admitting a school guidance counselor's testimony, because the statements were consistent with the victim's testimony on direct examination; on cross-examination, the defense implied that the victim made up the allegations of rape against defendant, and as a result, the state was permitted to ask the school counselor about the victim's prior statements); State v. Heng Lac Liu, 2015 Tenn. Crim. App. LEXIS 378 (Tenn. Crim. App. 2015) (where defendant attacked the victim's credibility by insinuating that she was fabricating her allegation of sexual assault in order for her and her husband to obtain a U-Visa and establish permanent residency in the United States, the trial court did not err when it determined that the victim could be rehabilitated by using testimony of a witness to recount the victim's statements to her about being sexually assaulting by defendant). *See also*, State v. Love, 2020 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. May 8, 2020) (where defense repeatedly attacked robbery victim's credibility at trial by impeaching his testimony with his statement given to police; since the defense insinuated that the victim's entire testimony was not trustworthy, the trial court did not abuse its discretion in allowing the State to ask an officer about the victim's prior consistent statement given to the officer).

State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. 2019) (a defendant may not introduce his own statement preemptively during the cross-examination of the interviewing police officer; rather, defendant must first testify and have his credibility sufficiently attacked in order to introduce the statement as a prior consistent statement); State v. Sharp, 2019 Tenn. Crim. App. LEXIS 130 (Tenn. Crim. App. 2019) (where, during cross-examination of witnesses in child abuse prosecution, defense counsel repeatedly insinuated that the children had been coached by to fabricate abuse allegations, trial court did not err in admitting children's forensic interviews as prior consistent statements).

[51.2] State v. Herron, 461 S.W.3d 890 (Tenn. 2015); State v. Orr, 2016 Tenn. Crim. App. LEXIS 271 (Tenn. Crim. App. 2016) (trial court erred by admitting witness' prior consistent statement at the conclusion of his direct examination, before he had been cross-examined, as his credibility had not been attacked or questioned).

[51.3] *See* State v. Beaty, 2015 Tenn. Crim. App. LEXIS 931 (Tenn. Crim. App. 2015), substituted opinion, 2016 Tenn. Crim. App. LEXIS 491 (Tenn. Crim. App. 2016), modified, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. 2016) (trial court properly excluded witness' videotaped proffer, which defendant sought to offer into evidence to demonstrate that the witness had been "coached", where the connection to bias was unclear and the foundational conditions for substantive admissibility under Rules 803(26), and 613(b) were not met; defendant was not precluded from using the proffer during the witness's cross-examination, however, for impeachment purposes to establish a prior inconsistent statement).

[52] 945 S.W.2d 776 (Tenn. Crim. App. 1996).

examine a police detective by asking about several self-serving exculpatory statements the defendant had made to the officer. The trial court refused to permit the interrogation on the theory that the accused's self-serving statements were hearsay. The Tennessee Court of Criminal Appeals held that the defendant's prior exculpatory statements were not hearsay since they were not being used to prove their truth. The defendant sought to use them to suggest the detective was biased against him because the detective took no action to verify or discredit the defendant's exculpatory statements.

[10] Other Categories of Nonhearsay

There are a number of other categories of nonhearsay. Orders or instructions are often not hearsay because they are not offered to prove the truth of their content,[53] and similarly, questions are usually not hearsay.[54] Statements designed to (1) provide a context for, or (2) permit an understanding of, another statement may not be hearsay.[55]

[11] Common Mistakes in Hearsay Definition

[a] Party Present When Statement Made

One common misconception about hearsay is that a statement is not hearsay if the party against whom it is used was physically present when the statement was made. The scenario is as follows:

Q: How many beers did the defendant driver quaff before leaving the tavern?

A: The server told me six.

Counsel: Objection, Your Honor. Hearsay.

Court: Was the defendant present when the statement was made?

A: Yes.

Court: Overruled.

Whether a party was present or absent when an assertion was made out of court has absolutely nothing to do with whether or not it is hearsay. Although the Tennessee Rules of Evidence provide a hearsay exception for tacit admissions,[56] the classification of declarations as hearsay or nonhearsay does not depend on a party litigant's presence. Irrespective of the party's presence when the statement was made, the trier of fact may be deprived of the opportunity to hear the declarant cross-examined when the hearsay evidence is presented in court.

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[53] *See*, *e.g.*, *United States v. Shepherd, 739 F.2d 510 (10th Cir. 1984)* (instructions not hearsay if used to prove they were given, not to prove their content); ***United States v. Reilly, 33 F.3d 1396, 1410 (3d Cir. 1994)*** (instructions are not hearsay because they are not declarations of fact).

[54] *See, e.g.*, *United States v. Jackson, 88 F.3d 845 (10th Cir. 1996)* ("Is this Kenny?" is not an intended assertion and thus not hearsay). On rare occasions a question may be hearsay because it is used to prove an implicit assertion. An example is, "Why did you wreck my boat?"; *State v. Flood, 219 S.W.3d 307, 314 n.5 (Tenn. 2007)* (questions are often not hearsay because they are not offered to prove the truth of their content, but on rare occasions a question may be hearsay if used to prove an implicit assertion); *State v. Brown, 373 S.W.3d 565 (Tenn. Crim. App. 2011)* (defendant-prisoner's question to guard, "Do you honestly believe there is anything wrong with raping a child?," was interpreted as a statement actually saying that the prisoner did not believe there was anything wrong with raping a child; though a question, it was admissible against the defendant in a child rape case as an admission of a party opponent); *United States v. Summers, 414 F.3d 1287 (10th Cir. 2005)* ("How did you guys find us so fast" is hearsay because it contains an inculpatory assertion). *See above § 8.01[4]*.

[55] *See*, *e.g.*, *State v. Price, 46 S.W.3d 785 (Tenn. Crim. App. 2000)* (tape recorded conversation between Durham and the defendant was admissible; Durham's statements were not hearsay because they were used only to provide the context for defendant's statements, which would have made "little sense" had Durham's statements been redacted).

[56] *See below § 8.06[4]*.

[b] Indirect Hearsay

Sometimes witnesses, especially police, are tempted by lawyers to get in hearsay through the back door.

> Q: After talking to the informant—and don't tell the jury what the informant told you—what did you do?
>
> A: I went to the luggage room, found the red suitcase with the defendant's name on it, and found cocaine inside.

Most jurors will get the message intended from this indirect hearsay. They will have learned what the informant said, even though no words from the informant were actually repeated. The testimony is hearsay and inadmissible; courts should close such back doors.[57] This testimony should be permitted only if the effect on the listener is somehow relevant or there is some other relevant nonhearsay use.[57.1] For example, in the above hypothetical if the issue is whether the officer had probable cause to search the suitcase in the luggage room, the evidence would not be hearsay. It would be used to prove the effect on the listener, not the truth of the informant's statement.

[c] Witness as Declarant

Another misconception about hearsay is that a statement is not hearsay if the declarant is on the witness stand and repeats what he or she said earlier. Although there is some logic in this view since ordinarily the witness can be cross-examined about the statement and the trier of fact can observe the witness-declarant's demeanor, the rule is that the normal hearsay rules still apply to the witness's earlier statement.[58] The reason for this is that sometimes the witness may not be able to recall the original event, and cross-examination is insufficient to ensure reliability. Thus, a witness should not be permitted to repeat his or her earlier statement unless that statement is not hearsay or is covered by a hearsay exception. A non-hearsay use could be a prior consistent statement to rehabilitate the witness-declarant.[59]

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[57] *See, e.g.*, *United States v. Reyes, 18 F.3d 65, 67 (2d Cir. 1994)* (barring testimony that customs agent spoke to two men which led her to conclude that defendant was involved in criminal activity; testimony clearly related content of hearsay statements by the two men); *United States v. Hall, 989 F.2d 711, 715 (4th Cir. 1993)* (error to permit cross-examination of defendant by essentially reading hearsay statement of defendant's wife to the effect that the defendant had used drugs). *See also*, *State v. Padgett, 2019 Tenn. Crim. App. LEXIS 327 (Tenn. Crim. App. 2019)* (where the State asked officer why he had collected defendant's gray tennis shoes during search of defendant's apartment, and the officer responded that "they matched the suspect's description," the jury could infer that a witness to the crime had said the suspect was wearing gray shoes; since the witness's statement had to be believed in order for it to have relevance, i.e. the shoes were only relevant because they were gray, and the fact that they were gray was only relevant if you believed the witness's statement that the suspect had been wearing gray shoes, the trial court erred by admitting the officer's testimony); *State v. Pratt, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 634 (Tenn. Crim. App. 2018)* (trooper's testimony that defendant was the driver based on "statements" made by the passenger was indirect hearsay; moreover, because the improperly introduced hearsay more probably than not affected the judgment, its admission was not harmless).

[57.1] Generally, when a police officer testifies about an out-of-court statement merely to explain his or her own actions, the testimony is not hearsay, but the details of the information obtained from an informant should not be admitted at trial. *State v. Spencer, 2016 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. 2016)*. Instead, testimony that the officer acted "upon information received," or words to that effect, should be sufficient to explain the officer's actions. *Id.* In *Spencer*, the testifying agent sufficiently explained that he was investigating a particular house based on information provided by the "cooperating source," and there was no need for the agent to provide further details about the source's description of the house or the defendant. Accordingly, the trial court erred by admitting agent's testimony that the house and defendant matched descriptions provided by the source. *Id.*

[58] *See above § 8.01[4][d]*.

[59] *See below § 8.05[5]*.

End of Document

§ 8.02 Rule 802. Hearsay Rule

[1] Text of Rule

Rule 802 Hearsay Rule

Hearsay is not admissible except as provided by these rules or otherwise by law.

Advisory Commission Comment:

The rule does not change Tennessee law.

[2] Exclusion of Hearsay

This rule states the basic principle that hearsay evidence is inadmissible unless made admissible by either (1) the Tennessee Rules of Evidence, or (2) some other law. Rules 803 and 804 provide the basic exceptions in the Tennessee Rules of Evidence. While local court rules cannot create new hearsay exceptions, the Tennessee legislature is free to do so. The next section of this book describes other areas of law that admit hearsay evidence.[60]

[3] Exceptions Otherwise Provided by Law

[a] In General

Not only the Tennessee Rules of Evidence, but also other court rules or statutes, may make hearsay admissible. The following materials describe some examples of such rules and statutes.

[b] Probable Cause

In Tennessee, credible hearsay can establish probable cause for an arrest warrant.[61] Likewise, hearsay may and usually does furnish the basis for issuance of a search warrant.[62]

[c] Preliminary Examination

The prosecution can use hearsay documents of ownership and hearsay expert witness written reports at a Tennessee preliminary examination.[63]

[d] Juvenile Court Proceedings

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[60] *See below § 8.02[3].*

[61] *Tenn. R. Crim. P. 4(b).*

[62] *Tenn. R. Crim. P. 41(c).*

[63] *Tenn. R. Crim. P. 5.1(a).*

Some juvenile court hearings admit hearsay evidence. The judge at a detention hearing in a delinquent or unruly case may consider "reliable" hearsay.[64] Such "reliable" hearsay may also be considered at a preliminary hearing in dependent and neglected or in abused child cases.[65] On the other hand, the Tennessee law of evidence governs at adjudicatory hearings in delinquent and unruly cases in Juvenile Court, except that certain statements a child made to a youth services or intake officer during the early part of the processing are inadmissible against the child.[66] The full set of evidence rules apply in all other adjudicatory hearings in Juvenile Court.[67] At a juvenile dispositional hearing, "reliable" hearsay is admissible.[68]

[e] Administrative Proceedings

Another example, found in the Administrative Procedures Act, reads as follows:

> The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.[69]

Although this statute makes little evidentiary sense and is so vague that it is impossible to apply with precision, it is clear that administrative hearings, according to the Tennessee Advisory Commission Comment to Evidence Rule 101, are beyond the reach of the Tennessee Rules of Evidence. Some administrative agencies, however, have opted to use all or part of the rules of evidence.[70]

[f] Sentencing Hearings

Criminal sentencing offers more illustrations of admissible hearsay. The Criminal Sentencing Reform Act provides that the rules of evidence apply at a sentencing hearing but specifically admits "reliable" hearsay, including certified copies of "documents" and certified records of conviction.[71] First degree murder

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[64] TENN. R. JUV P. 15(b).

[65] TENN. R. JUV P. 16(a).

[66] TENN. R. JUV P. 28(c).

[67] *Id.*

[68] TENN. R. JUV P. 32(f). *But see* TENN. R. JUV P. 32(e), allowing the judge to "consider such evidence as may be presented by a party."

[69] *Tenn. Code Ann. § 4-5-313(1)* (2005). The statute makes privileges and laws rendering materials confidential applicable in administrative hearings.

[70] *See*, *e.g.*, RULES OF THE TENN. CLAIMS COMM'N 0310-1-1-.01(11) (rules of evidence generally applicable in hearings before Tennessee Claims Commission, but exceptions for medical and car repair records).

[71] *Tenn. Code Ann. § 40-35-209(b)* (2010). *See*, *e.g.*, *State v. Baker, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997)* (presentence report will contain hearsay, which is reliable because it is based on presentence officer's research of records, contact with relevant agencies, and the gathering of information that must be included in the report).

sentencing hearings permit "probative" hearsay to be offered if the defendant has an opportunity to rebut the hearsay, subject to constitutional limitations.[72]

[g] Civil Procedure

The Tennessee Rules of Civil Procedure admit certain hearsay. Rule 56 admits affidavits in support of a motion for summary judgment.[73] Rule 32 partially regulates the admissibility of depositions.[74] Hearsay evidence may not be considered in some situations under Rule 56.06 in summary judgment motions.[74.1]

[h] Child Support

Under Tennessee law a certified copy of various documents relating to intercounty support actions is admissible to prove the facts in the document. In effect, this creates an exception to the hearsay rule for such information.[75]

The legislature has created a more specific statutory hearsay exception regarding records of child support payments made through the state's central collection and distribution unit.[76] With the advent of a central statewide processing unit, proof of the payments made by a particular individual became problematic due to the vast number of cases tried daily in which such information is relevant and necessary. As an alternative to having records custodians testify in all such cases, a Tennessee statute provides that child support records of the Department of Human Services are self-authenticating, non-hearsay, and admissible into evidence.[77] The records need not be certified copies, and can even be obtained via internet. Once admitted, the records constitute a rebuttable presumption that the payments shown in the records are the amount of support actually paid. The presumption can be overcome by presentation of rebuttal evidence satisfactorily demonstrating other payments.[78]

[4] Confrontation

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[72] *Tenn. Code Ann. § 39-13-204(c)* (2010). *See also*, *State v. Clayton, ___ S.W.3d ___, 2016 Tenn. Crim. App. LEXIS 614(Tenn. Crim. App. Aug. 18, 2016)*, aff'd, *535 S.W.3d 829, 2017 Tenn. LEXIS 723 (Tenn. Nov. 20, 2017)* (trial court did not abuse its discretion in allowing the State to introduce photographs depicting the face of each victim during the penalty phase, as they were relevant to establishing the mass murder aggravating circumstance, were not unduly gruesome or unfairly prejudicial in light of the other evidence presented at the trial, and the number of photographs was limited to one for each victim); *State v. Davidson, ___ S.W.3d ___, 2015 Tenn. Crim. App. LEXIS 164 (Tenn. Crim. App. Mar. 10, 2015)*, aff'd, *509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. Dec. 19, 2016)* (trial court did not err by refusing to allow defendant to introduce evidence regarding the cost of imposing the death penalty compared to the cost associated with imprisoning an individual for life; evidence of the expense associated with implementing the death penalty bore no relation to defendant or his crimes, and as such, it was irrelevant).

[73] *Tenn. R. Civ. P. 56.06*.

[74] TENN. R. CIV. P. 32. *See also* *Tenn. R. Evid. 804(b)(1)* (former testimony hearsay exception).

[74.1] *City of Memphis v. Tandy J. Gilliland Family, L.L.C., 391 S.W.3d 60 (Tenn. Ct. App. 2012)*; *Sneyd v. Washington County, 387 S.W.3d 1 (Tenn. Ct. App. 2012)*; *Lee v. Lyons Constr. Co., 368 S.W.3d 510 (Tenn. Ct. App. 2012)*; *Newman v. Jarrell, 354 S.W.3d 309 (Tenn. Ct. App. 2010)* (hearsay statements do not satisfy presence of genuine issues of material fact for trial, required for summary judgment).

[75] *Tenn. Code Ann. § 36-5-3001 et seq.* (2010).

[76] *Tenn. Code Ann. § 24-7-121*(2000).

[77] *Id.*

[78] *Id.*

[a] In General

Sometimes when hearsay evidence is used against the criminal accused, the *confrontation clauses* of the federal[79] and Tennessee[80] constitutions are implicated. The accused may allege that the admission of the hearsay statements violates his or her right to confront adverse witnesses. Although an extensive discussion of the *confrontation clause* is beyond the scope of this book, this section is designed to provide an introduction to this complex area of constitutional law.

[b] Policies

The *confrontation clause* cases discuss two competing policies, both centered on accurate factfinding. First, the courts note that face-to-face confrontation, including cross-examination, in the jury's presence serves the interest of accurate factfinding by giving the jury a way to evaluate evidence.[80.1] On the other hand, the cases also recognize that accurate factfinding sometimes requires consideration of out-of-court statements where face-to-face confrontation is impossible.[81]

[c] Pre-*Crawford* Approach: *Ohio v. Roberts*

The modern law of confrontation stemmed in large part from the Supreme Court's seminal—and now rejected—decision in *Ohio v. Roberts*.[82] There, the Court assessed the admissibility of a transcript of a preliminary hearing witness's testimony which the government offered to prove that the defendant did not have permission to use someone else's check and credit cards. Recognizing that some hearsay statements are sufficiently reliable to be admitted against the criminal accused despite a lack of face-to-face cross-examination in the jury's presence, the *Roberts* Court established a two-part test involving both (1) the need for the hearsay proof, and (2) reliability of that proof.

When applicable, the first prong of *Roberts* required a showing that the declarant was unavailable before the *confrontation clause* would permit the hearsay to be used. This rule of preference, applied in only certain situations by subsequent Supreme Court decisions,[83] meant that the hearsay statement of an absent declarant could be used against the criminal accused only when the declarant could not testify in person. The second prong of *Roberts* mandated a showing that the hearsay statement bore an adequate "indicia of reliability." This indicia of reliability could be established in two ways: by being covered by a "firmly rooted hearsay exception"[84] or by having "particularized guarantees of trustworthiness." Subsequent

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[79] *U.S. Const. Amend. VI* ("right to be confronted with the witnesses against him").

[80] *Tenn. Const. Art. I, § 9* ("to meet witnesses face to face"). The Tennessee Supreme Court has held that *Article I, § 9 of the Tennessee Constitution* "does not impose any restrictions on admitting hearsay statements beyond those of the [U.S. Constitution's] *Sixth Amendment*." *State v. McCoy, 459 S.W.3d 1, 13–14 (Tenn. 2014)*.

[80.1] *State v. Heng Lac Liu, 2015 Tenn. Crim. App. LEXIS 378 (Tenn. Crim. App. 2015)* (hearsay evidence consists of out-of-court statements offered for the truth of the matter they assert; there are concerns with reliability and the inability to cross-examine such statements, which is why they are excluded as admissible evidence).

[81] *See Bourjaily v. United States, 483 U.S. 171, 182, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)*.

[82] *448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)*.

[83] *See*, *e.g.*, *United States v. Inadi, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986)* (co-conspirator's statement may be introduced irrespective of declarant's availability); *White v. Illinois, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)* (no unavailability showing necessary before government may use hearsay covered by Evidence Rule 803(2), the spontaneous explanation, or Rule 803(4), statement for purpose of medical diagnosis or treatment).

Supreme Court decisions were somewhat inconsistent in applying these factors. The approach of *Ohio v. Roberts*, rejected by the United States Supreme Court in *Crawford v. Washington* (discussed in the next section), is no longer viable in Tennessee.[85]

[d] The New Era of Confrontation: *Crawford v. Washington*

In 2004 the United States Supreme Court overruled *Ohio v. Roberts* and substituted a new approach to analyzing confrontation issues. In *Crawford v. Washington*[86] defendant Crawford was charged with fighting and then stabbing a man who allegedly tried to rape Crawford's wife, Sylvia. Defendant Crawford claimed self defense. Sylvia did not testify at trial because of the marital privilege; hence she could not be cross-examined. At trial the prosecutor introduced a tape recorded statement by Sylvia to the police which contradicted the defendant's version of the fight and cast doubt on his self-defense claim. The tape recording was admitted under the hearsay exception for statements against penal interest because it also implicated Sylvia. The trial court found that it satisfied *Ohio v. Roberts* by having adequate indicia of reliability. The defendant argued that the tape recording violated his confrontation rights since he was unable to cross examine the person (his wife Sylvia) who made it.

The Washington Court of Appeals reversed, finding the evidence did not have adequate particularized guarantees of trustworthiness to satisfy *Roberts*. The Washington Supreme Court reversed the court of appeals on the grounds that the statement did have adequate particularized guarantees of trustworthiness to satisfy *Roberts*.

Justice Scalia wrote the opinion for seven justices. This opinion noted that the *Sixth Amendment* does not resolve the case because its terms are not sufficiently detailed. Justice Scalia then looked at the history of the *confrontation clause* and concluded that the principal evil it addressed was the government's use of ex parte examinations (*i.e.* statements that are never subjected to cross examination) as evidence against an accused. Concluding that *Ohio v. Roberts* was not faithful to these historical values, the *Crawford* majority overturned that decision, which was also characterized as too unpredictable since the trial court makes a "reliability" determination and the jury may hear testimonial evidence not tested by cross examination. In place of *Roberts*, the *Crawford* decision adopted a new conceptual framework to analyze confrontation cases. The Court held:

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[84] *See*, *e.g.*, *White v. Illinois, 502 U.S. 346, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1992)* (spontaneous exclamation and statement for purpose of medical diagnoses or treatment are firmly rooted); *Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)* (co-conspirator's admission is firmly rooted); *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)* (residual hearsay exception of Federal Rule 807 is not firmly rooted).

[85] *State v. Lewis, 235 S.W.3d 136 (Tenn. 2007)*, *overruling in part*, *State v. Maclin, 183 S.W.3d 335 (Tenn. 2006)*. In *State v. Maclin, 183 S.W.3d 335 (Tenn. 2006)*, no longer followed, the Tennessee Supreme Court applied both *Crawford* and pre-*Crawford* authority in assessing confrontation issues. Consistent with *Crawford*, *Maclin* held that testimonial statements must be analyzed under *Crawford*. But filling a void not clearly resolved in *Crawford*, *Maclin* further held that nontestimonial hearsay statements must be analyzed under the pre-*Crawford* test of *Ohio v. Roberts*.

In a subsequent decision, *State v. Lewis, 235 S.W.3d 136 (Tenn. 2007)*, however, the Tennessee Supreme Court reversed *Maclin* in part and held that *Ohio v. Roberts* would no longer be followed in Tennessee for nontestimonial statements. *See generally*, *State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)*; *State v. Franklin, 308 S.W.3d 799, 810 (Tenn. 2010)*. Thus, if a statement is deemed to be testimonial, *Crawford* and subsequent opinions determine whether the *confrontation clause* is satisfied. For nontestimonial statements, the *confrontation clause*, by definition, simply is inapplicable and the admissibility of the evidence is assessed using the hearsay and other evidence rules rather than the *confrontation clause*. A confrontation objection may be forfeited if the defendant intentionally procured the declarant's unavailability.

[86] *541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*.

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[87]

A key concept is whether the statement is testimonial or nontestimonial. *Crawford* held:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether. Where testimonial evidence is at issue, however, the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination.[88]

In summary, *Crawford v. Washington* held that in a criminal case[89] the government may introduce testimonial hearsay evidence against the criminal accused only if:

> **(1)** The declarant is available for cross examination at trial;[90] or
>
> **(2)** The declarant is unavailable for cross examination at trial, the government made reasonable efforts to procure the declarant's presence, and the testimonial statement was previously subject to cross examination, such as at a preliminary hearing.[91] [92]

Crawford was first followed in the leading Tennessee case, *State v. Maclin*. The United States Supreme Court has provided guidance applying *Crawford's* standard in subsequent cases.[92.1] The Tennessee courts have also applied *Crawford* and its progeny in various contexts.[92.2]

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[87] *Id. at 59*.

[88] *Id. at 68*. *See generally* *State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)* (excellent summary of confrontation decisions).

[89] *Crawford* does not apply in a Tennessee probation revocation case, which is not a "criminal prosecution." *State v. Walker, 307 S.W.3d 260, 264 (Tenn. Crim. App. 2009)*.

[90] *See, e.g.*, *State v. Banks, 271 S.W.3d 90, 118 (Tenn. 2008)* (no confrontation issue when declarant testifies about his or her prior statement).

[91] *See*, *e.g.*, *State v. Shipp, 2017 Tenn. Crim. App. LEXIS 893 (Crim. App. 2017)* (the *Confrontation Clause* guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish; accordingly, the criminal appeals court has upheld the admission of testimony from a preliminary hearing when the defendant had an opportunity to cross-examine a witness who was subsequently deemed unavailable; similarly, the court has rejected the claim that cross-examination at the preliminary hearing was insufficient due to differences in the nature of the proceedings, including the burden of proof); *State v. Bowman, 327 S.W.3d 69, 89 (Tenn. Crim. App. 2009)* (*confrontation clause* satisfied when deceased witness testified at a preliminary hearing, was cross examined at this hearing, and a transcript of the preliminary hearing testimony was admitted as former testimony at the subsequent trial).

[92] *State v. Maclin, 183 S.W.3d 335 (Tenn. 2006)*.

[92.1] *See, e.g.*, *Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221 (2012)* (abuses for which the *Confrontation Clause* was adopted involve (1) an out-of-court statement that has, as its primary purpose, "accusing a targeted individual" of criminal conduct; and (2) a "formalized statement" such as an affidavit, deposition, prior testimony, or a confession); *Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705 (2011)* (trial court's admission of forensic reports violated *Confrontation Clause* because there was no ongoing emergency and the reports were the "equivalent of affidavits" made for the purpose of proving the guilt of a particular criminal defendant at trial); *Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006)* (limiting the reach of *Crawford* to testimonial hearsay and adopting "primary purpose" test; statements elicited during police interrogations do not violate the *Confrontation Clause* when the primary purpose of the interrogation is to assist police in an ongoing emergency).

[e] Reach of *Crawford*: Hearsay

Crawford makes the confrontation clause applicable only when a *hearsay statement* is used to prove the truth of the matter asserted in the statement.[93] It does not apply for any other use, such as impeachment. In such cases the confrontation clause is probably irrelevant.

Another illustration is *State v. Sexton*[93.1] in which a declarant's statement was offered to establish the motive for homicides. The declarant testified that the alleged sex assault victim claimed the defendant had sexually abused her. The prosecution argued that the defendant killed the homicide victims because defendant thought that the homicide victims had caused the sexual assault victim to make false accusations of sex abuse. The Tennessee Supreme Court indicated that if the declarant's hearsay statement about the abuse was used to establish that the defendant had a motive to kill the victim, the statement was not hearsay because it was not offered for its truth. The motive was present irrespective of whether the abuse allegation was true or false.

[f] Reach of *Crawford*: Unavailable Declarant and Forfeiture

Unavailable Declarant. Crawford specifically provides that the confrontation clause is satisfied if the declarant testifies at the trial.[93.2] On the other hand, if the declarant is unavailable at trial, he or she is not

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[92.2] *See below*, 8.02[4](h), discussing *Crawford*'s reach and its application in Tennessee. *See also* State v. Dotson, 450 S.W.3d 1, *69 (Tenn. 2014), adopting the D.C. Court of Appeals' interpretation of the U.S. Supreme court's decision in Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221 (2012)—*i.e.*, that an out-of-court statement is testimonial "if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character." *See* Young v. United States, 63 A.3d 1033, 1044 (D.C. 2013). *Dotson* notes the lack of clarity in post-*Crawford* decisions: "[U]ncertainty … has existed in Confrontation Clause jurisprudence since *Crawford*, and in particular the lack of clarity regarding expert reports and testimony, which was actually exacerbated by the [United States Supreme Court's] splintered decision in *Williams*." Id., *72.

The Tennessee Supreme Court revisited the issues raised by Williams in State v. Hutchison, 482 S.W.3d 893 (Tenn. 2016), a case involving the admissibility of an autopsy report. The Court held that the victim's autopsy report was nontestimonial and that its admission into evidence, during the testimony of a medical examiner who did not prepare it, did not violate the Confrontation Clause. The Court first noted that the primary purpose of preparing an autopsy report is "not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial," but rather, to determine the manner and cause of death. The Court then applied the multi-step Confrontation Clause analysis it adopted from the D.C. Court of Appeals, as enunciated in *Dotson*. The Court held that the autopsy report was not testimonial, because (1) it was not sworn to or certified by the medical examiner who performed it, and was merely "authorized" by the examiner—and thus lacked "the formality and solemnity" of an affidavit, deposition, or prior testimony as required under *Dotson*; and (2) the overall circumstances did not indicate that the report was made for the purpose of proving defendant's guilt. Id., *913–914. The Court reiterated its frustration with U.S. Supreme Court precedent post-*Crawford*, particularly *Williams*, complaining that "[a]ny hopes of a single standard … were dispelled" by the fractured nature of the *Williams* decision. Id., *907.

In its attempt to reconcile the disparate majority, concurrence, and dissent opinions reached in *Williams*, the Tennessee Supreme Court has essentially adopted a three-part constitutional inquiry for assessing Confrontation Clause violations. This inquiry involves multiple levels of analysis and includes criteria culled from three different parts of the *Williams* decision—the majority opinion, the concurrence, and the dissent. A succinct version of the required inquiry is summarized in *Hutchison*: "While the autopsy report … meets the broad [testimonial] standard advocated by the dissent in *Williams*, it meets neither the standard under Justice Thomas's concurrence nor the standard of the *Williams* plurality." State v. Hutchison, 482 S.W.3d 893, *914 (Tenn. 2016).

[93] Id. at 59 n.9. The Court cites Tennessee v. Street, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985).

[93.1] State v. Sexton, 368 S.W.3d 371 (Tenn. 2012).

subject to cross examination at that time and the declarant's pretrial hearsay statement may be subject to exclusion unless the defendant had an opportunity to examine the declarant about the pretrial statement at a prior time.

In Tennessee, a witness is deemed "unavailable" only when the prosecution can prove that it made a *good faith* effort to secure the declarant's trial presence.[94] The key is whether the lengths the state when to secure the declarant's presence at trial were reasonable.[95] The trial court's ruling will be reversed on appeal only for an abuse of discretion.[96]

Tennessee courts require more than casual efforts to locate the witness before he or she is deemed unavailable. In *State v. Sharp*[97] a witness testified at the first trial then disappeared before the second trial. The prosecution sought to use the declarant's testimony at the first trial as evidence in the second trial. As proof of its efforts to find the witness before the second trial, the state introduced evidence of a subpoena it had issued. The subpoena contained a handwritten note that the witness had moved to Atlanta. The prosecutor also stated that it had located a telephone number from the declarant's foster mother and had unsuccessfully tried to call the declarant at this number for six to eight months. The telephone became disconnected at some time. Despite these efforts, the Tennessee Court of Criminal Appeals held the witness was not "unavailable" since the state had not made a good faith effort to locate her. The decision seemed to indicate that mere statements by the prosecution were insufficient absent independent evidence of measures to locate the witness.[98]

Forfeiture. The rule barring pretrial testimony if the declarant is unavailable and the testimony was not subject to cross examination at an earlier time could provide a criminal accused with an incentive to make sure the declarant, who made a pretrial testimonial statement implicating the accused, does not testify at trial. However, *Crawford* anticipates this problem and makes it clear that if the defendant procured the unavailability of the declarant, the *confrontation clause* is deemed forfeited and not applicable even if the declarant is unavailable and was never subject to prior cross examination.[99]

The United States Supreme Court has held that forfeiture of confrontation requires that the defendant *intended* to prevent the witness from testifying, reporting an incident to authorities, or cooperating in a criminal prosecution.[100] Thus, the mere fact that the defendant killed the declarant does not, alone,

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[93.2] *See, e.g.*, *State v. Ackerman, 397 S.W.3d 617, 640 (Tenn. Crim. App. 2012)* (no confrontation issue because declarant was present at trial and subjected to cross examination; does not matter that victim could not remember the earlier interview; lack of memory does not make a witness unavailable for purposes of the *Confrontation Clause* though it does for purposes of the rules of evidence), *overruled on other grounds*, *State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)*.

[94] *See*, *e.g. State v. Sharp, 327 S.W.3d 704, 712 (Tenn. Crim. App. 2010)*, *review denied and ordered not published by State v. Sharp, 2015 Tenn. LEXIS 77 (Jan. 16, 2015)*.

[95] *Id*.

[96] *Id*.

[97] *State v. Sharp, 327 S.W.3d 704 (Tenn. Crim. App. 2010)*.

[98] *Sharp* cited a pre-*Crawford* Tennessee case, *State v. Armes, 607 S.W.2d 234 (Tenn. 1980)*, for the need for independent proof.

[99] *Crawford v. Washington, 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*. *See also Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)* ("one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation").

[100] *Giles v. California, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)*.

establish that the defendant forfeits the right to have evidence of the victim's statements excluded under the *confrontation clause*.

A good example is *Giles v. California*,[101] where the defendant killed the victim because of serious domestic disputes. Several weeks before the homicide, the victim told police that the defendant had assaulted her and then threatened to kill her. Despite being hearsay, the victim's statement to the police was admissible in the homicide trial under California's domestic violence hearsay exception. The state argued that it was also admissible under the *confrontation clause*, even though testimonial, because the defendant had forfeited his confrontation rights by making the now-deceased declarant unavailable to testify. The Supreme Court rejected the argument and remanded for a hearing on whether the defendant killed the victim for the purpose of preventing her from reporting abuse to authorities or from cooperating with a criminal prosecution.

The Tennessee Supreme Court, of course, follows *Crawford*, but also makes it applicable through the Tennessee Constitution's guarantee of meeting witnesses face to face.[102]

[g] Reach of *Crawford*: Subject to Cross-Examination

If a hearsay statement is testimonial, it is admissible only if the declarant was subject to cross-examination at or before trial. This may have occurred in a preliminary hearing or other judicial proceeding.

[h] Reach of *Crawford*: Testimonial v. Nontestimonial Statements

The most important issue in *Crawford* is whether a statement is *testimonial or nontestimonial*. This distinction involves a "pure question of law" and the trial court's findings and decision are subject to *de novo* review on appeal.[103]

If a statement is not testimonial, the *confrontation clause* is inapplicable. Admissibility is determined by the ordinary evidence rules.[104]

A significant problem with *Crawford* is that it does not define the critical term *testimonial*.[105] Rather, the Court provided a number of illustrations of evidence that it considered testimonial and nontestimonial. In general terms, the *Crawford* Court noted that the "*Sixth Amendment* applies only to 'witnesses against the

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[101] *Giles v. California, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)*.

[102] *State v. Maclin, 183 S.W.3d 335, 339 (Tenn. 2006)* (citing *Art. I, § 9 of the Tennessee Constitution*, Tennessee Supreme Court has "largely adopted" the federal standards in determining whether the Tennessee face-to-face standard has been violated).

[103] *State v. Franklin, 308 S.W.3d 799, 809 (Tenn. 2010)*.

[104] *Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)* ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the *Confrontation Clause*.").

[105] *Id. at 68*. The Tennessee Supreme Court has stated that evidence is testimonial under *Crawford* if "its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character." *State v. Dotson, 450 S.W.3d 1, *69 (Tenn. 2014)*. *See also State v. Hutchison, 482 S.W.3d 893 (Tenn. 2016)* (applying *Dotson* and reiterating the confusing nature of testimonial/non-testimonial jurisprudence post-*Crawford*).

accused.' This means those who 'bear testimony.' "[106] The Court defined *testimony* as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[107]

Instead of providing a more detailed definition of "testimonial," the *Crawford* Court provided a number of illustrations of statements it considered "testimonial." One illustration is "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially … [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[108] Another illustration is "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[109]

An obvious and important area involves statements made to law enforcement officials. The Court specifically indicated that some such statements are testimonial.[109.1] For example, a *Crawford* illustration of a testimonial statement is an "accuser who makes a formal statement to a government officer."[110] Similarly, the Court listed "statements taken by police officers in the course of interrogations" and "interrogations by law enforcement officers."[111]

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[106] *Id.* "We leave for another day any effort to spell out a comprehensive definition of 'testimonial' ").

[107] *Id. at 51*.

[108] *Id. at 52*. In noting that a pretrial statement is testimonial if "circumstances … would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," the *Crawford* Court raises far more questions than it answers. For example, what is the perspective that is used? That of this particular declarant (who may be exceptionally knowledgeable or exceptionally dull)? The reasonable person declarant? What if the statement were made by a three-year-old child? Is the issue whether that child, or a "reasonable" three-year-old child, would believe that the statement would be used at trial?

[109] *Id. at 51–52*.

[109.1] *State v. Webster, 2018 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. 2018)* provides an instructive example. Addressing the admissibility of statements made by informants, the court explained why statements to a police officer generally constitute inadmissible hearsay, but those made to non-law enforcement individuals are generally admissible: "A statement made directly to the police generally reveals information about the accused and is offered to prove the truth of the matter asserted; accordingly, the statement violates a defendant's right to confrontation because it is both testimonial and hearsay … Conversely, most informant statements made during a recorded conversation between the informant and a non-law enforcement party do not violate the *Confrontation Clause*. In that situation, the informant generally does not divulge information but rather converses with a third party in order to expose a target's criminal acts to police. As a consequence, the fact of the informant's interaction with a third party rather than the substance of his statements during that interaction is the chief focus of law enforcement and, later, of a criminal trial." *Id. at *16–17*.

[110] *Id. at 51*. Some post-*Crawford* cases take a narrow approach to what constitutes a government agent. *See*, *e.g.*, *People v. Geno, 683 N.W.2d 687 (Mich. App. 2004)* (government agency referred sex abuse victim to private agency for questioning; held, not testimonial because not to government agent).

[111] *Crawford v. Washington, 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*. It should be noted that *Crawford* specifically indicated the word "interrogation" was used "colloquially" rather than in a technical sense. *Id. at 53 n.4*. This may have been meant to indicate that *Miranda* and *Fourth Amendment* cases defining "interrogation" do not necessarily apply to the definition of "testimonial" under the *confrontation clause*. The *Crawford* Court conceded that the concept of interrogation is imprecise, noting "one can imagine various definitions of 'interrogation' " *Id.* Some post-*Crawford* cases take a narrow view of interrogation. *See*, *e.g.*, *State v. Forrest, 596 S.E.2d 22 (N.C. App. 2004)* (limited interpretation of "interrogation"; assault victim was rescued by police and immediately made statement to detective; held, not testimonial because no "interrogation"; was spontaneous statement; victim was not aware that her statement might impact future legal proceedings or that she was "bearing witness").

Primary Purpose Doctrine. Subsequent decisions by the United States Supreme Court added more detail to the meaning of "testimonial." In *Davis v. Washington*, the Court distinguished a recitation to police about a past crime to identify the perpetrator (is testimonial) and one dealing with current circumstances and uttered for purpose of obtaining assistance (not testimonial).[112] Thus, police contact to seek help to remove a present emergency does not engender a testimonial communication. The key under *Davis* is the *primary purpose* of the communication.

In *Davis v. Washington*,[113] involving a 911 call by a victim of domestic violence, the Supreme Court clarified *Crawford* by further defining "testimonial" in the context of police interrogation:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Applying this test, the *Davis* Court held that the domestic violence victim's 911 call was not testimonial because it was for purposes of meeting an ongoing emergency. The violence occurred during the 911 call and was essentially a call for help rather than a report for purposes of criminal prosecution. By way of contrast, in a second domestic violence case also covered in the *Davis* opinion, the Supreme Court found the victim's statement to police to be testimonial. There was no emergency in progress when the police responded to a domestic violence call. The victim was interrogated about past events for possible criminal prosecution.

The primary purpose doctrine was further elucidated in *Michigan v. Bryant*,[114] where the police found a dying homicide victim in a parking lot. In response to police questions about what happened, the victim said that he had been shot by Bryant through the door at Bryant's house. The victim had driven himself to the parking lot where he was found. He died a few hours later. At Bryant's murder trial, the police officers testified about the victim's statement. The defense argued that this testimony violated the *confrontation clause*.

The Supreme Court assessed the "primary purpose" of the victim's statements by looking "objectively" (rather than "subjectively, which would require a look at the subjective or actual purpose of the people involved in the encounter) at the "circumstances in which the encounter occurs and the statements and actions of the parties."[115] One factor is the informality of the police interrogation, which occurred where a wounded person was found rather than in a more formal setting such as a police station or squad car. Another key consideration is the content of both the questions and answers.

Noting that some situations involve "mixed motives," the Court in *Bryant* held that the statement was nontestimonial since its primary purpose was to respond to an ongoing emergency rather than to provide evidence to use in a criminal prosecution. The police were concerned that there was an armed shooter, acting on unknown motives, who had "mortally wounded" a man a short time ago and in a location not far from where the victim was found.[116] The Court found no indication that the police had evidence that the serious emergency had ended.

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[112] *Davis v. Washington, 547 U.S. 813, 826–27, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006)*.

[113] *Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)*. *See also* *State v. Parker, 350 S.W.3d 883 (Tenn. 2011)* (following *Davis* in holding that under Tennessee law a statement is not testimonial if its primary purpose is responding to an ongoing emergency).

[114] *Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)*.

[115] 131 S. Ct. at 1156.

[116] *Id*. at 1164.

The Supreme Court further explained the primary purpose doctrine in *Ohio v. Clark*, a child abuse case where a three-year-old child told his teacher about the defendant's abuse.[116.1] Defendant argued that admitting the statement at his trial violated the *Confrontation Clause*. The Supreme Court disagreed and upheld admission of the child's statements because their primary purpose was not to gather evidence for criminal prosecution. It was to deal with an ongoing emergency to protect the child from further abuse. Moreover, the Court noted that the setting was informal, taking place in a school classroom and lunchroom. The statements were made to teachers, not law enforcement officers, making it "less likely" to be testimonial. And statements "by very young children" will "rarely, if ever, implicate the *Confrontation Clause*."

Illustrations of Nontestimonial Statements. The *Crawford* Court also provided illustrations of statements not considered testimonial. These include a "casual remark to an acquaintance,"[117] an "off-hand overheard remark,"[118] business records,[119] and "statements in furtherance of a conspiracy."[120] The Court also suggested that dying declarations are probably not testimonial.[121] Summarizing its concept of what is testimonial, the *Crawford* Court stated, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations."[122]

[116.1] *Ohio v. Clark, 135 S. Ct. 2173 (2015)*.

[117] *Crawford v. Washington, 541 U.S. at 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*.

[118] *Id.*

[119] *Id. at 56*. It should be noted that subsequent cases may not follow this general approach since some business records, such as a TBI lab report or a coroner's report, may well be testimonial and be subject to *confrontation clause* analysis. Also, Justice Rehnquist's *Crawford* concurrence adds "public records" as having been found by the majority to be nontestimonial. *Id. at 76*.

A subsequent decision by the United States Supreme Court retracted from the view that business records were not testimonial. In *Melendez-Diaz, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)*, involving prosecution for cocaine offenses, the prosecution, consistent with Massachusetts law, introduced three "certificates of analysis" establishing that lab tests determined that the substances involved in the case were cocaine. The United States Supreme Court held that the *confrontation clause* was violated by admission of the certificates. Noting that the certificates, though business records, were testimonial (as a form of "affidavit"), the Court held that the state was required to have the drug analysts testify at the trial and could not rely simply on their written certificates. *See also Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011)* (lab technician who tested blood sample and prepared report certifying results was unavailable at trial (for unspecified reasons); report was testimonial and *confrontation clause* barred another lab employee from testifying about the test results or from entering the report into evidence).

[120] *Crawford v. Washington, 541 U.S. 36, 56, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*. Note that co-conspirator's statements to police during interrogation not covered by co-conspirator's hearsay exception are testimonial.

[121] *Id. at 56, n.6*. The Court hinted that even testimonial dying declarations may survive confrontation challenge because of historical reasons.

[122] *Id. at 68*.

However, it may not apply if the information was used as the underpinning for expert testimony but was not introduced into evidence.[122.1]

[i] Reach of *Crawford*: "Testimonial" in Tennessee

The *Crawford* concept of "testimonial" was analyzed by the Tennessee Supreme Court in the leading case, *State v. Maclin*, where the court adopted an objective, case-by-case approach in assessing whether a statement qualifies as "testimonial." The key is whether the statement was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

According to *Maclin*,[123] the following nonexhaustive list of factors may be used in applying this test of "testimonial":

> (1) whether the declarant was a victim or an observer; (2) whether contact was initiated by the declarant or by law-enforcement officials; (3) the degree of formality attending the circumstances in which the statement was made; (4) whether the statement was given in response to questioning, whether the questioning was structured, and the scope of such questioning; (5) whether the statement was recorded (either in writing or by electronic means); (6) the declarant's purpose in making the statements; (7) the officer's purpose in speaking with the declarant; and (8) whether an objective declarant under the circumstances would believe that the statements would be used at a trial.[124]

[122.1] *Williams v. Illinois, 132 S. Ct. 2221, 2232 (2012)* (4-1-4 decision involving an expert witness who testified that a DNA profile, prepared by a Cellmark laboratory from a vaginal swab of a rape victim, matched that of the accused. The defendant's DNA had been analyzed by a different laboratory. The expert witness testified that the two profiles matched, thereby providing strong evidence that the defendant was the rapist. The defendant argued that the *Confrontation Clause* was violated when no witness from the Cellmark lab testified about the process used to analyze the victim's swab and the expert who did testify knew virtually nothing about the Cellmark process or personnel.)

In a decision written by Justice Alito and joined only by three Justices (Justice Thomas concurred in the result on the theory that the test report was not testimonial because it was not sufficiently formal), the plurality held that the *Confrontation Clause* was not violated since the Cellmark report was never introduced into evidence (it was used only as a basis for the expert's testimony) and the primary purpose of the Cellmark analysis was not to accuse a targeted person but was to apprehend a dangerous rapist still considered to be at large. A dissent by Justice Kagan, joined by three other Justices, concluded that the *Confrontation Clause* was violated since no one from Cellmark testified about the report or analysis.

Obviously *Williams* leaves many questions unanswered. Since there was no majority opinion, it is still not clear when the *Confrontation Clause* requires live testimony in the present or a previous hearing. Many lab reports are not conducted to provide evidence against a particular person but rather are routine scientific tests solely designed to provide information about a substance or item. Must the analysts be produced in court before the report can be used? And if so, how many of them. Each person who had a hand in the analysis? Only the supervisor? Much remains to be known about this emerging area of constitutional law.

In *State v. Dotson, 450 S.W.3d 1, *69 (Tenn. 2014)*, the Tennessee Supreme Court court grappled with the lack of clarity inherent in post-*Crawford* guidance, but adopted the D.C. Court of Appeals' interpretation of *Williams*—namely, that an out-of-court statement is testimonial "if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character." *Id.* (*quoting Young v. United States, 63 A.3d 1033, 1044 (D.C. 2013)*). *See also State v. Hutchison, 482 S.W.3d 893 (Tenn. 2016)* (applying *Dotson*; autopsy report held nontestimonial).

[123] *State v. Maclin, 183 S.W.3d 335, 348–49 (Tenn. 2006)*; *State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)* (excellent summary of confrontation decisions including what is testimonial).

[124] *State v. Maclin, 183 S.W.3d 335, 349 (Tenn. 2006)* (*quoting Crawford v. Washington, 541 U.S. 36, 52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*). *See also State v. Lewis, 235 S.W.3d 136, 143 (Tenn. 2007)*; *State v. Franklin, 308 S.W.3d 799, 813 (Tenn. 2010)*. *See also State v. Parker, 350 S.W.3d 883, 898–899, 901 (Tenn. 2011)* (confirming *Maclin* factors; assault victim's statement to investigating officer was testimonial since emergency was over when officer interrogated victim and purpose of victim's statement was to help apprehend assailant).

Previous Hearing. Obviously, testimony in a previous judicial proceeding is testimonial.[125]

Dying Declaration. Following a suggestion in *Crawford*, the Tennessee Supreme Court has held that the dying declaration is admissible under the *confrontation clause*, even if the dying declaration is deemed to be testimonial.[126]

Excited Utterance. An excited utterance may or may not be testimonial, depending on the various factors.[127] The key, according to the Tennessee Supreme Court, is whether the declarant was acting as a witness "bearing testimony against the accused."[128] In *Maclin* a domestic assault victim called 911 and told the police who answered the call that defendant had assaulted her. The Court held that the statement was testimonial because an objective witness would reasonably believe the statement would be available for use at a later trial. *Maclin* also addressed a second statement finding it nontestimonial. These statements were by teenagers who flagged down a police officer and reported a burglar alarm and told the office that a large black man had kicked in the door and was inside the building. The Court found the statements not the product of police interrogation and not the type that an objective person would think would be used at a later trial. Rather, they were simply to direct police to a crime in progress.[129]

Forensic Interview. A victim's statement to a forensic interviewer may well be testimonial.[129.1]

Medical Records. Medical records often are not testimonial, but may be depending on the circumstances. In an illustrative case, an elderly rape victim made statements to medical personnel that she had been raped.[130] These statements were included in medical records, which were introduced at the defendant's rape trial. The Tennessee Supreme Court found that the victim's statements were for purposes of medical diagnosis and treatment and were, therefore, not testimonial. On the other hand, the victim's statements to a nurse gathering evidence for a criminal prosecution were deemed testimonial and subject to confrontation analysis.

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[125] *See*, *e.g.*, *State v. Sharp, 327 S.W.3d 704 (Tenn. Crim. App. 2010)*(testimony in prior trial of same case), *review denied and ordered not published by State v. Sharp, 2015 Tenn. LEXIS 77 (Jan. 16, 2015)*.

[126] *State v. Lewis, 235 S.W.3d 136 (Tenn. 2007)*.

[127] *State v. Maclin, 183 S.W.3d 335, 349–352 (Tenn. 2006)*. *See also State v. Ramos, 331 S.W.3d 408, 415 (Tenn. Crim. App. 2010)*(three-year-old sex abuse victim's statement to her mother that "it hurts," made immediately after the assault, was not testimonial).

[128] *Id. at 351*.

[129] *Id. at 353*. *See also State v. Parker, 350 S.W.3d 883, 899 (Tenn. 2011)* (assault victim's statement to neighbor was not testimonial since half-nude victim had just escaped from the attack and feared the assailant was still in her apartment; was ongoing emergency).

[129.1] *See, e.g.*, *State v. McCoy, 459 S.W.3d 1 (Tenn. 2014)* (child sex abuse victim's videotaped interview was testimonial. Interviewer was part of a team of a governmental entity formed to investigate severe child abuse).

[130] *State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)* (excellent summary of confrontation decisions). It should be noted that *Cannon* also characterized business records as nontestimonial, reflecting loose language in *Crawford*. In *Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)*, however, the United States Supreme Court cast doubt on this conclusion and held that laboratory reports showing the composition of a drug sample, though business records, were testimonial and subject to confrontation analysis, requiring the analyst to testify if available. *Melendez-Diaz* casts doubt on the Cannon Court's statement that business records are not testimonial. It is now clear that at least some business records are testimonial for *confrontation clause* purposes. *See also State v. Hutchison, 482 S.W.3d 893 (Tenn. 2016)* (autopsy report not testimonial because lacked sufficient formality and not made to establish a fact for eventual criminal prosecution).

Statement for Purposes of Medical Treatment. A statement made for purposes of medical treatment may not be testimonial if its purpose is to seek professional care rather than provide evidence for a criminal prosecution.[130.1]

[j] Practical Impact of *Crawford*

While *Crawford* literally created a paradigm change in *confrontation clause* analysis, it engendered so many questions[130.2] that the precise impact of the decision will not be appreciated for years. Counsel in criminal cases must pay special attention to appellate decisions interpreting this seminal decision. It will be especially troublesome for prosecutors in cases involving child victims, who may be unable or reluctant to testify. Hearsay testimonial statements by these child victims may be inadmissible unless the child testifies. The key issue will be whether the statement is or is not testimonial.

It is likely that many such statements will not be deemed testimonial when made to non-law enforcement people. A good illustration involving an adult victim is *State v. Lewis*,[131] where a dying homicide victim told a detective at the crime scene that "the lady with the vases" who was in his antiques store "was involved in" his homicide. The Tennessee Supreme Court held that the statement was testimonial because the defendant had already left the antiques store, 911 had been summoned, the statements were not describing an ongoing emergency, and the statements were a description of a past criminal activity.

[k] Televised and Videotaped Testimony

While the use of videotaped or televised testimony in civil cases involving child sexual abuse issues does not raise *confrontation clause* difficulties, introduction at a criminal trial poses the constitutional issue directly. *Coy v. Iowa*[132] appears to make some such videotapes inadmissible. *Coy* involved a child sex abuse case where, during the trial, a screen was placed between the defendant and the two minor victims. The defendant could "dimly" perceive the witnesses but the witnesses could not see the defendant. Recognizing a defendant's *confrontation clause* right to face his or her accusers, the United States Supreme Court in *Coy* held that the use of the screen violated the accused's right of confrontation. The Court refused to consider whether there were any exceptions to the defendant's right to face accusers in a criminal trial.

A Tennessee statute authorizes videotaped testimony in certain civil and criminal child sex abuse cases.[133] Under this statute, the child's testimony is taken and videotaped outside the courtroom. The accused is present with counsel in the same room as the child during this taping session. The defense may observe and hear the child's testimony, and may cross-examine the child. The tape is then played in the courtroom for the trier of fact. The only element missing is a face-to-face confrontation in the actual presence of the jury. This is, however, a critical element.

Another Tennessee statute authorizes two-way televised testimony in certain sex offenses cases.[134] When the court finds that the child victim or witness would be traumatized by the defendant's presence and

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[130.1] *See State v. Parker, 350 S.W.3d 883, 900–901 (Tenn. 2011)* (assault victim's statements describing attempted sexual assault, made to emergency room nurse, were not testimonial since made for purposes of obtaining medical treatment).

[130.2] *See, e.g., Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford? 67 Vand. L. Rev. 1497 (2014)*.

[131] *State v. Lewis, 235 S.W.3d 136 (Tenn. 2007)*.

[132] *487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)*.

[133] *Tenn. Code Ann. § 24-7-117* (2000) (previously denoted as *Tenn. Code Ann. § 24-7-116*).

[134] *Tenn. Code Ann. § 24-7-120* (2000).

therefore could not reasonably communicate, the child's testimony can be taken by a two-way closed circuit television. The defendant remains in the courtroom while the child testifies from another place. Whether *Coy* and the Tennessee Constitution permit such procedures remains to be seen. Arguably *Coy* requires an in-court confrontation, though *Maryland v. Craig*,[135] discussed below, took a more flexible approach to the issue. In *State v. Pilkey*[136] the Tennessee Supreme Court held that the *confrontation clause* bars the use of an *ex parte* videotape statement of a child abuse victim if the statement is used as "evidence in chief by the prosecution."

By statute, a video recording of a child's forensic interview describing sexual conduct is admissible in a criminal trial for this conduct.[136.1] The child must be under age 13 and testify under oath, and the video recording must possess particularized guarantees of trustworthiness.[136.2] The interviewer must satisfy specific qualifications relating to experience, training, and employment. The video recording is not part of any public record; it is sealed as part of the court record.

Maryland v. Craig,[137] which upheld a Maryland statute that permitted a child sex abuse victim to testify in the criminal child abuse trial by means of a closed circuit, one-way television broadcast, interpreted *Coy v. Iowa*[138] as providing significant flexibility. The Maryland statute authorized the child witness, prosecutor, and defense counsel to conduct an examination and cross-examination in a room separate from the judge, jury, and defendant. The examination was broadcast by means of a one-way television circuit that permitted the judge, jury, and defendant to see and hear the child, but did not enable the child to see and hear them. The criminal defendant, though in another room, was in constant audio contact with his attorney. The United States Supreme Court held that the procedure satisfied the *confrontation clause*, despite the lack of a face-to-face encounter between the defendant and the victim-witness. The Court noted that in some cases the government's interest in the physical and psychological well-being of child abuse victims is sufficient to overcome the defendant's interest in facing his accusers in open court.

The Tennessee Supreme Court examined these authorities in *State v. Deuter*,[139] in which the trial court admitted unsworn, *ex parte* videotapes of interviews between alleged victims of child sexual abuse and investigators regarding the alleged criminal activities. The children, called to the stand after their videotaped statements were shown, were made available for cross-examination and re-direct. In condemning such a practice, the Tennessee Supreme Court held that the language of the Tennessee Constitution regarding "face-to-face" confrontation is stronger than that found in the federal constitution. Although there may be some exceptions to an absolute right of confrontation, the use of *ex parte* videotapes under these circumstances is constitutionally infirm.

In 2009, the Tennessee General Assembly attempted to create a valid procedure for the use, in court, of a video recording of a child sexual abuse victim made out of court.[140] Such a video of an interview by a

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[135] *497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)*.

[136] *776 S.W.2d 943 (Tenn. 1989)*, *cert. denied*, ***494 U.S. 1032 (1990)***.

[136.1] *Tenn. Code Ann. § 24-7-123* (2015).

[136.2] *See, e.g., State v. Franklin, 585 S.W.3d 431, 2019 Tenn. Crim. App. LEXIS 377 (Tenn. Crim. App. June 28, 2019)* (trial court did not abuse its discretion in finding video of forensic interview trustworthy, since nothing in the video indicated that the victim made up her story or that she was coached, there were no alleged inconsistencies during the interview that would render it untrustworthy, and the victim gave no sign of being intimidated by her surroundings during the interview).

[137] *497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)*.

[138] *487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)*.

[139] *839 S.W.2d 391 (Tenn. 1992)*.

qualified forensic interviewer[141] of a child under the age of thirteen, in which the child describes an act of sexual contact with or on the child, is made admissible at a trial regarding the sexual offense if specific criteria are met.[142] The child must testify at trial, confirming that the video is a true and correct recording of the interview, and must be available for cross-examination.[143] A pretrial hearing must be conducted to determine, to the court's satisfaction, that the video possesses qualities of trustworthiness, taking into account a number of statutory factors.[144]

This statute creates a mechanism for allowing the finder of fact to observe the statements made by the child victim under circumstances that are presumably less stressful than the courtroom setting, where the alleged perpetrator will be present. However, there may be significant problems with this approach. The Tennessee Constitution gives the defendant the right "to meet witnesses face-to-face."[145] Arguably, this right is abrogated by the use of the child's video, as the defendant would not be face-to-face with the child at the time the video was made.[146]

An additional potential problem is raised by the fact that the legislature has, through this new statute, created a statutory hearsay exception. The Tennessee Supreme Court has previously held that "Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."[147] Relying on the separation of powers doctrine,[148] the court struck down a statute that conflicted with the provisions of *Tennessee Rule of Evidence 404*.[149] Should a court see fit to follow the same rationale, *Tennessee Code Annotated section 24-7-123* could likewise be found to be invalid.

In *State v. McCoy*,[149.1] the Tennessee Supreme Court specifically rejected this argument and upheld *Tennessee Code Annotated § 24-7-123* against a *Mallard* challenge. The *McCoy* court held the legislature may enact evidence rules as long as they do not frustrate or interfere with the adjudicative function or Tennessee courts. This statute does neither. It gives courts considerable discretion and requires the trial court to make a reliability determination.

Closing the courtroom during a victim's trial testimony because of the victim's reluctance to testify in the presence of a defendant's family members defeats the purpose of the defendant's constitutional right to a

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[140] *Tenn. Code Ann. § 24-7-123* (Supp. 2010).

[141] *Tenn. Code Ann. § 24-7-123(b)(3)* (Supp. 2010).

[142] *Tenn. Code Ann. § 24-7-123(a)* (Supp. 2010).

[143] *Tenn. Code Ann. § 24-7-123(b)(1)* (Supp. 2010).

[144] *Tenn. Code Ann. § 24-7-123(b)(2)* (Supp. 2010). *See also State v. Franklin, 585 S.W.3d 431, 2019 Tenn. Crim. App. LEXIS 377 (Tenn. Crim. App. June 28, 2019)* (video of forensic interview properly held trustworthy).

[145] *Tenn. Const. Art. I, § 9*.

[146] *See* also Tenn. Att'y Gen. Opn. 09-67 (2009).

[147] *State v. Mallard, 40 S.W.3d 473, 480–81 (Tenn. 2001)*.

[148] *Tenn. Const. Art. II, § 2*.

[149] *State v. Mallard, 40 S.W.3d 473, 480–81 (Tenn. 2001)*.

[149.1] *State v. McCoy, 459 S.W.3d 1 (Tenn. 2014)*.

public trial under the *Sixth Amendment*.[149.2] A trial court is required to consider reasonable alternatives before permitting the trial's closure.[149.3]

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[149.2] *State v. Franklin, 585 S.W.3d 431, 2019 Tenn. Crim. App. LEXIS 377 (Tenn. Crim. App. June 28, 2019)*.

[149.3] The findings of fact supporting closure must be based on "some type of proof" including, but not limited to, testimony, medical evidence, or psychological evidence. Reasonable alternatives to closure might include allowing a guardian of the victim to sit with the child, or using a qualified courtroom canine for witness comfort. *Id., *473*.

§ 8.03 Rule 803. Hearsay Exceptions

[1] Overview of Hearsay Exceptions in Rule 803

The Tennessee Rules of Evidence contain twenty-six hearsay exceptions, presented in two lists in Rules 803 and 804. In general terms, evidence satisfies the hearsay rule if it satisfies any one exception, even if it does not meet the requirements of other hearsay exceptions.[150] As discussed below,[151] the five exceptions listed in Rule 804 are only applicable if the declarant is "unavailable," a term of art defined in Rule 804(a).

Rule 803 contains twenty-one hearsay exceptions. For seventeen of these, the hearsay statement may be used irrespective of the declarant's availability to testify. In other words, for these exceptions the hearsay statement may be used even if the declarant is available and ready to testify. Three of the hearsay exceptions in Rule 803 may be used only if the declarant testifies at the hearing.[152] Another exception, involving children's statements in certain child abuse and related cases, requires the child-declarant to testify if older than twelve years of age unless unavailable to testify.[153]

[2] Procedures Involving Hearsay Exceptions

When a party objects to evidence as hearsay and the proponent of the evidence argues that a hearsay exception applies, the burden is on the person asserting the exception. Once the court finds the statement is hearsay, the exception will overcome the hearsay objection only if the court finds by a preponderance of evidence that the necessary facts supporting the exception are present.[154] Ordinarily this factual determination is entitled to deference on appeal.[155] The Tennessee Supreme Court has held that if a hearsay statement does fit under one of the exceptions, the trial court may not use the hearsay rule to suppress the statement. However, the statement may otherwise run afoul of another rule of evidence. If a trial court excludes otherwise admissible hearsay on the basis of *Tenn. R. Evid. 401*, *402*, or *403*, this determination is reviewed for abuse of

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[150] *See, e.g., Parker v. Reda, 327 F.3d 211, 214 (3d Cir. 2003)* (though police officer's memorandum was not sufficiently trustworthy to be admitted as a business record, it is admissible as past recollection recorded).

[151] *See below § 8.33[2]*.

[152] The three exceptions are: prior identification, Rule 803(1.1), recorded recollection, Rule 803(5), and prior inconsistent statements, Rule 803(26).

[153] *Tenn. R. Evid. 803(25)*.

[154] *State v. Gilley, 297 S.W.3d 739, 761 (Tenn. Crim. App. 2008)*.

[155] *Id.*

discretion.[155.1] The standard of review on appeal when hearsay is admitted or excluded is de novo and the issue is a question of law.[155.2]

In *Kendricks v. State*, the Tennessee Supreme Court succinctly summarized the general process by which a trial court makes its hearsay admissibility determination in criminal proceedings, and the applicable standard of review for each step in that process:

> The standard of review for rulings on hearsay evidence has multiple layers. Initially, the trial court must determine whether the statement is hearsay. If the statement is hearsay, then the trial court must then determine whether the hearsay statement fits within one of the exceptions. To answer these questions, the trial court may need to receive evidence and hear testimony.
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> When the trial court makes factual findings and credibility determinations in the course of ruling on an evidentiary motion, these factual and credibility findings are binding on a reviewing court unless the evidence in the record preponderates against them. Once the trial court has made its factual findings, the next questions—whether the facts prove that the statement (1) was hearsay and (2) fits under one the exceptions to the hearsay rule—are questions of law subject to de novo review.
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> If a statement is hearsay, but does not fit one of the exceptions, it is inadmissible, and the court must exclude the statement. But if a hearsay statement does fit under one of the exceptions, the trial court may not use the hearsay rule to suppress the statement. However, the statement may otherwise run afoul of

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[155.1] *State v. Hawkins, 519 S.W.3d 1, 2017 Tenn. LEXIS 272 (Tenn. 2017)*. *See also*, *State v. Ackerman, 397 S.W.3d 617 (Tenn. Crim. App. 2012)*, *overruled on other grounds, State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)*.

[155.2] *State v. Hill-Williams, 2017 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 2017)* (the determination of whether the statement in question is hearsay and whether a hearsay exception applies are questions of law that are reviewed de novo); *State v. Ackerman, 397 S.W.3d 617 (Tenn. Crim. App. 2012)*, *overruled on other grounds, State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)*; *State v. Foust, 482 S.W.3d 20, 39 (Tenn. Crim. App. 2015)* (whether a statement satisfies a hearsay exception is a question of law subject to de novo review on appeal); *Kendrick v. State. 454 S.W.3d 450, 479 (Tenn. 2015)* (same).

another rule of evidence … . If a trial court excludes otherwise admissible hearsay on the basis of Rule 401, 402, or 403, this determination is reviewed for abuse of discretion.[155.3]

[3] Text of Rule

The following are not excluded by the hearsay rule:

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[155.3] *Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015)*. Since *Kendrick*, the Court of Criminal Appeals has applied this standard to many different hearsay situations. In most cases, there is no error. *See, e.g.,* *State v. Hawkins, 519 S.W.3d 1, 2017 Tenn. LEXIS 272 (Tenn. 2017)* (trial court did not err in admitting childrens' and adult's statements under state of mind hearsay exception); *State v. Howard, 504 S.W.3d 260 (Tenn. 2016)* (trial court properly admitted Children's Advocacy Center reports pursuant to the business records exception, and the hearsay statements contained within the reports constituted statements made for the purpose of medical diagnosis or treatment; thus both the reports and the statements contained in the reports were admissible under *Tenn. R. Evid. 803(4)*, *(6)*); *State v. Hill-Williams, 2017 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 2017)* (text messages received by defendant were not offered for the truth of the matter asserted, and therefore the trial court did not err by admitting them into evidence, because they were necessary to put the text messages defendant sent into context); *State v. Fuller, 2016 Tenn. Crim. App. LEXIS 862 (Tenn. Crim. App. 2016)* (trial court did not err by admitting statements the victim made while on the phone with an inmate under the excited utterance exception to the hearsay rule under *Tenn. R. Evid. 803*(2)), because the statements occurred as defendant approached the victim with a gun while the victim was sitting in his car, unarmed); *State v. Jones, 2016 Tenn. Crim. App. LEXIS 25 (Tenn. Crim. App. 2016)* (officer's testimony about victim's mother's statements to him, explaining why she called 911, was not inadmissible hearsay because it was not offered for the truth of the matter asserted, but to explain the officer's actions in assessing the domestic disturbance call that precipitated his arrival at the residence; the victim's brother's statements to his mother about the whipping he and the victim received from defendant also established their mother's basis of knowledge of the victim's injuries and when she was informed of the whipping); *State v. Romero, 2016 Tenn. Crim. App. LEXIS 440 (Tenn. Crim. App. 2016)* (trial court properly admitted portions of a 911 call, because the call fell within the excited utterance exception to the rule against hearsay in *Tenn. R. Evid. 803(2)*); *State v. Triplett, 2015 Tenn. Crim. App. LEXIS 1050 (Tenn. Crim. App. 2015)* (trial court did not err in permitting an officer to testify as to statements made to him by a witness regarding the location of a gun, as the statements were not offered for the truth of the matter asserted, but rather to explain why the officer searched the particular car he did). *But see* *State v. Donaldson, 2017 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2017)* (trial court erred in excluding testimony by defendant's aunt regarding victim's statements to defendant about giving him venereal disease, as such statements were not offered to prove truth of matter asserted, but to show effect on defendant, and error probably affected judgment, as it would have assisted him in the defense of adequate provocation).

§ 8.04 Rule 803(1). [Reserved]

§ 8.05 Rule 803(1.1). Prior Statement of Identification by Witness

[1] Text of Rule

Rule 803(1.1) Prior Statement of Identification by Witness

A statement of identification of a person made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.

Advisory Commission Comment:

Tennessee recognizes declarations of eye-witness identification as an exception to hearsay exclusion, and the rule generally follows Tennessee precedent. Note that the declarant must also be a witness, affording at least delayed cross-examination as to the extrajudicial statement. Note also, however, that witnesses other than the declarant may testify about the identifying declaration. Perhaps the rule changes Tennessee law in this respect. *See* *Blankenship v. State, 432 S.W.2d 679, 684 (Tenn. Crim. App. 1967)*.

[2] Prior Identifications by Witnesses: Policy

Rule 803(1.1), partially consistent with pre-rules Tennessee law,[156] admits a declarant-witness's prior identification as substantive evidence. Typically this exception is used in a criminal case where the victim views a sketch, lineup, or photographic display, or attends a hearing, and immediately identifies the defendant as the one who committed the crime. Later at trial the witness again clearly identifies the defendant at counsel table as the offender, and then testifies that he or she also identified the defendant at the earlier lineup, photo display, or the like. The evidence of the earlier identification, although admitted under Rule 803(1.1) as substantive evidence, essentially bolsters the credibility of the in-court identification. It should be noted, however, that under Rule 803(1.1) the prior identification is admissible on its own even if the witness's credibility has not been attacked and even if the prior statement was not made under oath.

The trustworthiness of such hearsay declarations is established by the opportunity to cross-examine the declarant, who, under rule 803(1.1), must testify at trial. The evidence may also be more accurate than in-court testimony because the earlier identification was made while the appearance of the person identified was fresher in the declarant's memory. Moreover, the later in-court testimony may be more suggestive than the earlier out-of-court. It may be obvious who the defendant is at trial, sitting with defense counsel, but the out-of-court identification may have occurred in a lineup or photo display where the defendant was one of many possible choices. The primary weakness in this evidence is that there was no cross-examination at the time the earlier identification was made.

Ordinarily, there is no great need for this hearsay exception since the declarant will usually have made an in-court identification. But there will be instances where the declarant, now witness, cannot (or pretends to be unable to) identify the accused in the courtroom. Because the hearsay declaration of identification is

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[156] *See*, *e.g.*, *Blankenship v. State, 432 S.W.2d 679 (Tenn. Crim. App. 1967)* (is hearsay exception for person who made earlier identification, but not for the person who witnessed that earlier identification).

substantive evidence under Rule 803(1.1), there is an extreme need for the out-of-court statement in these rare cases.

[3] Proof

Ordinarily the declarant is the witness who repeats what he or she said at the earlier identification. However, since any witness can repeat the extrajudicial declaration from the stand, the witness may be a police officer rather than the declarant. The officer-witness may testify, "I was at the lineup and I saw and heard the victim-declarant point to the defendant and say, 'He's the one who robbed me.' " The trial judge can exclude the officer's testimony as cumulative under Rule 403 if the declarant testifies about the same prior identification. As discussed in the next section,[157] under Rule 803(1.1) the declarant must personally take the stand to "testify" and be "subject to cross-examination." This is one of the four exceptions in Rule 803 where the declarant's availability is material.[158]

It should be noted that the prior identification can be equivocal and still be admissible under this rule.[159] Some cases even admit the prior identification if the witness recants it.[160] However, if the prior identification is too equivocal or untrustworthy, the court can exclude it pursuant to Rule 401 (the statement is not probative and hence irrelevant) or Rule 403 (the statement has slight probative value which is substantially outweighed by the danger of unfair prejudice).

[4] Elements

[a] In General

The hearsay exception for prior identification, under Rule 803(1.1), contains a number of important, and sometimes unusual, elements. Similarly, the identification may be introduced through a witness who heard the declarant make it, but the declarant must ultimately testify and be subject to cross-examination.[161]

[b] Identification of a Person

Rule 803(1.1) creates a hearsay exception for identification *of a person*. Thus, it does not apply to identification of items, such as a weapon, or animals. However, it may indirectly involve an item if the declarant identifies a person in a photograph[162] or other item.[163]

[c] Made After Perceiving the Person

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[157] *See below § 8.05[4]*.

[158] The declarant must also testify for the past recollection recorded hearsay exception. *Tenn. R. Evid. 803(5)*, in some cases involving children's statements in abuse and related civil cases, *Tenn. R. Evid. 803(25)*, and for prior inconsistent statements, *Tenn. R. Evid. 803(26)*.

[159] *See, e.g., United States v. Hudson, 564 F.2d 1377 (9th Cir. 1977)*.

[160] *See, e.g., United States v. O'Malley, 796 F.2d 891 (7th Cir. 1986)*.

[161] *Cf. State v. Holt, 965 S.W.2d 496, 498–99 (Tenn. Crim. App. 1997)* (police detective testified that declarant told detective that declarant saw defendant drive the stolen vehicle; declarant testified later; detective's testimony admissible as prior identification). *See below § 8.05[4][d]*.

[162] *See, e.g., United States v. Ayala, 289 F.3d 16 (1st Cir. 2002)* (officer testified he arrested four people at stated location then identified a photo of these four people; he made no in-court identification of people in the courtroom).

[163] *See, e.g., United States v. Davis, 181 F.3d 147 (D.C. Cir. 1999)* (agent's drug "buy report" admitted as prior identification because it contained a description of defendant).

The statement of identification must be made *after perceiving* the culprit. This means that the person who made the identification must have personally perceived the person identified. Although the precise meaning of "perceiving" is admittedly confusing, often there will actually be three instances where the declarant "perceived" the culprit. First, the declarant will have seen the accused at, say, the bank during the course of a robbery. The second occurs when the declarant attends a lineup or the like and identifies the defendant as the bank robber. The third instance arises when the declarant testifies in court and points to the accused when asked to identify the bank robber.

Rule 803(1.1), the prior identification hearsay exception, ordinarily applies to the second of these "perceptions." It could also deal with the first instance if, at the robbery, the declarant looked at the robber and said, "Jerrold Beaker is robbing this bank." The observation about Beaker could qualify as a prior identification under Rule 803(1.1) if repeated later at trial. For example, in *State v. Stout*,[164] a co-defendant told Woodall that he saw defendant kill the victim. The co-defendant's statement was held admissible as a prior identification.

The declarant "perceives" by the use of the five senses. Ordinarily, the perception will occur as the result of having seen and identified the person at a lineup or showup procedure. The same would be true of a photographic identification or similar procedure.[165] The identification could also be based on other senses, such as hearing or smell. Thus, Rule 803(1.1) could involve a voice identification or a smell identification of a person.

[d] Declarant Must Testify at Trial

One of the most unusual features of this hearsay exception is that Rule 803(1.1) states that the declarant must testify at the trial in which the prior identification is introduced. Designed to satisfy concerns about confrontation rights of the criminally accused, this rule will eliminate prior identification testimony if the declarant is dead or otherwise unable to testify. It should be noted that the rule requires the declarant to testify, but it does not require the declarant to make an in-court identification during that testimony.

[e] Declarant Must Be Subject to Cross-examination About the Statement

The declarant of a prior identification must both testify and be subject to cross-examination concerning the extrajudicial statement, Rule 803(1.1). Note that the rule states only that the declarant be *subject* to cross-examination; it does not require that cross-examination actually have occurred. If the party against whom the identification is made chooses to bypass cross-examination of the declarant on this issue, the prior identification may nevertheless be used. Similarly, the prior identification can be used even if the declarant denies making or contests the accuracy of the earlier statement[166] and the prior identification is admissible even if the declarant remembers making the identification but cannot recall the basis for that identification.

In *United States v. Owens*[167] a federal prison employee was beaten with a lead pipe. During a lengthy hospitalization, he told an F.B.I. agent that the defendant had hit him. At trial he could not remember who had struck him, but he did recall telling the F.B.I. agent that the defendant had done it. The United States Supreme Court upheld the use of the prior identification. The federal prior identification provision, virtually identical with Tennessee Rule 803 (1.1), requires only that the declarant be "subject to cross-examination concerning the statement."[168] The test is satisfied if the declarant takes the stand, is placed under oath, and

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[164] *State v. Stout, 46 S.W.3d 689 (Tenn. 2001)*. *See also State v. Dotson, 450 S.W.3d 1 (Tenn. 2014)* (stabbing victim identified defendant as the person who stabbed him and killed others in the same home).

[165] The Tennessee language is a rearranged version of FED. *R. EVID. 801(D)(1)(C)*, and federal decisions may be instructive. The federal drafters classified prior statements of identification as nonhearsay. FED. *R. EVID. 801(D)(1)(C)*.

[166] MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE 738–39 (6th ed. 2006). Professor Graham disagrees with this view.

[167] *484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988)*.

responds to questions.[169] Note, however, that the declarant in *Owens* clearly recalled making the identification statement.

[5] Prior Consistent Statements Compared

A prior statement of identification is much more than a prior consistent statement. A prior consistent statement is generally not admissible to bolster the testimony of a witness.[169.1] The reason is a concern the prior consistent statement would influence the jury to decide on the basis of the repetition rather than the in-court testimony, however, a prior consistent statement may be used for a limited purpose: to rehabilitate a witness. The prior consistent statement is only admissible to rehabilitate a witness attacked through impeachment, where the thrust of the attack is recent fabrication of trial testimony.[169.2] Under Tennessee law, a consistent statement made before [=the] motive to fabricate [arose] is admissible to rehabilitate the attacked witness,[170]

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[168] FED. *R. EVID. 801(D)(1)*.

[169] ***484 U.S. at 844***.

[169.1] *State v. Herron, 461 S.W.3d 890, 904 (Tenn. 2015)*.

[169.2] *See State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2019)*, in which the court summarized the three scenarios in which a prior consistent statement is admissible: "As a general rule, evidence of prior consistent statements is inadmissible to rehabilitate an impeached witness. Three exceptions exist. First, prior consistent statements may be admissible to rehabilitate a witness when insinuations of recent fabrication have been made, or when deliberate falsehood has been implied. In this situation, the prior consistent statement is permitted to show that the witness testified consistently with a prior statement made at a time when the witness had no influence or motive to lie. In order to be admissible, the witness's testimony must have been assailed or attacked to the extent that the testimony needs rehabilitating. If admitted for the purpose of rehabilitating a witness, the statement is not hearsay because it is not admitted to prove the truth of the matter asserted. Second, a prior consistent statement may be admitted after a witness has been impeached with a prior inconsistent statement that suggests the witness fabricated testimony or testified based upon faulty recollection. In this situation, a statement made by the witness before the inconsistent statement and which is consistent with the witness's trial testimony is admissible to rehabilitate the witness's credibility. Third, a prior consistent may be admitted when a witness is asked specific questions that make a prior statement appear to be inconsistent with the witness's trial testimony, the rationale being that the prior statement is admissible to place the apparently inconsistent statement into proper context (cites omitted)." *Id. at *74–76*.

[170] The Tennessee Rules of Evidence do not specifically cover rehabilitation of impeached witnesses, but Tennessee law is well-established. *Farmer v. State, 201 Tenn. 107, 296 S.W.2d 879 (1956)*; *Sutton v. State, 155 Tenn. 200, 291 S.W. 1069 (1927)*; *Legere v. State, 111 Tenn. 368, 77 S.W. 1059 (1903)*; *Queener v. Morrow, 41 Tenn. 123 (1860)*. According to Tennessee law, a prior consistent statement is admissible to rehabilitate a witness after insinuations of recent fabrication or deliberate falsehood. *See State v. Meeks, 867 S.W.2d 361 (Tenn. Crim. App. 1993)*; *State v. Benton, 759 S.W.2d 427, 433–34 (Tenn. Crim. App. 1988)* (cannot use videotaped statement as prior consistent statement when in-court testimony was not challenged as being fabricated or falsehood); *State v. Tizard, 897 S.W.2d 732, 746 (Tenn. Crim. App. 1994)* (if opponent attempts to show a witness was motivated to lie or slant testimony, evidence is admissible of a witness's previous consistent statement made before the motive to lie arose); ***State v. Inlow, 52 S.W.3d 101, 106 (Tenn. Crim. App. 2000)*** (a prior consistent statement may be admissible to rehabilitate a witness when insinuations of recent fabrication or deliberate falsehood have been made; it should be noted that *Inlow* may not have involved a prior consistent statement since the prior statement used as such was actually made by the defendant rather than by the witness whose in-court testimony was impeached; a prior consistent statement for rehabilitative purposes should have been made by the witness who was impeached); *State v. Herron, 461 S.W.3d 890 (Tenn. 2015)* (error to allow recording to be admissible as prior consistent statement on direct exam of witness who had not been impeached); *State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2019)* (trial court erroneously admitted prior consistent statements of State's witness on redirect to rehabilitate her credibility, because all of the statements were made after her motive to lie arose); *State v. Sharp, 2019 Tenn. Crim. App. LEXIS 130 (Tenn. Crim. App. 2019)* (where, during cross-examination of witnesses in child abuse prosecution, defense counsel repeatedly insinuated that the children had been coached by to fabricate abuse allegations, trial court did not err in admitting children's forensic interviews as prior consistent statements).

Unlike the Tennessee rule, consistent statements to rebut recent fabrication are nonhearsay in federal courts and admissible as substantive evidence. FED. *R. EVID. 801 (D) (1) (B)*. To qualify under this federal rule, the prior consistent statement must have

but the consistent statement is not substantive evidence. It is hearsay under Tennessee law. Only the in-court testimony is substantive evidence.

A good example is *State v. Meeks*,[171] a kidnapping and robbery case. The victim testified that shortly after his escape he told his mother that defendant Billy Meeks was one of his kidnappers. On cross-examination, however, defense counsel confronted the victim with the victim's preliminary hearing testimony which stated the victim had not told his mother that Meeks was involved. In response, the prosecutor then called the victim's mother to testify that her son, the victim, had indeed told her that Meeks was one of the kidnappers. According to the Tennessee Court of Criminal Appeals, the mother's rebuttal testimony was proof of a prior consistent statement admissible to corroborate the victim's in-court testimony that had been the subject of impeachment. The victim's prior statement to his mother was consistent with his in-court testimony and was relevant to negate the cross-examination attack on his credibility. The jury properly had been instructed to use the mother's testimony only as rebuttal and not for the truth. Since the victim testified at the trial and was subject to cross-examination, it is also possible that the victim's earlier hearsay statement to his mother would satisfy Rule 803(1.1) and be admissible as substantive evidence (as well as to rehabilitate the impeached victim).

Another illustration is *State v. Hodge*,[172] where the sex abuse victim, a minor, told two school officials about the defendant's misconduct. Each school official was permitted to testify about the victim's statements. The Tennessee Court of Criminal Appeals held that a prior consistent statement was admissible to rehabilitate a witness after insinuations of recent fabrication or deliberate falsehood. These tests were satisfied because, during defense counsel's cross-examination of the victim, the victim was repeatedly asked whether she had ever told anyone of the abuse and whether she told everything she related at trial to the people she had spoken with about the sexual misconduct.

A related rule in Tennessee allows a prior consistent statement to be introduced to respond to impeachment by a prior inconsistent statement.[173] The consistent statement must have been made before the inconsistent one.

Similarly, if a witness is impeached by a suggestion that the witness's recollection was faulty, the court can admit a prior consistent statement made soon after the event when the facts were fresher in the witness's mind.[174] The prior consistent statement is relevant on whether the witness's memory of the event was inaccurate.

Since a witness may have made several prior consistent statements, the trial judge may be presented with a parade of witnesses who repeat the prior consistent statement. This raises the danger that the jury could be "influenced to decide the case on the repetitive nature of the contents of the out-of-court statements instead of on the in-court, under-oath testimony."[175] Accordingly, trial courts should be mindful of the need to limit credibility bolstering evidence to that which they, in their discretion, determine will not be unduly prejudicial to the opponent of such evidence.[176]

Because of this danger and the fact that the repetitive proof at some point becomes wasteful of everyone's time, the trial judge has the authority to impose reasonable limits on this repeated testimony. Eventually it

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been made before the charged recent fabrication or improper influence or motive. *Tome v. United States, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995)*.

[171] *867 S.W.2d 361 (Tenn. Crim. App. 1993)*.

[172] *989 S.W.2d 717, 724–25 (Tenn. Crim. App. 1998)*. Note that this testimony would not be admissible as fresh complaint under Tennessee law since the victim was a minor. *State v. Livingston, 907 S.W.2d 392 (Tenn. 1995)*. *See below § 8.07[7]*.

[173] *State v. Tizard, 897 S.W.2d 732 (Tenn. Crim. App. 1994)*; *State v. Belser, 945 S.W.2d 776, 786 (Tenn. Crim. App. 1996)* (prior consistent statement admissible to place in context alleged inconsistencies in other statements).

[174] *See*, *e.g.*, *State v. Tizard, 897 S.W.2d 732, 746 (Tenn. Crim. App. 1994)*.

[175] *State v. Tizard, 897 S.W.2d 732, 747 (Tenn. Crim. App. 1994)*.

[176] *Id.*

becomes irrelevant under Rule 401 as the repetition adds nothing to the existing proof, or it can be excluded under Rule 403 as unfairly prejudicial or the "needless presentation of cumulative evidence." Rule 611(a) specifically authorizes the trial court to control "the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel."

The court may also impose reasonable scope limits on prior consistent statements. In *State v. Livingston*,[177] the prosecution in a child sex abuse case offered an audiotape (of the child victim describing in detail the crime) as a prior consistent statement. The Tennessee Supreme Court held that the audiotape was not admissible because the child's credibility was only "mildly questioned on cross-examination" and this audiotape detailing the abuse exceeded the scope of evidence appropriate to rehabilitate the victim.

In contrast, a prior statement of identification under Rule 803(1.1) is admissible as substantive evidence under a hearsay exception. Many times the in-court testimony and prior identification will be identical. Yet we could have a scenario in which the victim is called but either cannot identify the person sitting at the defense table or positively says the accused is not the perpetrator. A police officer could testify that the victim picked the accused out of a lineup. That identification is admissible to convict.[178]

[6] Constitutional Limitations

The use of prior identification in criminal cases raises a number of constitutional issues that are beyond the scope of this book. In general terms, the prior identification may be inadmissible in a criminal case if made without counsel after the initiation of certain criminal proceedings.[179] Moreover, the pretrial identification procedures may be so suggestive and unfair that due process bars evidence of the identification.[180] In extraordinary cases, the pretrial identification may be so suggestive that the live in-court identification, if based on the earlier defective lineup, is also excluded.[181]

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[177] *907 S.W.2d 392 (Tenn. 1995)*.

[178] MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE 738 (6th ed. 2006).

[179] *See*, *e.g.*, *United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)*; *California v. Gilbert, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)*.

[180] *See*, *e.g.*, *Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)*.

[181] *See*, *e.g.*, *Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)*.

§ 8.06 Rule 803(1.2). Admission by Party-Opponent

[1] Text of Rule

Rule 803(1.2) Admission by Party-Opponent

The following are not excluded by the hearsay rule:

A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.

Advisory Commission Comment:

Most of the rule embodies Tennessee common law. In part (D), though, present law is extended to clearly allow an agent's post-accident declarations to come in against the principal if the subject matter of the declarations is "within the scope of the agency." A driver who tells bystanders about driving mistakes may face those declarations in court, and likewise the driver's employer may have to deal with these vicarious admissions at trial. In the absence of a rule such as that proposed, Tennessee has excluded such declarations. *Citizens' Street R.R. Co. v. Howard, 102 Tenn. 474, 52 S.W. 864 (1899)*.

Other requirements for vicarious admissions are (1) that the agency relationship exist at the time of a declaration and (2) that the declarant's statement be against his or her own interest. The latter proviso is to prevent agents and employees from gratuitously harming superiors for their own benefit.

The rule at part (F) retains common law admissibility of declarations by predecessors in title.

The final sentence is intended to abolish the distinction between evidentiary (unsworn) and judicial (sworn) admissions. Unless made conclusive by statute or another court rule, such as *TEEN. R. CIV. P. 36.02* on requests for admission, party admissions are subject to being explained away by contradictory proof. But the final sentence is not intended to affect the doctrine of judicial estoppel. That doctrine involves two separate lawsuits and bars contradiction by a party in the second suit of that party's sworn statement in the first suit. *See* *Marcus v. Marcus*, 993 S.W.2d 596 (Tenn. 1999). In contrast the last sentence of this evidence rule contemplates a single lawsuit in which a party's admissions, sworn or not, can be contradicted. [Amended effective July 1, 2004.]

This rule changes the law as stated in Tennessee decisions excluding party admissions phrased in terms of fault. *See, e.g.,* *King v. Leeman, 30 Tenn. App. 206, 204 S.W.2d 384 (1946)*, excluding the plaintiff's admission that a driver other than the defendant was "to blame." Such an admission, even though in opinion form, is competent evidence under Rule 803(1.2).

[2] Overview of Admissions of Party-Opponent

Rule 803(1.2) provides six varieties of the hearsay exception for admissions of a party opponent. Since this exception often involves the declarant-party's own statement used against that same party, the trier of fact frequently will give considerable weight to evidence falling in this category. Yet it must be stressed that an admission covered by this exception is not conclusive, Rule 803(1.2). The admission is *some* evidence that the jury may consider and give appropriate weight. While many admissions will be quite influential in the outcome of the case, others will be disregarded by the trier of fact.

The underlying theory is that in an adversary system it is fair to permit the trier of fact to consider a party's statements in resolving issues about that party. We are all considered to be responsible for our own communications and for those of certain others for whom we are deemed accountable. Since by definition the declarant is a party in the case, he or she can testify and explain, amplify, or deny the statement. A related rationale is that the admission is bottomed on concepts underlying waiver and estoppel, allowing a party to rely on the statements of the opponent.[182]

Irrespective of the theory, it is clear that trustworthiness is not a separate requirement for an admission.[183] However, it may be excluded under Rule 403 if it is so unreliable that its probative value is minimal.[184]

The six varieties of admission share several common features. By definition, each involves a statement by one party (or someone else whose statement Rule 803(1.2) permits to be viewed as that party's statement) introduced by another party and used against the first party. This means that party A cannot introduce A's own statement as an admission to help A's case. Party B, however, may use A's admission against A.[185]

Another common feature is that admissions are substantive evidence of their contents. They are not used simply to impeach. And it does not matter that in the admission the declarant stated an opinion rather than a fact. The penultimate sentence in Rule 803(1.2) puts that debate to rest, as discussed below.[186] Similarly, it does not matter that the declarant has no firsthand knowledge of the fact or opinion declared, for the firsthand knowledge and personal opinion rules do not apply to admissions.[187] There is also no requirement that the party be shown to be competent as a witness. An admission may be used even if the party does not take the stand. As with all exceptions within Rule 803, the declarant of an admission need not be unavailable. The party declarant is usually available, although (especially in criminal cases) may choose not to testify.

Despite the liberal admissibility of party admissions, there are limits that occasionally surface when objections are made based on other evidence rules. For example, in a federal case a party admission was excluded because the statement included an expert opinion that the witness was not qualified to give.[188]

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[182] *Jewel v. CSX Transportation, 135 F.3d 361 (6th Cir. 1998)*.

[183] *Id.* (admission by party who had suffered permanent brain damage and retrograde amnesia, causing her to have no memory of incident she had described).

[184] *See* *United States v. Singleterry, 29 F.3d 733, 739 (1st Cir. 1994)* (dictum).

[185] *See, e.g.,* *United States v. Bond, 87 F.3d 695, 699 (5th Cir. 1996)* (defendant may not introduce own taped statement as an admission, which must be offered by adversary party).

[186] *See below* *§ 8.06[10]*.

[187] *See* *Tenn. R. Evid. 602* Advisory Commission Comment.

The six varieties of admissions can be classified into two subgroups: those involving a statement by the party opponent personally and those involving a statement of someone else that is attributed to the party opponent. The first category is represented by Rule 803(1.2)(A), which provides a hearsay exception for a statement by the party opponent in a personal or representative capacity.[189] The remaining five examples of admissions comprise the second category because they all involve statements of others that are considered admissions against the party opponent.[190]

[3] Party's Own Statement

[a] In General

Rule 803(1.2)(A) provides a hearsay exception for a statement offered against a party that is "the party's own statement in either an individual or a representative capacity." This means that any assertion a party spoke,[191] wrote,[192] or did may be used against that party as an admission.[192.1]

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[188] *Aliotta v. National R.R. Passenger Corp., 315 F.3d 756, 763 (7th Cir. 2003)*. *See also* *Davis v. Odeco, Inc., 18 F.3d 1237, 1247 (5th Cir. 1994)* (excluding forms plaintiff filled out about own health; plaintiff was not qualified as an expert on medical issue).

[189] *See below* *§ 8.06[3]*.

[190] *See below* *§§ 8.06[4]–[9]*.

[191] *See*, *e.g.*, *State v. Binion, 947 S.W.2d 867, 873 (Tenn. Crim. App. 1996)* (defendant's statements to friend admitting that defendant committed attempted rape are admissible as party admissions); *United States v. Goodchild, 25 F.3d 55, 61 (1st Cir. 1994)* (telephone call); *United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994)* (confession to police); *United States v. Haun, 90 F.3d 1096 (6th Cir. 1996)* (statements in deposition); *United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993)* (guilty plea); *State v. Wilson, 164 S.W.3d 355, 364 (Tenn. Crim. App. 2003)* (homicide defendant's statement that she would cremate the victim and put his ashes next to her bed to remind her not to remarry was admissible as an admission to prove her poor relationship with the victim and as proof that she wanted the defendant cremated to destroy evidence of how the homicide occurred). *State v. Jones, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 338 (Tenn. Crim. App. June 5, 2019)* (defendant's video-recorded statement to police, in which he continued to deny knowledge of the offense, was an admission by a party-opponent and properly admitted by the trial court; the State provided independent, direct evidence establishing the falsity of defendant's statements, enabling the jury to infer consciousness of guilt); *Logan v. Estate of Cannon, 2016 Tenn. App. LEXIS 708 (Tenn. Ct. App. 2016)* (statement of what witness overheard a party-opponent say during a telephone call was an admission and, therefore, not hearsay); *Dep't of Children's Servs. v. Hood, 338 S.W.3d 917, 923–24 (Tenn. Ct. App. 2009)* (statement criminal accused made while testifying in prior criminal trial is admissible against same person in subsequent case to terminate his parental rights; is admission of party opponent); *State v. Brown, 373 S.W.3d 565 (Tenn. Crim. App. 2011)* (criminal accused asked jail guard, "Do you honestly believe there is anything wrong with raping a child?"; this was a statement of a party opponent (the criminal accused) admissible by the state as a party admission); *State v. Smoot, 2018 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. 2018)* (defendant's statements to his wife, in which he denied having an affair with the victim, were admissable as party-opponent admissions under *Tenn. R. Evid. 803(1.2)(A)* in his trial for first-degree murder).

[192] *See, e.g.*, *Benson v. Tennessee Valley Elec. Coop., 868 S.W.2d 630 (Tenn. Ct. App. 1993)* (interrogatory); *United States v. Disantis, 565 F.3d 354 (7th Cir. 2009)* (statements in police reports); *United States v. Spiller, 261 F.3d 683, 690 (7th Cir. 2001)* (handwritten drug ledgers). In *Wilder v. Tennessee Farmers Mut. Ins. Co., 912 S.W.2d 722 (Tenn. Ct. App. 1995)*, the defendant insurance company in an arson-fraud case attempted to prove the plaintiff-insured committed fraud in claiming fire insurance benefits. The defendant tried to prove this by introducing into evidence several sworn statements the plaintiff had made. The Court of Appeals upheld the trial court's decision to exclude them.

Of course the Court of Appeals is correct in that admissions are not per se admissible. But absent some other valid reason, such as the statements contained evidence inadmissible under Rule 403, it is submitted that they should have been admissible as party admissions in *Wilder*. The Court of Appeals suggests the statements could have been read into evidence as admissions, but does not discuss the admissibility of the actual written statements themselves. It is submitted that the written statements

Of course the declarant must be a party to the litigation. The Tennessee Supreme Court has opined that a party is someone who has a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment.[193] Under this definition, the crime victim, though given a number of rights under Tennessee law, is not considered a party in a criminal case.[194]

The rule is simple and absolute, although this Tennessee hearsay exception, differing conceptually from the federal rule,[195] has many particular applications.

Contrary to some common misconceptions, it does not matter that the statement was self-serving when made but turns out to be harmful by the time of trial. Accordingly, the misleading term, "admission against interest," should be banned from courtrooms and appellate opinions. Under Rule 803(1.2)(A), it does not matter whether the declaration was self-serving when made.[196] Moreover, the admission need not be inculpatory, against interest, or even contrary to the trial position of the party who made it.[197] If the opponent wants to use it, the statement qualifies as an admission and satisfies the hearsay rule. Of course,

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themselves should have been admitted as admissions under Rule 803(1.2) on the issue of whether the plaintiff had committed fraud. The admissions hearsay exception clearly embraces written statements and permits them to be entered into evidence.

[192.1] Rule 803(1.2)(A) encompasses "anything the opposing party said or wrote out of court", regardless of whether the statement was "disserving or self-serving" when it was made. *State v. Jones, 2019 Tenn. Crim. App. LEXIS 338, *32 (Tenn. Crim. App. June 5, 2019)*, *quoting* *State v. Lewis, 235 S.W.3d 136, 145 (Tenn. 2007)*.

[193] *State v. Flood, 219 S.W.3d 307, 314 (Tenn. 2007)* (*citing* *City of Chattanooga v. Swift, 442 S.W.2d 257, 258 (1969)*.

[194] *State v. Flood, 219 S.W.3d 307, 314 (Tenn. 2007)* (crime victim does not meet the definition of a party). *State v. Howard, 2015 Tenn. Crim. App. LEXIS 627 (Aug. 4, 2015)* (rape victim is not a party for purposes of the admission hearsay exception), *aff'd on this ground, rev'd on other grounds*, by *State v. Howard, 504 S.W.3d 260 (Tenn. 2016)*.

[195] FED. *R. EVID. 801(D)(2)* treats admissions as a form of nonhearsay, contrary to the common law and current Tennessee law. As the late Prof. Irving Younger observed, "The explanation for that lies in a bit of intellectual foppery on the part of the drafters of the Federal Rules," who adopted Wigmore's analysis. IRVING YOUNGER, HEARSAY (1988). Prof. Younger was right; the traditional grouping of admissions into a hearsay exception is more convenient for trial lawyers, despite Dean Wigmore's intriguing argument. 4 WIGMORE ON EVIDENCE 4–5 (Chadbourn rev. 1972). This hearsay exception classification in current Tennessee Rule 803(1.2) rejects the pre-rules view advanced in *State v. Jones, 598 S.W.2d 209, 223 (Tenn. 1980)*, where the Tennessee Supreme Court, in dictum, stated that it preferred to treat an admission as nonhearsay rather than as a hearsay exception.

[196] The misunderstanding about this issue stems from confusion about another hearsay exception, the declaration against interest. *See below* *§ 8.37[2]*. A declaration against interest must have been against the declarant's interest when the statement was made, Rule 804(b)(3). However, an admission of a party opponent need not be against interest when made, though it is ordinarily against the declarant party's best interests when used in court by the other side. *See, e.g.,* *State v. Lewis, 235 S.W.3d 136, 145 (Tenn. 2007)* (an admission need not be against the interest of the declarant when the statement was made). *See generally* Donald F. Paine, *Paine on Procedure: Admissions "Against Interest,"* ***43 Tenn. B.J. 32 (Apr. 2007)***. *But see* *State v. Litton, 161 S.W.3d 447, 457 n.5 (Tenn. Crim. App. 2004)* (continuing use of term "admission against interest"). *See also* *State v. Jones, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 338 (Tenn. Crim. App. June 5, 2019)* (defendant's self-serving statements in videotaped interview were properly admitted into evidence under Rule 803(1.2)(A)).

[197] *United States v. Reed, 227 F.3d 763, 769 (7th Cir. 2000)*.

the declarant cannot use his or her own statement as an admission.[198] The court may instruct the jury on the proper way to assess the weight to be given an admission.[199]

Expungement. The rule admitting party admissions may be inapplicable for certain party statements given in proceedings or documents that were the subject of an expungement under Tennessee law. For example, in *Pizzillo v. Pizzillo*[200] the defendant was given pretrial diversion for sexual battery. Pursuant to statute,[201] he entered a memorandum of understanding in which he admitted unlawful sexual contact with his daughter. Subsequently the trial court dismissed the charges and expunged the records. The Tennessee Court of Criminal Appeals held that the pretrial diversion statute specifically barred use of the party admissions in the memorandum of understanding if there were later criminal trials for the same charges[202] and the general expungement statute[203] barred introduction of the memorandum in a civil suit concerning child visitation.

Corroboration. Tennessee law has long held that a criminal conviction may not be based solely on the defendant's confession.[204] This rule, required by due process, is designed to ensure minimal protections that an untrustworthy confession by itself will not lead to a criminal conviction.[205] The corroboration, however, need not be substantial. Only "slight" corroboration of the confession is needed.[206] Circumstantial evidence may furnish sufficient corroboration.[207] The corroborating evidence need not be as convincing as that required to establish guilt but it must be at least slight evidence that a crime was committed at the

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[198] *State v. Turnmire, 762 S.W.2d 893, 897 (Tenn. Crim. App. 1988)* (defense witness not permitted to repeat defendant's prior statements to witness; statements were self-serving and did not qualify as admission since were not used by opposing party; no discussion of other possible hearsay exceptions). *Riad v. Erie Ins. Exch., 436 S.W.3d 256, 267 (Tenn. Ct. App. 2013)* (party cannot offer statement as an admission if the statement is that party's own statement used to help that party's case), *superseded by statute, as stated in Lindenberg v. Jackson Nat'l Life Ins. Co., 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. 2014))*. At the time *Riad* was decided, punitive damages were available in breach of insurance claim cases. *Tenn. Code Ann. § 56-8-113* now governs damages in such claims. *See also*, *State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. 2019)* (although the State may admit a defendant's statement as an admission by party-opponent under *Tenn. R. Evid. 803(1.2)*, a defendant cannot admit his own statement under this exception).

[199] *State v. Litton, 161 S.W.3d 447 (Tenn. Crim. App. 2004)* (approving jury instruction on weight to give admission).

[200] *884 S.W.2d 749 (Tenn. Ct. App. 1994)*.

[201] *Tenn. Code Ann. § 40-15-105* (Supp. 2010). *See also Tenn. Code Ann. § 40-35-313* (Supp. 2010) (judicial diversion).

[202] *See Tenn. Code Ann. § 40-15-105 (a)* (Supp. 2010).

[203] *See Tenn. Code Ann. § 40-32-101* (Supp. 2010).

[204] *See*, *e.g. Ashby v. State, 139 S.W.872, 875 (Tenn. 1911)*; *State v. Smith, 24 S.W.3d 274, 281 (Tenn. 2000)*; *State v. Hill, 333 S.W.3d 106, 134 (Tenn. Crim. App. 2010)*.

[205] *State v. Smith, 24 S.W.3d at 281*.

[206] *State v. Brock, 327 S.W.3d 645, 702 (Tenn. Crim. App. 2009)*; *Ricketts v. State, 241 S.W.2d 604, 606 (Tenn. 1951)*; *State v. Hill, 333 S.W.3d 106, 134 (Tenn. Crim. App. 2010)*.

[207] *State v. Brock, 327 S.W.3d at 703*; *see also State v. Smith, 24 S.W.3d 274, 281 (Tenn. 2000)* (inconsistent statements of assault victim are sufficient to corroborate confessions).

place listed in the indictment.[208] A defendant may even corroborate his or her out-of-court testimony by in-court testimony.[208.1]

[b] Representative Capacity

Rule 803(1.2)(A) provides a hearsay exception when a party serves in a representative capacity and makes a statement that is used against the party in that capacity. This exception applies to such representatives as agents, trustees, guardians, and administrators. It applies even when the person was not acting in a representative capacity when the statement was made, as long as the statement was pertinent to that capacity. For example, if a trustee sues or is sued, the trustee's statement can be an admission whether the trustee spoke as an individual or as the official representative of the trust when the statement was made. If only the trust and not the trustee is named as a party, under Rule 803(1.2)(A) the trustee may still be viewed as a party.[209] The lawyer offering the trustee's statement may also be able to use Rules 803(1.2)(C) or (D) to admit the evidence.

[c] Guilty Pleas

If a criminal defendant enters a guilty plea that is not withdrawn, he or she makes an admission when acknowledging responsibility for the crime. Under Tennessee law, a person may not be convicted solely on the basis of a confession,[210] but only slight corroboration of the confession is necessary to sustain a conviction.[211]

Proof of the defendant's unwithdrawn guilty *plea* must be distinguished from proof of the *conviction* that is entered after the plea. Rule 803(22) creates a hearsay exception for a criminal conviction to a crime punishable in excess of one year in jail or prison. It should be obvious that the hearsay exception in Rule 803(22) is not consistent with the admissions exception of Rule 803(1.2)(A). The latter contains no limit on the use of admissions involving pleas for crimes punishable by a sentence of one year or less. Thus, a literal reading of these two rules would suggest that proof *of a conviction* for minor crimes is inadmissible (Rule 803(22)), but proof of a guilty plea for such crimes is admissible as an admission (Rule 803(1.2)).[212]

[4] Adoptive Admissions

[a] In General

Rule 803(1.2)(B) provides a hearsay exception for "a statement in which the party has manifested an adoption or belief in its truth." This exception admits a statement by X to be used as an admission of Y if Y is a party and has manifested an adoption or belief that X's statement is true.

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[208] *State v. Hill, 333 S.W.3d 106, 134 (Tenn. Crim. App. 2010)*.

[208.1] *State v. Frausto, 463 S.W.3d 469, 480 (Tenn. 2015)*.

[209] *Cf. Estate of Shafer v. Commissioner, 749 F.2d 1216, 1219 (6th Cir. 1984)*.

[210] *See*, *e.g.*, *Ashby v. State, 124 Tenn. 684, 139 S.W. 872 (1911)*; *State v. Ellis, 89 S.W.3d 584, 600 (Tenn. Crim. App. 2000)* (*corpus delicti* cannot be established by confession alone).

[211] *See*, *e.g.*, *State v. Lord, 894 S.W.2d 312, 317 n.1 (Tenn. Crim. App. 1994)*; *State v. Ellis, 89 S.W.3d 584, 600 (Tenn. Crim. App. 2000)* (only slight evidence of *corpus delicti* is necessary to corroborate a confession).

[212] It could be argued that although technically correct, this interpretation would frustrate Rule 803(22)'s policy of not admitting misdemeanor convictions because of their unreliability. In order to assure that admissions are as reliable as convictions, courts could refuse to accept admissions, through guilty pleas, for crimes that would not be admitted if proof were a criminal conviction offered pursuant to Rule 803(22). *See* MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE 778 (6th ed. 2006). *See above §§ 4.10[2]–4.10[8]*.

It is sometimes difficult to determine whether an adoption occurred. The key is whether an adoption was intended. The person arguing that the statement was adopted has the burden of proving that the adoption occurred. Of course, no such adoption occurs if the party expressly disavows or disagrees with the statement. And there is no adoption in many circumstances if the party did not hear, understand, and accede to the statement.[213]

[b] Express Adoption

Adoptive admissions can be express or, more frequently, implied. An express adoption occurs when the party specifically indicates that the party adopts another's statement or believes another's statement is true. An express adoption can be retrospective ("I agree with what you said yesterday"), concurrent ("I agree with what you are saying" (or "just said")), or prospective ("I agree with whatever you say about the accident").

Sometimes the adoption is obvious but not stated directly. For example, in a federal case a child abuse victim made statements to an F.B.I. agent in the defendant's presence.[214] The defendant heard the statements, looked at the victim, apologized, and promised not to do it again. The court found that defendant's statements meant he admitted the truth of the victim's statement and adopted it.

Each adoptive admission case must be evaluated carefully to assess whether an apparent adoption is an actual adoption. In an illustrative federal case,[215] a defendant signed a statement handwritten by an immigration official after an interview with the defendant. The appellate court held that the report, though signed by the defendant, was not an adoptive admission because the defendant had questionable English language skills and there was insufficient proof he read (or could have read) it before signing it.

[c] Implied Adoption

An implied adoption occurs when a party learns about another's statement and takes some action that can be viewed as adopting the content of the statement. For example, in a federal case a university appointed a grievance committee to investigate discrimination allegations.[216] The committee issued a report making certain recommendations. When the university implemented the recommendations, the court found that it impliedly adopted the report, which was then admissible against the university as an admission.

Issues of implied adoption arise in insurance litigation where a beneficiary submits a doctor's records. Does the beneficiary adopt the doctor's statements? If there is no qualification when the record is submitted, and if it is clear that the patient agrees with the physician's assessment, the doctor's statements are probably adoptive admissions against the beneficiary. On the other hand, pre-rules decisions in Tennessee refused to find an admission by adoption when a beneficiary articulated objections to a doctor's conclusions.[217] Presumably those precedents would be persuasive under new Rule 803(1.2)(B), especially because insurance policies generally force the beneficiary to furnish medical records. Still, the cautious lawyer will review records carefully and make plain any disavowals in order to avoid having the records used as admissions of the client.

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[213] *United States v. Monks, 774 F.2d 945, 950 (9th Cir. 1985)*.

[214] *United States v. Harrison, 296 F.3d 994, 1001 (10th Cir. 2002)*.

[215] *United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002)*.

[216] *Pilgrim v. Trustees of Tufts College, 118 F.3d 864 (1st Cir. 1997)*.

[217] *See National Life & Acc. Ins. Co. v. Turner, 159 Tenn. 130, 17 S.W.2d 13 (1929)* (illiterate plaintiff did not know contents of doctor's statement and repudiated when told); *Home Beneficial Ass'n v. McClain, 20 Tenn. App. 24, 95 S.W.2d 53 (1935)*; *National Life & Acc. Ins. Co. v. Neal, 9 Tenn. App. 451 (1928)* (beneficiary should notify insurer of objections before trial, but judgment for beneficiary upheld because company introduced hospital records conflicting with proof of death which beneficiary submitted).

Another example occurred in a federal case in which a corporation distributed to its business associates newspaper articles describing the corporation's financial situation.[218] The court held that the corporation adopted the newspaper articles when it sent them out. By contrast, the mere act of hosting web content does not constitute an adoption of the content hosted on the website.[218.1]

Does a party adopt, by implication, evidence the party introduced at a prior trial? General authority supports the view that documents introduced at a prior proceeding are adoptive admissions, unless the context indicates that no adoption was intended.[219] The direct testimony of a party's witness at a prior proceeding may also be an adoptive admission.[220]

[d] Adoption by Silence

In certain circumstances a party can adopt another person's statement by not saying anything when the other person makes the statement later introduced into evidence. These tacit admissions occur when a declarant by silence[221] implicitly adopts another's assertion or accusation. This can occur in countless ways, each depending on the unique facts of the case. One way is when a party listens to another person say something, then speaks in a way that incorporates or builds on the earlier statement. An example is a federal bribery case where A said that X wanted a payoff and the defendant asked how much. When A said $10,000, the defendant agreed. The defendant's responses were deemed to adopt A's statements, thus establishing an agreement to bribe the agent.[222]

When the adoption is literally by silence, several obvious requirements must be satisfied, assuming no *Miranda* or other constitutional problems, as described below. First, the party against whom it is used must have heard and understood the other person's statement. Second, the subject matter must be within the knowledge of that party. Third, the party must have been physically able to communicate a clarification or disagreement. Finally, the circumstances must have been such that the party would probably have responded if he or she disagreed with the statement.[223]

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[218] *Wagstaff v. Protective Apparel Corp., 760 F.2d 1074 (10th Cir. 1985)*; *see also Alvord-Polk, Inc., v. F. Schumacher & Co., 37 F.3d 996 (3d Cir. 1994)* (statements were adopted by association when it published them in its newsletter).

[218.1] *See Parker v. Winwood, 938 F.3d 833 (6th Cir. 2019)* (in the context of statements by party opponents, merely hosting a document on a web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content; although posting a statement on a webpage might imply one's general agreement with it, Fed. *R. Evid. 801(d)(2)(B)* requires an actual manifestation of one's adoption of a statement or belief in it).

[219] *Cf. Brownko Int'l, Inc. v. Ogden Steel Co., 585 F. Supp. 1432 (S.D.N.Y. 1983)* (one company's minutes introduced by another company in arbitration were not adopted by offering party); *United States v. Warren, 42 F.3d 647, 655 (D.C. Cir. 1994)* (officer's affidavit attached to criminal complaint filed in a case is adoptive admission admissible against government).

[220] McCormick On Evidence 454 (6th ed. 2006). Perhaps a party who calls a hostile witness should not be held to adopt even direct testimony, and that may hold true for the direct testimony of a turncoat witness who must be impeached by the calling lawyer.

[221] This silence can be either hearsay, requiring an exception, or nonhearsay. Silence can be hearsay because silence is a form of conduct which, in some instances, is intended as an assertion, and therefore is hearsay requiring this exception. On the other hand, if silence is not an assertion, under Rule 801(a) it is not a statement and therefore is not hearsay. *See above § 8.01[4]*.

[222] *United States v. Shulman, 624 F.2d 384 (2d Cir. 1980)*. The co-conspirators exception may also have been applicable. There may also have been a non-hearsay verbal act.

[223] *See, e.g.*, *United States v. Duval, 496 F.3d 64 (1st Cir. 2007)* (informant testified that codefendant in defendant's presence said he and defendant wanted to sell firearms; conversation was in a small room and defendant remained silent; was adopted admission) (also possibly verbal act and co-conspirator's admission).

A jury instruction on admission by silence is available. Tenn. Pattern Jury Instructions-Civil 2.23 (Snyder ed. 2006).

Traditional examples of tacit admissions are silence in the face of a damning accusation (leaving *Miranda* considerations aside)[224] or failure to respond to a bill in a business transaction.[225]

Whether these illustrations are analyzed as hearsay or nonhearsay is of little practical importance.[226]

A good example is *State v. Black*,[227] in which a murder defendant made a tacit admission when he responded, "Huh," after being told over the telephone that he should kill himself if he was planning on committing a murder-suicide. The trial court properly held that the defendant made a tacit admission because the record clearly identified the defendant as the target of an accusation, the defendant knew he was the object of the reference, the accusation was incriminating, and the defendant did not deny or object to the accusation.

[5] Authorized Admissions

[a] In General

This third category of the admissions exception is a "statement by a person authorized by the party to make a statement concerning the subject," Rule 803(1.2)(C). Since this rule places no restrictions on who can make an authorized admission, the person can be a party's lawyer, business associate, employee, agent, friend, relative, or even casual acquaintance. By laying a foundation that one person had authority to speak or write on behalf of a party, the trial lawyer can place in evidence the authorized declarations for use against that party.

The authority to make an authorized admission may be either express or implied, but agency as well as evidence principles require that proof of authority come from a source other than the agent's extrajudicial statement itself.[228] Any other proof should suffice, including the agent's in-court testimony; it is only the out-of-court statement that is incompetent for this purpose.

[b] To Whom Statement Communicated

Another issue is whether the authorized agent's statement must be communicated to an outsider, or whether it can be communicated only to the principal or another agent. The language of Rule 803(1.2)(C) appears to be broad enough to make all such statements admissible, and that is the scholarly consensus as to identical federal language.[229] For example, if a principal authorizes X to make a statement only to the principal, X's statement to a third party is admissible against the principal even though the principal never intended for X to speak to third parties.

[c] Limited Subject Matter

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[224] Silence does not constitute an admission if *Miranda* warnings have been given, but may be so used, even after arrest, when no such warnings have been given. *See* *Fletcher v. Weir, 455 U.S. 603 (1982)*. *But see* *United States v. Whitehead, 200 F.3d 634, 638 (9th Cir. 2000)* (government may not use defendant's post-arrest, pre-*Miranda* silence as admission). A sentencing court may not draw an adverse inference from the defendant's silence in determining facts about the crime which bear upon the severity of the sentence. *State v. Souder, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002)*.

[225] McCormick On Evidence 457 (6th ed. 2006).

[226] Flight, failure to call witnesses or produce evidence, and obstruction of justice are often nonhearsay under Rule 801(a) because frequently they are not assertive conduct and thus are not used to prove the truth of the matter asserted therein.

[227] *815 S.W.2d 166 (Tenn. 1991)*.

[228] *Frank v. Wright, 140 Tenn. 535, 205 S.W. 434 (1917)*.

[229] McCormick On Evidence 451 (6th ed. 2006); Michael H. Graham, 3 Handbook Of Federal Evidence 814 (6th ed. 2006); Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, 4 Federal Rules Of Evidence Manual 801-45 (9th ed. 2006).

Rule 803(1.2) (C) places an important restriction on the authorized statement. The person must have the authority to speak "concerning the subject." Some people are authorized to speak on some subjects but not others. The hearsay exception of Rule 803(1.2)(C) applies only to statements in the former category.

[d] Lawyers

Lawyers are agents and have *prima facie* authority to speak for their clients through pleadings and negotiations.[230] But the scope of that authority is limited by the scope of the client's manifestation of consent for counsel's services.[231] In *Worrell v. Worrell*,[232] plaintiffs argued that defendant's former lawyer made an admission against the defendant when the attorney made certain statements during negotiations with the plaintiffs in a will contest. The Tennessee Court of Appeals held that the issue depended on the scope of authority the defendant-client gave to the lawyer. Since the record was inadequate to determine this issue, the Court of Appeals held that the plaintiffs had not established the necessary authority to satisfy Rule 803(1.2)(C).

Another area where lawyers may be authorized to speak for their clients is a release. An attorney's execution of a release would require the client's express permission,[233] but most releases are signed by clients.

[e] Partnership

The Revised Uniform Partnership Act provides that, in general, each partner is an agent of the partnership.[234] A partner's act after dissolution binds the partnership only if "appropriate for winding up the partnership business."[235]

[6] Agents' and Employees' Admissions

[a] In General

Rule 803(1.2)(D), changing pre-rules Tennessee law,[236] provides an important hearsay exception for the statements of a party's agents or employees. These statements are admissible against the party as an admission. The underlying theory for this expansive hearsay exception is that in an adversary process it is fair to hold a party accountable for statements of agents and employees, who may well be able to provide the trier of fact with the most accurate information about an event. Of course the principal or employer, against whom the statements are admitted, is in a position to find out about the content and context of these statements and can explain, deny, or clarify them on the witness stand.

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[230] McCormick On Evidence 452 (6th ed. 2006). *See also* Simmons v. O'Charley's Inc., 914 S.W.2d 895, 902 (Tenn. Ct. App. 1995) (lawyer's letter about matter under lawyer's supervision is agent's admission since lawyers are agents and have prima facie authority to speak for their client through pleadings and negotiations); United States v. Amato, 356 F.3d 216 (2d Cir. 2003) (admitting letter by defense counsel that contradicts testimony of defense witness).

[231] Worrell v. Worrell, 59 S.W.3d 106, 109 (Tenn. Ct. App. 2000).

[232] *Id.*

[233] Tenn. Code Ann. § 29-34-101 (2000).

[234] Tenn. Code Ann. § 61-1-301 (1) (2002).

[235] Tenn. Code Ann. § 61-1-804 (2002).

[236] *See* Tenn. R. Evid. 803(1.2) Advisory Commission Comment.

Rather than use the federal language,[237] the Tennessee Supreme Court adopted a less expansive approach to this hearsay exception. If a declaration is to fit subsection (D), it must satisfy three requirements.

[b] Concern Matter Within Scope of Agency or Employment

First, the statement must have as its subject matter something within the scope of the agency or employment, Rule 803(1.2). In order to determine whether this standard is satisfied, one must look carefully at the exact responsibilities of the agent or employee. In *Breneman v. Kennecott Corporation*,[238] for example, two employees commented on why a third employee was fired. Since neither of the two was involved in the dismissal, the court held that their statements did not concern a matter within the scope of their employment and were therefore inadmissible as agents' admissions.

[c] Statement Made During Existence of Agency or Employment Relationship

Second, the statement must have been made while the agency or employment relationship existed.[238.1] Note that this language refers to the general period of employment. It does not require that the statement be made during actual working hours or that it be made for the purpose of facilitating the speaker's job. It also does not matter whether the statement was made to another agent or employee or even to a total stranger. Thus, the employee admission could have occurred during a Sunday neighborhood picnic when the employee gossiped to a next-door neighbor about a job-related matter.

[d] Against Declarant's Interest When Made

Third, it must have been against the declarant's interest to make the statement, a requirement absent in the equivalent federal rule.[239] This third requirement is a significant limitation. As the Tennessee Advisory Commission Comment suggests,[240] it was feared that a disgruntled employee is sometimes tempted to make false statements about the employer in order to place the worker in a good light and the boss in a bad light. To help ensure trustworthiness, the rule requires the existence of "circumstances qualifying the statement as one against the declarant's interest." Although the rule itself does not specifically address the issue, it is logical to interpret this provision as requiring that the employee must realize that the statement is against his or her own interest—the kind of statement one usually does not make unless true. There is no unavailability requirement, distinguishing this vicarious admission from the declaration against interest hearsay exception in Rule 804(b)(3).

This rule is illustrated by *Dailey v. Bateman*[241] involving a tort suit against a city for negligently not replacing a stop sign that had been somehow knocked in a ditch. A police officer allegedly told one of the parties at the hospital that the sign had been in the ditch before the accident at issue. The plaintiff tried to have the officer's hospital statement admitted against the city as an admission under Rule 803(1.2)(D) to prove that the city had notice of the sign's condition before the accident at issue. The Court of Appeals held that the

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[237] FED. R. EVID. 801(D)(2)(D) admits "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

[238] 799 F.2d 470, 473 (9th Cir. 1986).

[238.1] Popick v. Vanderbilt Univ., 2017 Tenn. App. LEXIS 171 (Tenn. Ct. App. 2017) (trial court did not err in excluding email messages sent by doctors who had been employed by defendant, and which were offered by plaintiff under Rule 803(1.2), because the doctors were no longer employed by defendant when the emails were sent).

[239] *See* FED. R. EVID. 801(D)(2)(D).

[240] *See* Tenn. R. Evid. 803(1.2) Advisory Commission Comment.

[241] 937 S.W.2d 927 (Tenn. Ct. App. 1996).

statement should be excluded because, contrary to Rule 803(1.2)(D), it was not against the officer's personal interest when made. The court did not explore, nor was any proof mentioned in the appellate decision, whether the officer risked his job or any promotion by the statement that could have been quite damaging to his employer.

Another illustration is provided by *Worrell v. Worrell*,[242] involving a suit over the proceeds of insurance paid a life tenant after a tornado destroyed the house covered by the life tenancy. Defendant life tenant's attorney made certain statements that the plaintiffs sought to introduce as an agent's admission under Rule 803(1.2)(D). The statements would have indicated that the defendant-life tenant intended to insure the property for the remaindermen's benefit. The Tennessee Court of Appeals refused to admit the evidence because there was no evidence that the declarant-lawyer's statements were against his personal interest when made. The court noted that counsel had no interest in the client's future plans to purchase insurance.

Sometimes the statement is hearsay within hearsay, further complicating its admission under Rule 803(1.2)(D). In *Acree ex rel. Acree v. Metro. Gov't of Nashville & Davidson Cty.*,[242.1] the decedent died after being shot by police officers during their attempt to serve him with a felony warrant. Decedent's brother (plaintiff) filed a tort action under the Governmental Tort Liability Act, *Tenn. Code Ann. § 29-20-205*, against the city and county on behalf of the decedent, alleging that the officers acted recklessly and failed to follow standard police training. In particular, plaintiff argued that officers were reckless by failing to withdraw after seeing the decedent with a gun moving toward the rear of the house. To support the contention that the officers were aware the decedent had a gun and was retreating before they entered, plaintiff offered testimony from a witness concerning what the witness allegedly overheard a detective (Roland) say several hours after the incident. Roland's statement included comments made by another officer (Hummell), who had been present when the shooting occurred. Conceding that Hummell's statement to Roland was hearsay within hearsay, the plaintiff argued that the witness should be able to testify to what he overheard Roland say Hummell told him, because Roland's statement was admissible under Rule 803(1.2)(D), *i.e.*, it was made during the scope of Roland's employment and was against his interest. Plaintiff argued that the statement was against Roland's personal interest because in the immediate aftermath of the incident Roland would have understood that the shooting might lead to a *42 U.S.C 1983* lawsuit and that he might be "cast" in it. The trial court rejected this argument and excluded the entire statement. Because Roland had not been present and had no involvement in the serving of the warrant, there was no reason for him to believe that he might be in personal legal jeopardy after the shooting. Since the plaintiff failed to offer any proof to establish that the statement was against Roland's personal interest, the Court of Criminal Appeals affirmed the trial court's ruling.[242.2] The plaintiff would have had an easier time admitting Hummell's statement if the witness had been told what happened by Hummell himself. Because Hummell was directly involved in the incident, he arguably had potential legal jeopardy. But plaintiff would still have had the burden of proving that Hummell knew he was in personal jeopardy when he made the statement.

[e] Pre-Rules Cases Compared

A look at some of the pre-rules Tennessee precedents for comparison purposes may be useful. *Citizens' Street Railroad Co. v. Howard*[243] is a leading case for the former and traditional view that an agent's post-accident admissions were incompetent against the principal. Mr. Howard was run over by a Memphis street car as he crossed the tracks. The Tennessee Supreme Court reversed a plaintiff's verdict reached at the end of three trials, holding that the motorman's statement, "I saw the plaintiff, but I thought he would get off

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[242] *59 S.W.3d 106, 109 (Tenn. Ct. App. 2000)*.

[242.1] *Acree ex rel. Acree v. Metro. Gov't of Nashville & Davidson Cty., 2019 Tenn. App. LEXIS 623 (Tenn. Ct. App. Dec. 27, 2019)*.

[242.2] *Id.*

[243] *102 Tenn. 474, 52 S.W. 864 (1899)*.

the track," could not be repeated in the courtroom against the defendant company.[244] The result would be different under the Tennessee Rules of Evidence. The admission would come in under Rule 803(1.2)(D) because it was a statement by a current employee concerning a matter within the scope of employment and it was against the employee's interest when made.

Gulf Refining Company v. Frazier[245] provides another pre-rules comparison. Again the appellate court reversed, this time a plaintiff's verdict in a case that had already been before the Tennessee Court of Appeals and then remanded for a second trial. Robert Frazier, aged seven, was thrown from his father's car when an oil truck slammed into the rear of the car. One of several plaintiffs' witnesses testified:

> Q Did you see this man Ingram that was driving the truck?
>
> A. Yes sir, I did.
>
> Q. Did you hear him make a statement?
>
> A. Yes sir, he was talking to Mr. Frazier and said his brakes were wet and wouldn't hold.

The court reversed.[246] Today, under Rule 803(1.2)(D) the driver's statement would be admissible against the employer, since it was about driving and was against the employee's interest when made.

The next example, *American Publishing Company v. Gamble*,[247] comes from the tort field of libel. Colonel Gamble was a Nashville lawyer. A widow claimed she paid him $15 to be used toward satisfying a judgment, but that the lawyer pocketed the money rather than applying it to the judgment on behalf of his client, the judgment creditor. A *Nashville American* reporter picked up the story from court files, and the article appeared. Colonel Gamble sued the paper for libel. At trial, plaintiff Gamble called a witness to repeat the reporter's statement that, upon learning of Colonel Gamble's denial, the reporter said he went to the courthouse, read the pleading again, admitted it was "susceptible of two constructions 'and that newspapers wanted the sensational features.' "[248] The verdict for the plaintiff was reversed. The court found the witness's testimony was inadmissible as an admission against the defendant newspaper. Would the reporter's declaration be admissible under Rule 803(1.2)(D)? Although a close question, it probably would be because of the admission that the pleading could be construed two ways.

[7] Conspirators' Admissions

[a] In General

Just as the substantive law of agency and partnerships governs admissibility of evidence, as discussed in the preceding paragraphs, so does the substantive law of crimes govern the admissibility of conspirators' declarations against other members of the conspiracy. Consequently, there is nothing surprising in the concept in Rule 803(1.2)(E) that courts will admit against a party "a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy." The rationale for this hearsay exception is general agency law that provides that "each conspirator is bound to the actions and statements made by other conspirators during the course and in furtherance of a common purpose."[249]

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[244] The opinion refers to "*res gestae*," an unintelligible term.

[245] *15 Tenn. App. 662, 674–681 (1932)*.

[246] Again, the "rationale" was *res gestae.*

[247] *115 Tenn. 663, 90 S.W. 1005 (1905)*.

[248] *115 Tenn. 663, 674, 90 S.W. 1005, 1007 (1905)*.

[249] *State v. Henry, 33 S.W.3d 797, 801 (Tenn. 2000)*.

A good illustration is *Danny L. Davis Contractors v. Hobbs*[250] where a licensed contractor agreed to seek a building permit and then allow a nonlicensed contractor to perform the work, in violation of Tennessee law. In order to get a contract, employees of the nonlicensed contractor made statements to the effect that the two companies were one and the same. The Tennessee Court of Appeals correctly found that the there was a civil conspiracy between the two companies and allowed the employees' statements to be admitted as co-conspirators' admissions. The statements were made during the pendency of the conspiracy and in furtherance of it.

[b] Statement by Co-conspirator

Rule 803(1.2)(E) applies to a statement by a "co-conspirator of a party." This element requires a showing that the declarant was in a conspiracy with the party against whom the statement is being used, but the declarant need not be charged with conspiracy or any other crime or tort. Although the Tennessee Rules of Evidence do not define "conspiracy," the word is defined by Tennessee criminal law.[251] It requires an agreement that one or more of the people involved in the crime will engage in criminal conduct.[252]

Another definition was used in a civil conspiracy case:

> A civil conspiracy is a combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means.[253]

Additionally, in a civil case it has been held that each conspirator must have the intent to accomplish the common purpose and must know of the other's intent, though the agreement need not be formal, may involve a tacit understanding, and it is not essential that each conspirator have knowledge of the conspiracy's details.[254]

Each conspirator must have the mental state required for the offense and each must act for the purpose of promoting or facilitating commission of an offense or unlawful act. It is not clear whether the Tennessee co-conspirator's hearsay exception requires that the criminal code definition of conspiracy be satisfied or whether the civil standard's use of the word *unlawful* refers only to criminal activity.

[c] During Course of Conspiracy

Rule 803(1.2)(E) applies only to statements made *during the course of* the conspiracy. This means that the conspiracy must have been occurring at the time the statement was made. If the conspiracy had not yet begun or had ended when the statement was made, the declaration is not admissible under this hearsay exception.[255] The Supreme Court of Tennessee has explicitly recognized that "there is no bright line test or

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[250] *Danny L. Davis Contractors v. Hobbs, 157 S.W.3d 414 (Tenn. Ct. App. 2004)*.

[251] *Tenn. Code Ann. § 39-12-103* (2010).

[252] A case by the Tennessee Court of Criminal Appeals extended this to an unlawful act. *State v. Alley, 968 S.W.2d 314, 316 (Tenn. Crim. App. 1997)* (for purposes of co-conspirator's hearsay exception, conspiracy is defined as "a combination between two or more persons to do a criminal or unlawful act or a lawful act by criminal or unlawful means," citing authority predating the revised definition of conspiracy in *Tenn. Code Ann. § 39-12-103* (2010).

[253] *Danny L. Davis Contractors v. Hobbs, 157 S.W.3d 414, 419 (Tenn. Ct. App. 2004)* (*quoting* *Chenault v. Walker, 36 S.W.3d 45,52 (Tenn. 2001)*.

[254] *Danny L. Davis Contractors v. Hobbs, 157 S.W.3d 414, 419 (Tenn. Ct. App. 2004)* (*quoting* *Dale v. Thomas H. Temple Co., 186 Tenn. 69, 208 S.W.2d 344, 353 (1948))*.

[255] This view is consistent with pre-rules Tennessee authorities. *Owens v. State, 84 Tenn. 1 (1885)*; *Sweat v. Rogers, 53 Tenn. 117 (1871)*.

precise definition for determining whether a statement has been made during the course of a conspiracy.[256] All the factors and circumstances of the case must be examined.[257]

Although it is often difficult to determine whether a conspiracy was over on a particular date, in some cases the conspiracy does not end until the ultimate goal is achieved. In *State v. Hutchison*,[258] for example, a group of men conspired to kill the victim in order to get the proceeds from the victim's life insurance policy. The Tennessee Supreme Court held that the conspiracy continued until the goal of collecting the proceeds was either achieved or abandoned.[259]

Similarly, in *State v. Walker*, the defendant was charged with conspiracy to commit robberies. The Tennessee Supreme Court held that the conspiracy ended when the robberies were consummated.[260] The *Walker* court did note that there may be a later conspiracy to hide the original crimes. If so, the conspirators' admission exception may apply to statements made during the course of and in furtherance of the new conspiracy.

In *State v. Henry*,[261] the Tennessee Supreme Court further clarified the issue and held that:

> The commission of the offense that was the goal of the conspiracy does not necessarily end the conspiracy, nor does it preclude the possibility that the conspiracy encompassed later statements regarding concealment of the offense. At the same time, the commission of the offense does not imply that the conspiracy automatically included all later statements pertaining to the concealment of the offense . … In short, the commission of the offense does not imply an agreement to conceal the offense given the risk that after the commission of the crimes, each co-conspirator may act in his or her self-interest. In such circumstances, where there is no longer a common purpose, statements may lack the reliability that serves as the basis for the "co-conspirator" exception.[262]

Applying this test, the *Henry* Court found that a co-conspirator's statement, made seven hours after the two conspirators were arrested and charged with the crimes, and nine hours after the crimes, was not admissible as a co-conspirator's statement. The Court found that the conspiracy had ended, even though the statements at issue were made during a videotaped conversation between the two conspirators. During this conversation the two discussed how to conceal their crimes. The Supreme Court specifically refused to hold that the statements at issue arose during a second conspiracy to conceal the original crime. Even if there were a second conspiracy, the Court held that statements made during that conspiracy were not admissible to prove the charged offense. The declaration may still be admissible under some other exception, such as a declaration against penal interest.[263]

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[256] *State v. Henry, 33 S.W.3d 797, 803 (Tenn. 2000)*.

[257] *Id.*

[258] ***898 S.W. 2d 161 (Tenn. 1994)***.

[259] *See also State v. Gaylor, 862 S.W.2d 546 (Tenn. Crim. App. 1992)* (murder and conspiracy to obtain various death benefits; co-conspirator's statements were during the course of the conspiracy because they were made during an on-going effort to conceal the conspiracy, but before the insurance proceeds were collected); *Danny L. Davis Contractors v. Hobbs, 157 S.W.3d 414 (Tenn. Ct. App. 2004)* (conspiracy to evade contractor's licensing law lasted throughout construction project).

[260] *State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995)*.

[261] *33 S.W.3d 797 (Tenn. 2000)*.

[262] *Id. at 803* (citations omitted).

[263] *See Tenn. R. Evid. 804(b)(3)*.

[d] In Furtherance of Conspiracy

The co-conspirator's hearsay exception requires the declaration to be *in furtherance of* as well as being made during the existence of the conspiracy. This has long been the Tennessee standard.[264] This standard means that "the statement must be one that will advance or aid the conspiracy in some way."[265] A statement may be in furtherance of the conspiracy in countless ways. Examples include statements designed to get the scheme started, develop plans, arrange for things to be done to accomplish the goal, update other conspirators on the progress, conceal the conspiracy,[265.1] deal with arising problems,[266] and provide information relevant to the project. While such statements are ordinarily made to other conspirators, Rule 803(1.2)(E) does not so require. Statements to third parties may qualify if in furtherance of the conspiracy.[266.1]

It is sometimes hard to decide whether a statement furthers the conspirators' goal. In *United States v. Howard*,[267] an arson case decided under the analogous federal rule, the Sixth Circuit *en banc* held that taped telephone conversations between two conspirators about the fire were admissible against all the conspirators, because the insurance proceeds had not been collected and the conversations were part of an ongoing concealment effort. On the other hand, if a conspirator is apprehended and tells all to the police, it is unlikely the confession is admissible as a conspirator's statement. The statement to the police can

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[264] *See* the language in *Owens v. State, 84 Tenn. 1, 4 (1885)*, and *Harrison v. Wisdom, 54 Tenn. 99, 107–08 (1872)*, both relying on the Greenleaf evidence treatise.

[265] ***State v. Carruthers, 35 S.W.3d 516, 555 (Tenn. 2000)***, *cert. denied*, ***533 U.S. 953 (2001)***.

[265.1] *See, e.g.*, *State v. Tull-Morales, 2016 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2016)* (post-crime statements by defendant were admissible under *Tenn. R. Evid. 803*; since participants were still acting to conceal their crimes at the time statements were made).

[266] *See*, *e.g.*, ***State v. Hutchison, 898 S.W.2d 161 (Tenn. 1994)*** (two conspirators' conversation, after arrest of third, about difficulty in collecting payment for their crime was in furtherance of the conspiracy); ***State v. Carruthers, 35 S.W.3d 516, 556 (Tenn. 2000)***, *cert. denied*, ***533 U.S. 953 (2001)*** (statements to third party to obtain transportation needed to complete objective of conspiracy were in furtherance of the conspiracy); *State v. Berry, 141 S.W.3d 549, 585 (Tenn. 2004)* (adopting opinion of Court of Criminal Appeals) (two robbers discuss need to kill robbery victims).

[266.1] ***State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000)***; *State v. Tull-Morales, 2016 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2016)*.

[267] *770 F.2d 57, 59 (6th Cir. 1985)* (*en banc*), rev'g *752 F.2d 220 (1985)*. The panel opinion contains this colorful colloquy, with expletives deleted:

> JH: You and your 40 … gallons of gas. 40. I couldn't believe you had that much gas.
>
> CS: By God it burned down, didn't it?
>
> JH: It didn't burn, it blowed … .
>
> JH: [B]ut how come you used 40 … gallons?
>
> CS: I wanted to make sure that … came down.

hardly be in furtherance of the conspiracy.[268] Similarly, gossip[269] or bragging about a crime may not be in furtherance of the conspiracy.

While a description of past conspiratorial acts is not necessarily in furtherance of the conspiracy, it so qualifies if it somehow assists in completion of the scheme, perhaps by orienting other conspirators.[270] The key concept seems to be whether the statement was intended to further the conspiracy. Thus, a conspirator's statement to a secret undercover agent is covered by this hearsay exception if the statement was designed to assist the conspiracy,[271] though the statement in fact had no such effect.

[e] Foundation

Much litigation under the federal counterpart to Rule 803(1.2)(E) has debated the proof burdens and foundation requirements for admissibility of conspirators' declarations. At least for the federal system, much of the debate ended with the United States Supreme Court's decision in *Bourjaily v. United States*,[272] affirming the Sixth Circuit's analysis of the issues. The Supreme Court held that the question of admissibility of a conspirator's statement is for the trial judge, not the jury. The judge should admit the statement if the elements of the hearsay exception are established by a preponderance of the evidence.[272.1] According to *Bourjaily*, the conspirators' statements themselves may be considered in deciding whether a conspiracy was afoot, thus allowing for bootstrapping. The Court in *Bourjaily* left unresolved the question whether there must be independent proof of the conspiracy or whether the conspirator's statement alone is sufficient to establish the conspiracy by a preponderance of evidence.[273] In deciding whether to admit the statement, Rule 104(a) states that the judge is not bound by evidence rules other than privileges.

Adopting *Bourjaily*, the Tennessee Supreme Court has determined that, under Tennessee Rule 803(1.2)(E), preponderance of the evidence is the legal standard to be utilized in determining whether sufficient evidence of a conspiracy exists to admit statements under the rule as conspirators' admissions.[274]

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[268] *See*, *e.g.*, State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995) (statement to police not in furtherance of conspiracy); ***State v. Carruthers, 35 S.W.3d 516, 556 (Tenn. 2000)***, *cert. denied*, ***533 U.S. 953 (2001)*** (confession to police is unlikely admissible as co-conspirator's statement; is narrative statement of past conduct between conspirators). *See also*, State v. Tull-Morales, 2016 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2016) (same).

[269] *See*, *e.g.*, ***State v. Hutchison, 898 S.W.2d 161, 170 (Tenn. 1994)*** (casual conversation between or among co-conspirators not necessarily in furtherance of conspiracy; "purposeless conversation" not in furtherance of conspiracy); State v. Heflin, 15 S.W.3d 519, 523 (Tenn. Crim. App. 1999) (statement not in furtherance of conspiracy; was casual conversation involving a statement of intent); ***State v. Carruthers, 35 S.W.3d 516, 556 (Tenn. 2000)***, *cert. denied,* ***533 U.S. 953 (2001)*** ("casual conversation between or among co-conspirators is not considered to be in furtherance of the conspiracy").

[270] *Cf.* United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006).

[271] *See*, *e.g.*, United States v. Smith, 600 F.2d 149 (8th Cir. 1979) (statements to conspirator-turned-undercover-agent admissible).

[272] 483 U.S. 171 (1987).

[272.1] *See e.g.*, State v. Batey, 2019 Tenn. Crim. App. LEXIS 781 (Tenn. Crim. App. Dec. 13, 2019) (aggravated rape case involving Vanderbilt football players, in which the Court of Criminal Appeals held that a sufficient foundation had been laid to prove by a preponderance of evidence that an ongoing conspiracy existed).

[273] The equivalent federal rule now specifically states that the "contents of the statement shall be considered but are not alone sufficient to establish … the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under [the co-conspirator admission rule]." FED. R. EVID. 801(D)(2).

The Tennessee Supreme Court, dealing with the question left unresolved in *Bourjaily*, has held that there must be independent proof of (1) the conspiracy, and (2) the connection of the declarant and the defendant to it.[275] This independent proof can be provided before or after admission of the co-conspirator's statement.[276]

Proof can be circumstantial, based on the conduct of the parties.[277] No formal written or oral agreement is necessary as long as there is an implied understanding between the parties.[278] In *State v. Alley*,[279] for example, the defendant was involved in a conspiracy to sell drugs. The conspiracy between the defendant and one Bondurant was proven when the defendant arrived at the drug sale in the same automobile as Bondurant, was present during Bondurant's drug transaction, provided the drugs Bondurant sold, and provided change for Bondurant's deal.

When proof of a conspirator's statement is to be introduced, the court can hold a jury-out hearing to determine whether there is sufficient proof of the conspiracy to admit the conspirator's statement. Another option is for the court to admit the statement subject to later proof "connecting it up" by establishing the existence of the conspiracy. An even better approach is for the court to require that the independent proof of the conspiracy be presented before the proof of the conspirator's hearsay statement. This sequence will help ensure that the jury does not hear the conspirator's statement in those few cases where the proof of the conspiracy is insufficient to admit the conspirator's statement under Rule 803(1.2)(E).[280]

[f] Judge's Explicit Finding

In order to facilitate appellate review, the trial court should make an explicit finding that a conspiracy existed by a preponderance of the evidence.[281] But a failure to make this finding may be harmless error if the record contains ample proof of the conspiracy.

[g] Types of Cases

Although a co-conspirator's statement is most frequently used in a criminal case where the crime of conspiracy is alleged in the charging instrument, Rule 803(1.2) does not limit the exception only to those cases. As long as a foundation is laid establishing the existence of the conspiracy by a preponderance of the evidence, the conspirator's statement is admissible even if no conspiracy is formally charged.[281.1] Indeed, if the foundation is present, the statement is admissible in a civil case.

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[274] *State v. Stamper, 863 S.W.2d 404 (Tenn. 1993)*. *See also* *State v. Alley, 968 S.W.2d 314, 316 (Tenn. Crim. App. 1997)* (standard of proof to show existence of prerequisite conspiracy is proof by preponderance of evidence); *State v. Henry, 33 S.W.3d 797, 802 (Tenn. 2000)* (preponderance of evidence standard).

[275] ***State v. Hutchison, 898 S.W.2d 161, 169 (Tenn. 1994)***, *citing* *State v. Hodgkinson, 778 S.W.2d 54 (Tenn. Crim. App. 1989)*.

[276] ***State v. Hutchison, 898 S.W.2d 161, 169 (Tenn. 1994)***.

[277] *State v. Alley, 968 S.W.2d 314, 316 (Tenn. Crim. App. 1997)*.

[278] *Id. See also* *State v. Batey, 2019 Tenn. Crim. App. LEXIS 781 (Tenn. Crim. App. Dec. 13, 2019)* (preponderance of the evidence standard requires only that the State prove "an implied understanding between the parties", which may be established by circumstantial evidence and the conduct of the parties).

[279] *Id.*

[280] *State v. Gaylor, 862 S.W.2d 546 (Tenn. Crim. App. 1992)*.

[281] ***State v. Hutchison, 898 S.W.2d 161, 169 (Tenn. 1994)***, *following* *United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979)*, *cert. denied*, ***444 U.S. 1074 (1980)***.

[281.1] *State v. Tull-Morales, 2016 Tenn. Crim. App. LEXIS 698 (Crim. App. 2016)*.

[h] Confrontation

It is likely that under *Crawford v. Washington*,[282] statements satisfying the co-conspirators' hearsay exception will be considered nontestimonial and therefore not susceptible to *confrontation clause* analysis.[283]

[i] Necessity for Corroboration of Accomplice Testimony Distinguished

While the co-conspirator's exception will permit one conspirator's statement to be used against another conspirator without offending the hearsay rule, Tennessee has long used another rule to limit the effect of such testimony. In Tennessee a criminal conviction may not be based on the uncorroborated testimony of an accomplice.[284] This rule "has functionally served as a safeguard against the obvious dangers of convicting a defendant of an offense based solely upon the testimony of an accomplice to *that* offense."[284.1] This rule raises two factual questions: whether the witness was an accomplice and whether there was adequate corroboration.

Procedures. Under Tennessee law, the first issue—whether the witness was an accomplice—is decided by either the judge or jury, depending on the circumstances. If the undisputed trial evidence clearly establishes that the witness is an accomplice as a matter of law, the trial court decides the issue.[285] But when the trial proof is unclear or in conflict or subject to different inferences, the jury decides whether the witness was an accomplice. If the jury finds that the witness was an accomplice, it then decides whether there was sufficient proof to corroborate the witness's testimony.[286] A defendant should request a corroboration jury instruction. The failure to do so may waive the issue.[287] A failure to produce sufficient corroboration is reversible error.[288]

What is an "Accomplice"? The definition of "accomplice" for this purpose is "a person who knowingly, voluntarily, and with common intent participates with the principal offender in the commission of a crime."[289]

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[282] *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. *See also Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)*. *See above* 8.02[4].

[283] *See above § 8.02[4]*.

[284] *See*, *e.g.*, *State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994)*; *State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994)*; *State v. Griffis, 964 S.W.2d 577 (Tenn. Crim. App. 1997)* (accused cannot be convicted of a felony on the uncorroborated testimony of an accomplice); *State v. Bragan, 920 S.W.2d 227, 240 (Tenn. Crim. App. 1995)* (defendant may not be convicted solely upon uncorroborated testimony of accomplice); *State v. Boxley, 76 S.W.3d 381 (Tenn. Crim. App. 2001)* (conviction cannot be based solely upon uncorroborated testimony of an accomplice); *State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001)* (conviction may not be based solely on uncorroborated testimony of an accomplice). *State v. Garrett, 331 S.W.3d 392, 406 n.10 (Tenn. 2010)* (accomplice's testimony must be corroborated by some independent proof in order to support a conviction).

[284.1] *State v. Little, 402 S.W.3d 202, 216 (Tenn. 2013)* (*quoting State v. Little, 2012 Tenn. Crim. App. LEXIS 1 (Jan. 3, 2012)*).

[285] *State v. Griffis, 964 S.W.2d 577 (Tenn. Crim. App. 1997)*.

[286] *Id.*

[287] *State v. Bough, 152 S.W.3d 453, 465 (Tenn. 2004)*.

[288] *See*, *e.g.*, *State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994)*.

[289] *State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004)*; *State v. Spadafina, 952 S.W.2d 444, 450 (Tenn. Crim. App. 1996)*, *quoting Clapp v. State, 94 Tenn. 186, 30 S.W. 214, 216 (1895)*. *See also State v. Ballinger, 93 S.W.3d 881 (Tenn. Crim. App. 2001)*, *overruled on other grounds*, *State v. Collier, 411 S.W. 3d 886 (Tenn. 2013)*.

This means more than that the witness must merely possess guilty knowledge, be morally delinquent, or have participated in a separate, related offense; it means that "the witness could have been convicted of the offense."[290] More particularly:

> The rule, simply stated, is that there must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence be slight and entitled, when standing alone, to but little consideration.[291]

Proof Needed for Corroboration. Accomplices cannot corroborate one another.[292] According to the Tennessee Supreme Court, corroboration requires:

> [T]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the

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State v. Collier, 411 S.W.3d 886, 896 (Tenn. 2013); State v. Jones, 450 S.W.3d 866 (Tenn. 2014) (co-conspirator's participation in murders sufficient to render him an accomplice; "accomplice" means "one who knowingly, voluntarily, and with common intent with the principal unites in the commission of a crime").

[290] State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004); State v. Jones, 450 S.W.3d 866 (Tenn. 2014).

State v. Collier, 411 S.W.3d 886, 896 (Tenn. 2013).

[291] Hawkins v. State, 4 Tenn. Crim. App. 121, 469 S.W.2d 515, 520 (1971) (citations omitted), cited in State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994). *See also* State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004) (same); State v. Griffis, 964 S.W.2d 577 (Tenn. Crim. App. 1997) (corroborating evidence may be direct, circumstantial, or a combination of both types of proof; it need only be "slight circumstances" as distinguished from proof beyond a reasonable doubt; it need only connect the accused to the crime); State v. Spadafina, 952 S.W.2d 444 (Tenn. Crim. App. 1996) (corroborating evidence may be direct or circumstantial and not necessarily adequate in itself to support conviction as long as it tends to connect defendant to the commission of the crime); State v. Parker, 932 S.W.2d 945 (Tenn. Crim. App. 1996) (person is not an accomplice to facilitation of armed robbery, and therefore her testimony did not have to be corroborated, when she did not know about the robbery before it occurred, did not participate in it, and did not provide any comfort or alibi after the robbery occurred), *overruled in part, on other grounds, by* State v. King, 2013 Tenn. Crim. App. LEXIS 192 (Crim. App. Mar. 4, 2013); State v. Bragan, 920 S.W.2d 227, 240 (Tenn. Crim. App. 1995) (corroborating evidence may be direct or circumstantial; need not be adequate in itself to support conviction as long as it legitimately tends to connect defendant with the commission of the charged crime; corroboration need not extend to every part of accomplice's evidence and may, in itself, be entitled to little consideration; trier of fact determines whether there was sufficient corroboration); State v. Green, 915 S.W.2d 827, 830–31 (Tenn. Crim. App. 1995) (since felony conviction may not be based solely on uncorroborated testimony of accomplice, where there are multiple accomplices there must be corroboration other than that from the accomplices' testimony); State v. Santiago, 914 S.W.2d 116, 123–24 (Tenn. Crim. App. 1995) (defendant cannot be convicted on uncorroborated testimony of accomplice; jury determines whether there is adequate corroboration; must be at least some other evidence fairly tending to connect the defendant with the commission of the crime, but the corroboration may constitute "slight circumstances" and need not extend to every part of the accomplice's testimony); State v. Smith, 24 S.W.3d 274, 281 (Tenn. 2000) (state needs only slight evidence of the *corpus delicti* to corroborate an accomplice's confession).

[292] State v. Boxley, 76 S.W.3d 381, 386 (Tenn. Crim. App. 2001). *See also* State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001) (a criminal defendant in Tennessee cannot be convicted solely on the uncorroborated testimony of an accomplice).

commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence.[292.1]

The corroboration must include some fact that establishes the identity of the defendant as a criminal actor.[293] The corroboration must be sufficiently strong that it goes beyond merely casting a suspicion on the accused.[294] However, the corroboration need not be overwhelming or even very strong. It need only provide a "modicum of evidence."[294.1] Put another way, only "slight circumstances" are enough.[294.2] Corroboration proof is sufficient "if it fairly and legitimately tends to connect the defendant with the commission of the crime charged."[295]

As one would expect from the broad definition of corroboration, it can take many forms.[296] The issue occasionally arises in sex crime cases where the defendant claims the victim is an accomplice whose testimony must be corroborated. By statute no such corroboration is needed if the victim is less than thirteen years old.[297] While at one time Tennessee law held that a child victim of statutory rape could be an accomplice whose testimony needed to be corroborated,[298] the rule is now the contrary. A statutory rape victim is not an accomplice to the crime and the child-victim's testimony does not have to be corroborated.[299]

[8] Admissions by Persons in Privity of Estate with Party

Unlike the Federal Rules of Evidence, which omit any reference to declarations by privities in estate,[300] Tennessee Rule 803(1.2)(F) expressly retains the common-law doctrine.[301] This rule creates a hearsay

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[292.1] State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001) (*quoting* State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994)); State v. Fusco, 404 S.W.3d 504 (Tenn. Crim. App. 2012)).

[293] State v. Boxley, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001) (reversal because corroboration was inadequate to establish that defendant was one of the robbers; only link was testimony of two accomplices).

[294] State v. Boxley, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001) (*quoting* State v. Griffis, 964 S.W.2d 577, 589 (Tenn. Crim. App. 1997)).

[294.1] State v. Fusco, 404 S.W.3d 504, 524 (Tenn. Crim. App. 2012).

[294.2] State v. Fusco, 404 S.W.3d 504 (Tenn. Crim. App. 2012) (*quoting* State v. Griffis, 964 S.W.2d 577, 588–89 (Tenn. Crim. App. 1997); State v. Little, 402 S.W.3d 202, 212 (Tenn. 2013)).

[295] State v. Garrett, 331 S.W.3d 392, 406 n.10 (Tenn. 2011) (quoting State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). *See also*, State v. Jones, 450 S.W.3d 866 (Tenn. 2014) (quoting *State v. Bigbee*; evidence sufficient to render co-conspirator accomplice to murder).

[296] *See*, *e.g.*, State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (accomplice's testimony implicating defendant is corroborated by another witness who overheard the defendant confess guilt to a third party); ***State v. Henley, 774 S.W.2d 908 (Tenn. 1989)*** (other witnesses corroborated many factual statements in accomplice's testimony); State v. Spadafina, 952 S.W.2d 444, 451 (Tenn. Crim. App. 1996) (defendant testified to his own presence at scene of crime; this evidence was sufficient corroboration for co-defendant's testimony implicating defendant in the murder); State v. Smith, 24 S.W.3d 274, 281 (Tenn. 2000) (corroboration may be provided by recanted accusation). *See also* State v. Savely, 2020 Tenn. Crim. App. LEXIS 443 (Crim. App. June 25, 2020) (accomplice's testimony regarding drug transaction was sufficiently corroborated by undercover officer).

[297] Tenn. Code Ann. § 40-17-121 (2006).

[298] *See, e.g.*, Boulton v. State, 377 S.W.2d 936, 938 (Tenn. 1964).

[299] State v. Collier, 411 S.W.3d 886, 898 (Tenn. 2013).

exception for *a statement by a person in privity of estate with the party*. "Privity" perhaps is a misleading, albeit traditional, term. It means that declarations of predecessors in title are admissible against the present title holder/litigant. This hearsay exception actually involves "ancestors" in estate to the current owner.

The exception is limited to privity involving property, both real[302] and personal.[303] The declaration of the prior owner must have been made during ownership of the property; subsequent declarations are generally excluded.[304] A different result applies in fraudulent conveyance actions. If the fraudulent grantor remained in possession, the grantor's declarations after the transfer are admissible against the grantee and subsequent purchasers.[305]

A troublesome area is decedents' estates. For example, in a wrongful death action the key statute[306] is grounded on a survival theory, with the right of action passing to a spouse, children, next of kin, or personal representative. Admissions made by the deceased person before death are admissible against the plaintiff in the wrongful death action who stands in the deceased declarant's legal shoes, because it is the deceased declarant's right of action which had survived.

Illustrating the point is the leading case of *Middle Tennessee Railroad Co. v. McMillan*,[307] where a train ran over the plaintiff's deceased husband, who was driving his horse and buggy across the track in Franklin. Aggrieved by a $5,000 verdict, the railroad appealed. The assigned error was exclusion of witnesses' testimony repeating certain statements by the plaintiff's late husband before he died, such as:

> Q. At the time you heard Mr. McMillan (the deceased) make this statement two or three minutes after the accident, what did he say?
>
> A. Well, he said he didn't hear the whistle and the train, and wasn't paying any attention to the railroad.
>
> Q. Did he say anything else?
>
> A. Yes, sir; said he didn't hear anyone hollering or see anyone waving at him, or pay any attention to the railroad, or see the train in any way; if he had, he wouldn't have drove on the track.[308]

The Tennessee Supreme Court, holding the evidence admissible against the widow, reversed.

Workers' compensation death actions brought by dependents produce a different result. An early decision, *Kennedy v. Columbian Casualty Co*.,[309] rejected evidence showing that a laundry truck driver's death occurred outside the scope of employment when he ran off a bridge in Chattanooga. The hospitalized employee, Mr. Kennedy, told his employer:

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[300] *Calhoun v. Baylor, 646 F.2d 1158 (6th Cir. 1981)*, construes the omission in FED. *R. EVID. 801(D)(2)* to be intended, and declarations of privies are not admissible, at least not under an admissions theory. Some may qualify as declarations against interest, assuming unavailability. Rule 804(b)(3).

[301] *See* MCCORMICK ON EVIDENCE 454 (6th ed. 2006) (discussing common law).

[302] *Dunn v. Eaton, 92 Tenn. 743, 23 S.W. 163 (1893)*.

[303] *Price v. Jones, 40 Tenn. 84 (1859)*.

[304] *Moyers v. Inman, 32 Tenn. 80 (1852)*.

[305] *Carney v. Carney, 66 Tenn. 284 (1874)*.

[306] *Tenn. Code Ann. § 20-5-106* (2009).

[307] *134 Tenn. 490, 184 S.W.20 (1915)*.

[308] *Id. at 506, 184 S.W. at 24*.

[309] *163 Tenn. 312, 43 S.W.2d 201 (1931)*.

> Mr. Bryan [the employer], I am sorry this has happened. I ruined your truck. Is the truck hurt bad? I had no business over there, but I was over there anyway, and if I ever get up I will try to make it right with you.[310]

Mr. Kennedy never got up, and the court held his deathbed admission was not admissible against his plaintiff-widow.[311]

Life insurance lawsuit results will turn on whether the insured reserved the power to change the beneficiary. If so, the insured's admissions come in against the beneficiary.[312] If not, the absence of control prevents declarations from being admitted.[313]

[9] Admissions of Principal Offered Against Surety

The Tennessee Rules of Evidence do not contain a subdivision specifically applicable to common-law admissions of a principal offered against a surety. The theory behind admissibility is similar to, but not the same as, that underlying vicarious admissions, and it resembles the rules governing declarations of privies in estate, although here the privity is of obligation.[314] Substantive law of suretyship governs admissibility of evidence. Early Tennessee precedents distinguished declarations by the principal made while performing the act upon which the surety was liable—those declarations being admissible against the surety[315]—from statements made after the principal's defalcation was uncovered—those being inadmissible.[316]

Whether this decisional law survives adoption of the Tennessee Rules of Evidence is unclear. The better view is that the omission to draft specific language concerning suretyship admissions indicates a reluctance to perpetuate this occasionally criticized doctrine.[317] If the common law remains extant, it can be argued plausibly that, by analogy to post-accident declarations,[318] post-embezzlement declarations of principals should come in against sureties. The outcome must await future Supreme Court pronouncements. Meanwhile, we should note that some declarations would be competent alternatively as declarations against the principal's interest under Rule 804(b)(3), assuming the principal's testimony is unavailable, as defined in Rule 804(a).

[10] Admissions in Opinion Form

Rule 803(1.2) reverses some pre-rules authority and expressly makes immaterial the happenstance that a party's admission is phrased as an opinion. Under Rule 803(1.2), the opinion evidence is not excludable merely because of its form. In other words, the opinion rule, as exemplified in Rule 701, does not apply to admissions under Rule 803(1.2).

The folly of the pre-rules approach is illustrated by *King v. Leeman*,[319] cited in the Tennessee Advisory Commission Comment to Rule 803(1.2). A bus passenger was injured when two buses collided, one owned by

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[310] *Id. at 315, 43 S.W.2d at 202*.

[311] The court found a "perfect" analogy between workers' compensation cases and life insurance cases. One wonders.

[312] *Life Ass'n v. Winn, 96 Tenn. 224, 33 S.W. 1045 (1896)*.

[313] *Kennedy v. Columbian Cas. Co., 163 Tenn. 312, 43 S.W.2d 201 (1931)*; *Southern Life Ins. Co. v. Booker, 56 Tenn. 606, 617–20 (1872)*.

[314] WIGMORE ON EVIDENCE 158 (Chadbourn rev. 1972); MCCORMICK ON EVIDENCE 454 (6th ed. 2006).

[315] *See Montgomery v. Coldwell, 82 Tenn. 29, 38 (1884)* (alternate holding, or possibly dictum).

[316] *White v. German Nat'l Bank of Memphis, 56 Tenn. 475 (1872)* (bank bookkeeper's statements admitting embezzlement when called on carpet by board of directors not admissible against sureties on bond).

[317] MCCORMICK ON EVIDENCE 454 (6th ed. 2006), suggests that omission by the federal drafters makes the exception nonexistent.

[318] *See above § 8.06[6]*.

the defendant and another owned by Tennessee Coach Company. After the accident, the plaintiff filled out a form:

> **Q.** Who, in your opinion, was to blame?
>
> **A.** Other [Tennessee Coach Company, not the defendant] bus driver.
>
> **Q.** Why are you of that opinion?
>
> **A.** Did not stop to make turn.[320]

The trial court excluded the plaintiff's first answer as an opinion but admitted the second; the appellate court affirmed. Aside from the fact that the Court of Appeals relied upon arguably inapplicable and equally irrational prior inconsistent statement precedents, it is unwise to exclude a party's admission to the effect that someone other than the defendant caused the wreck. Rule 803(1.2) restores credibility to this area of evidence law by providing that opinions may be admissible as party admissions.[321]

[11] Judicial Admissions

[a] In General

The final sentence of Rule 803(1.2) states that *statements admissible under this exception are not conclusive*. This alters Tennessee law.[322] This language, not found in the federal rule,[323] abolishes the common-law principle that sworn statements in pleadings or testimony[324]—and even unsworn pleadings[325]—were conclusive. Now, under the Tennessee Rules of Evidence, admissions are evidentiary, meaning they are admissible but can be rebutted.

Judicial Estoppel. This concept should not be confused with the doctrine of judicial estoppel. In *Cardin v. Campbell*,[326] the court held that "where a person states under oath in former litigation, either in pleadings or testimony, that a fact is true, she will not be permitted to deny that fact in subsequent litigation." The *Cardin* court did not mention Rule 803(1.2).

Similarly, in *Marcus v. Marcus*,[327] the Tennessee Supreme Court applied the concept of judicial estoppel without any reference to the Rules of Evidence in general or Rule 803(1.2) in particular. A mother who submitted court orders from another state in conjunction with her petition seeking their enforcement later

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[319] *30 Tenn. App. 206, 204 S.W.2d 384 (1946)*.

[320] Modified from language at *30 Tenn. App. 206, 213, 204 S.W.2d 384, 388 (1946)*.

[321] This is the modern view. MCCORMICK ON EVIDENCE 446–47 (6th ed. 2006).

[322] *See First Tennessee Bank, N.A. v. Mungan, 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989)* (factual statements in pleadings are judicial admissions and are conclusive against pleader in proceedings in which filed unless amended or withdrawn, in which case they become evidentiary admissions).

[323] FED. *R. EVID. 801(D)(2)*.

[324] *Sartain v. Dixie Coal & Iron Co., 150 Tenn. 633, 266 S.W. 313 (1924)*.

[325] *Bowers v. Potts, 617 S.W.2d 149 (Tenn. Ct. App. 1981)*.

[326] *920 S.W.2d 222, 223–24 (Tenn. Ct. App. 1995)* (letters are not covered by judicial estoppel since they were not part of any previous litigation).

[327] *993 S.W.2d 596 (Tenn. 1999)*.

claimed that the foreign court had lacked subject matter jurisdiction with respect to two of those orders, in which she had been held in contempt of court. The Tennessee Supreme Court held that she was judicially estopped from now taking the position that court orders she previously sought to enroll and have enforced are void.[328]

Under the Tennessee Rules of Evidence at least, a pleading, whether sworn to or not, is admissible against the pleader but is not conclusive. Similarly, language in an original pleading later deleted by an amendment may be offered into evidence.[329] A pleading from a different case, if relevant to the present inquiry, would appear to be a judicial admission and thus an evidentiary admission, which would therefore be subject to being rebutted under Rule 803(1.2) and its Advisory Commission Comment. However, under the doctrine of judicial estoppel and *Marcus*, it would be conclusive.

The 2004 Amendment to the Advisory Commission Comment clarifies that the final sentence in Rule 803(1.2) is not intended to modify the doctrine of judicial estoppel. That doctrine deals with a situation such as the facts of *Marcus*, involving inconsistent positions being taken in two separate law suits. A party generally cannot, in the second suit, contradict a sworn statement made in the first proceeding. The last sentence in Rule 803(1.2), however, addresses a party's admissions, whether sworn or unsworn, in a single proceeding. Because such admissions are evidentiary, rather than conclusive, they are subject to being explained or distinguished from one another by contradicting proof.

Does it make a difference that a complaint or answer contains alternative or hypothetical statements of a claim or defense, as permitted by procedural rules?[330] This is a knotty problem. Some authorities suggest that to allow an adversary to introduce the alternatives contradictory to the pleader's trial testimony would effectively undermine the policy supporting modern notice pleading.[331] In contrast, it can plausibly be argued that the party should be faced with "shotgun" allegations and given the opportunity to explain them away; there is no controlling Tennessee authority. In federal courts, the trial judge has the discretion to relieve a party from the consequences of a judicial admission.[332]

Sworn discovery answers and trial testimony are admissible as evidentiary admissions. The present exception covers interrogatory answers,[333] deposition answers,[334] earlier testimony by a party in today's trial, or testimony given in another trial by one who is now a party, regardless of whether the declarant was a party or ordinary witness in the other case.

In divorce cases, a pleading regarding the existence of grounds for divorce does not, by itself, authorize the court to accept the facts in that pleading and grant the divorce without hearing proof on the issue, unless both parties stipulate to the existence of grounds.[335]

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[328] *Id. at 601-02*.

[329] *Blackmon v. Estate of Wilson, 709 S.W.2d 596 (Tenn. Ct. App. 1986)*.

[330] ***Tenn. R. Civ. P. 8.05(2)***.

[331] McCormick On Evidence 448 (6th ed. 2006); 3 Michael H. Graham, Handbook Of Federal Evidence 903 (6th ed. 2006).

[332] 3 Michael H. Graham, Handbook Of Federal Evidence 908 (6th ed., 2006).

[333] *Tenn. R. Civ. P. 33.02*.

[334] *Tenn. R. Civ. P. 32.01*.

[335] *Hyneman v. Hyneman, 152 S.W.3d 549, 554 (Tenn. Ct. App. 2003)* (although husband admitted in answer that he was guilty of adultery and inappropriate marital conduct, as alleged by wife in complaint, Court of Appeals held, citing *Tenn. Code Ann. § 36-4-114*, that trial court erred in granting the divorce in the absence of an evidentiary hearing or mutual stipulation on issue of grounds due to particular statutory requirement).

[b] Diversion

Statutes may affect whether a particular statement is an evidentiary admission. For example, certain statements made in a memorandum of understanding,[336] a document required for a pretrial diversion in certain criminal cases, are not evidentiary admissions and not later admissible in criminal trials involving the same charge contained in the memorandum of understanding.[337] They are admissible in civil trials. However, once the records are expunged after successful completion of the pretrial diversion program, the memorandum of understanding is essentially nullified and statements in it are not admissible as an evidentiary admission.[338]

This principle is illustrated by *Pizzillo v. Pizzillo*,[339] where a father was given pretrial diversion after he executed a memorandum of understanding that admitted he had sexually abused his daughter and niece. The Tennessee Court of Appeals held that this pretrial diversion admission was not barred as an evidentiary admission in a subsequent child visitation case until the records were expunged. Since the purpose of expungement is to prevent the accused from suffering the stigma of a criminal charge, the effect of expunction is to restore the person to the position he or she was in before the criminal charges were filed.[340] Accordingly, the person whose records were expunged may legally refuse to reveal or even acknowledge the existence of the charge.

By way of contrast, the rules are slightly different if the admission was made in a judicial diversion (as distinguished from a pretrial diversion). Tennessee law authorizes a judge to place an offender on judicial diversion after a finding of guilt but before entry of a guilty judgment.[341] While records of the charges involved in a judicial diversion are also subject to expungement, the statute itself specifically permits a limited use of the expunged charges.[342] When the criminal defendant is a plaintiff in a civil action based on the same transaction or occurrence as the expunged criminal record, the records of the expunged conviction may be admissible as a judicial admission (the guilty plea) or to impeach the credibility of the plaintiff (the guilty verdict).

[c] Requests for Admission

Answers to Civil Procedure Rule 36 requests for admission—or, more commonly, unanswered requests for admission[343]—are conclusive admissions, not merely evidentiary, because of the express provisions in the

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[336] *Tenn. Code Ann. § 40-15-105* (Supp. 2010).

[337] *Pizzillo v. Pizzillo, 884 S.W.2d 749 (Tenn. Ct. App. 1994)*, *construing* *Tenn. Code Ann. § 40-15-105(a)*.

[338] *Pizzillo v. Pizzillo, 884 S.W.2d 749 (Tenn. Ct. App. 1994)*, *construing* *Tenn. Code Ann. § 40-32-101(a)*.

[339] *884 S.W.2d 749 (Tenn. Ct. App. 1994)*.

[340] *Id. at 754*.

[341] *Tenn. Code Ann. § 40-35-313* (2010).

[342] *Tenn. Code Ann. § 40-35-313(b)* (2010).

[343] *Tennessee Dep't of Human Servs. v. Barbee, 714 S.W.2d 263 (Tenn. 1986)*, states that an offering party should bring unanswered requests for admission to the trial court's attention before trial in order to make them conclusively binding.

procedure rule,[344] which the evidence rule does not affect. This means that such admissions, unless withdrawn or amended, resolve a factual question and eliminate the need for proof on it.[345]

Rule 36 admissions must be read carefully to ensure they are applied only on appropriate issues. In *Brown v. Daly*,[346] for example, the Tennessee Court of Appeals made it clear that an admission of the genuineness of a document is conclusive on the issue whether the document is what it is purported to be, but does not admit the document into evidence. The rules of evidence, such as hearsay or relevance, still may cause the document to be excluded. Oddly, Rule 36 admissions are usable only in the lawsuit where requested; they are not even evidentiary admissions in related suits.[347]

[d] Stipulations

Civil Case. The effect of stipulations varies according to whether the case is civil or criminal. In a civil case, a formal stipulation is conclusive.[348] It serves to remove issues from the ranks of those contested at trial. Though stipulated facts in a civil case may render proof unnecessary on certain issues, the same proof may be relevant and admissible to establish other matters in the case.[349]

Criminal Case. In a criminal case, however, a stipulation is not conclusive. It affects the weight to be given any evidence contradicting the stipulation but it does not bar such evidence. In *State v. Saylor*,[350] for example, the criminal defendant was charged with murder. At trial defense counsel stipulated that the defendant was the first aggressor, then sought to introduce testimony that the victim had threatened the defendant, suggesting the victim was actually the first aggressor. The prosecution objected on the ground that the stipulation settled the issue of who was the first aggressor and thereby made irrelevant the testimony about the threat. The Tennessee Supreme Court held that, despite the stipulation, the testimony about the threat was admissible since a stipulation is not dispositive on a fact issue in a criminal case.

End of Document

[344] Tenn. R. Civ. P. 36.02: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

[345] *Tennessee Dep't of Human Services v. Barbee, 714 S.W.2d 263 (Tenn. 1986)*. *See also Neely v. Velsicol Chem. Corp., 906 S.W.2d 915, 917 (Tenn. Ct. App. 1995)* (Rule 36 admissions that are unanswered are deemed admitted; no proof is necessary to establish a fact so admitted and no evidence on the issue should be allowed to refute the Rule 36 admission).

[346] *884 S.W.2d 121 (Tenn. Crim. App. 1994)*.

[347] Tenn. R. Civ. P. 36.02: "Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by that party for any other purpose nor may it be used against that party in any other proceeding."

[348] *See*, *e.g.*, *Tamco v,. Pollard, 37 S.W.3d 905, 909 (Tenn. Ct. App. 2000)* (open concession by attorneys is binding stipulation in civil case). *Cf. State v. Saylor, 117 S.W.3d 239, 249 n.8 (Tenn. 2003)* (noting Tennessee pattern jury instructions in civil cases require jury to regard stipulated facts as proven but no pattern jury instruction in criminal cases so requires).

[349] *See*, *e.g.*, ***Hunter v. Burke, 958 S.W.2d 751, 755 (Tenn. Ct. App. 1997)***.

[350] *117 S.W.3d 239 (Tenn. 2003)*. *See also* ***Hunter v. Burke, 958 S.W.2d 751, 755 (Tenn. Ct. App. 1997)***; *State v. Hill, 885 S.W.2d 357, 360–61 (Tenn. Crim. App. 1994)* (allowing victim to show scars even though defendant had stipulated that victim sustained bodily injury).

§ 8.07 Rule 803(2). Excited Utterance

[1] Text of Rule

Rule 803(2) Excited Utterance

The following are not excluded by the hearsay rule:

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.

Advisory Commission Comment:

The rule restates Tennessee law.

[2] Excited Utterance

[a] In General

Rule 803(2), a verbatim adoption of Federal Rule 803(2), provides a hearsay exception for an excited utterance, which is a statement about a startling event or condition made while the declarant was under stress caused by that event or condition. There are two rationales for this exception.

First, since this exception applies to statements where it is likely there was a lack of reflection—and potential for fabrication—by a declarant who spontaneously exclaims a statement in response to an exciting event, there is little likelihood, in theory at least, of insincerity. The Tennessee Court of Criminal Appeals eloquently summarized this view: "The underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[351]

The Tennessee Supreme Court noted that the "ultimate test" of an excited utterance is:

> Spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement or strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication.[352]

The lack of reflection is present because Rule 803(2) requires that the declarant must actually be under the stress of excitement while speaking. This hearsay exception is not available for a statement made when the declarant is no longer under stress. But a statement may qualify as an excited utterance even if the declarant had a motive to make a self-serving statement.[353]

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[351] State v. Franklin, 308 S.W.3d 799, 823 (Tenn. 2010); State v. Land, 34 S.W.3d 516, 528 (Tenn. Crim. App. 2000).

[352] State v. Franklin, 308 S.W.3d 799, 823 (Tenn. 2010) (*quoting* State v. Smith, 857 S.W.2d 1, 9 (Tenn. 1993)). *See also* Kendrick v. State, 454 S.W.3d 450, 478 (Tenn. 2015); State v. Shettles, 2016 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. 2016).

[353] United States v. Schreane, 331 F.3d 548, 562 (6th Cir. 2003) (alleged co-participant said, "He has a gun," as police approached declarant and defendant who were arguing).

Second, ordinarily the statement is made while the memory of the event is still fresh in the declarant's mind. This means that the out-of-court statement about an event may be more accurate than a much later in-court description of it.[354]

Since this is an exception covered by Rule 803, the availability of the declarant is immaterial. Rule 803 contains no requirement that the testifying witness actually see the declarant make the excited utterance. Hearing the utterance is sufficient. Thus, the transcript of a 911 call is admissible if the other requirements are met.[355]

[b] *Res Gestae* Distinguished

The excited utterance hearsay exception has unfortunately been linked with a category of evidence called *res gestae*. Modern lawyers and judges should never stoop to utter the term "res gestae." The term defies definition, causes confusion, and thwarts efforts at serious analysis. Wigmore accurately described these meaningless Latin words as "useless," "vicious," and "positively harmful."[356]

[c] Confrontation

It is likely that, under *Crawford v. Washington*,[357] some statements satisfying the excited utterance hearsay exception will also satisfy the *confrontation clause* and be admissible for the prosecution in a criminal case. The key is whether the statement is testimonial. If made to law enforcement officers, at least some excited utterances could be deemed to be testimonial and inadmissible unless the declarant testifies at trial or a prior proceeding. On the other hand, some excited utterances are clearly nontestimonial. This could include one occurring in an informal conversation with a friend.

In the leading Tennessee case, *State v. Maclin*,[358] the Tennessee Supreme Court held that an excited utterance may be testimonial, depending on the circumstances. This means that if the hearsay utterance is deemed nontestimonial, it should satisfy the *confrontation clause*.

[3] Elements

[a] In General

An excited utterance hearsay exception requires proof of several elements.

[b] Startling Event or Condition

Under Rule 803(2), in order to establish an excited utterance there must be "a startling event or condition" that causes the stress of excitement. The possibilities are endless. Any event deemed startling to the declarant is sufficient.[359] Although the rule itself provides no definition of "startling event or condition," the

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[354] *State v. Franklin, 308 S.W.3d 799, 823 (Tenn. 2010)*.

[355] *State v. Smith, 868 S.W.2d 561 (Tenn. 1993)*.

[356] 6 WIGMORE ON EVIDENCE 255 (Chadbourn rev. 1976).

[357] *541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*. *See* above *§ 8.02[4]*.

[358] *State v. Maclin, 183 S.W.3d 335 (Tenn. 2006)*.

[359] Examples under the identical federal rule include a child's statements about child abuse three hours after a visit with the defendants, *Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988)*; a juror's statements three minutes after an attempt to corruptly influence the juror, *United States v. Bailey, 834 F.2d 218 (1st Cir. 1987)*; a shooting victim's statement to police an hour after the

Tennessee Supreme Court favorably cited a treatise which stated that the "event must be sufficiently startling to suspend the normal, reflective thought processes of the declarants."[360] The Court of Appeals has stated that "the ultimate test is spontaneity and logical relation to the main event, and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstance and at a time so near it as to preclude the idea of deliberation and fabrication, it is to be regarded as contemporaneous within the rule."[360.1]

The startling event does not have to be the act that gave rise to the legal controversy. It may be a subsequent event related to the prior event and sufficient to produce an excited utterance.[360.2] Creative lawyering can be effective with this exception since there may be several possible events that could qualify as startling. In *United States v. Napier*,[361] a leading case, a kidnapping victim was beaten so badly she sustained brain damage. One week after returning home from the hospital she saw the defendant's photo and said, "He killed me." The court held that the photo was the startling event, and admitted the statement.

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incident, *Webb v. Lane, 922 F.2d 390 (7th Cir. 1991)*; and a husband's statements that he had heard his wife and her lover plot his death, *United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992)*.

Examples under Tennessee law include statements about the declarant's rape, *State v. Person, 781 S.W.2d 868, 872 (Tenn. Crim. App. 1989)* (rape victim on way to hospital identified car where rape occurred); *State v. Rucker, 847 S.W.2d 512 (Tenn. Crim. App. 1992)* (rape victim told mother about assault shortly afterwards); *State v. Binion, 947 S.W.2d 867 (Tenn. Crim. App. 1996)* (victim of attempted rape told mother and friend about incident shortly after it occurred; was startling event); *Davidson v. Lindsey, 104 S.W.3d 483 (Tenn. 2003)* (automobile accident is stressful event); *State v. Dellinger, 79 S.W.3d 458, 484 (Tenn. Crim. App. 2001)* (fight in which declarant received scratches and cuts is stressful event); *State v. Samuel, 243 S.W.3d 592, 600–01 (Tenn. Crim. App. 2007)* (the defendant coming into the victim's room, pulling her pants down, and vaginally penetrating her would certainly be a "startling event," especially when the victim was a child with a 44 IQ); *State v. Ramos, 331 S.W.3d 408, 415 (Tenn. Crim. App. 2010)* (defendant's touching of three-year-old child's vagina is startling event for child); *State v. Banks, 271 S.W.3d 90, 115 (Tenn. 2008)* (statement by declarant who was shot four times and whose uncle had been shot in a nearby room; declarant was disoriented because of extensive blood and nature of event; was startling event).

There are also many other situations where Tennessee courts find an event to be sufficiently startling to satisfy Rule 803(2); *State v. Kendricks, 947 S.W.2d 873, 884 (Tenn. Crim. App. 1996)* (child's mother was killed a few feet from where child was sitting; child was under stress from this startling event for significant time); *State v. Gilley, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008)* (homicide victim experienced startling event when she saw defendant repeatedly drive by her flag corps practice; there had been previous violent acts by defendant against victim); *State v. Hawthorne, 2016 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. 2016)* (trial court did not err by admitting into evidence the victim's statement identifying the shooter as an excited utterance, because the statement related to the shooting, a startling event, was made while the victim lay on the porch of her home awaiting medical treatment after being shot three times; and the statement was made while the victim was under the stress caused by the shooting and her medical condition).

[360] *State v. Franklin, 308 S.W.3d 799, 823 (Tenn. 2010)*; *State v. Gordon, 952 S.W.2d 817, 820 (Tenn. 1997)* (*citing* McCormick On Evidence 854 (2d ed. 1984)); *Kendrick v. State, 454 S.W.3d 450 (Tenn. 2015)* (same)..

[360.1] *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430, *9 (Ct. App. July 25, 2018)* (quoting *Irwin v. Anderson, 2012 Tenn. App. LEXIS 878 (Tenn. Ct. App. Dec. 17, 2012)* (no excited utterance because video was not made until four months after the allegedly startling event).

[360.2] *Kendrick v. State, 454 S.W.3d 450 (Tenn. 2015)*.

[361] *518 F.2d 316 (9th Cir.)*, *cert. denied*, ***423 U.S. 895, 96 S. Ct. 196, 46 L. Ed. 2d 128 (1975)***. *In State v. Carpenter, 773 S.W.2d 1 (Tenn. Crim. App. 1989)*, a homicide victim was talking on the phone when the defendant returned to the scene of an earlier crime. The Court of Appeals, using pre-rules Tennessee case law, admitted the phone statement as an excited utterance. The excitement was spontaneous and was caused by the defendant's return to the crime scene. *See also United States v. Tocco, 135 F.3d 116 (2d Cir.)*, *cert. denied*, ***523 U.S. 1096 (1998)*** (arsonist-declarant's startling event could have been the fire itself or the subsequent realization that people could have been trapped inside the burned building); *State v. Owens, 78 Wash. App. 897, 899 P.2d 833 (1995)*, *aff'd, 128 Wash.2d 908, 913 P.2d 366 (1996)*.

The Tennessee Supreme Court reached a similar result in *State v. Gordon*,[362] involving aggravated rape of a three-year-old girl. During urination, the child-victim yelled "real loud" from pain. Shortly afterwards, the victim's mother placed the victim on a bed, noted tears and blood on the child's vagina, and asked, "Who made you hurt like that?" After a brief delay, the child identified the defendant. The period between the child's yelling and the identification of the defendant was about two minutes. At the defendant's aggravated rape trial, the mother was permitted to testify about the child's identification. The Tennessee Supreme Court upheld the trial court's decision that the child's statement was an excited utterance under Rule 803(2). The startling event was the pain the child suffered during urination, not the actual rape that had occurred earlier in the evening.

Another Tennessee illustration involves a bystander outside of a dry cleaners who was approached by an upset woman who emerged from the cleaners and told the bystander that she had just been robbed by the man who had just left the cleaners. The bystander had been subjected to a startling event and his statement made shortly thereafter was an excited utterance.[363]

The event is frequently proved by extrinsic evidence, and the declaration itself may establish the event.[364] Other proof of the event is admissible to establish that it was a startling event.

[c] Statement Must Relate to a Startling Event or Condition

Rule 803(2) reaches only those statements that relate to a startling event or condition, and considerable leeway is available.[365] The statement may describe all or part of the event or condition, or deal with the effect or impact of that event or condition.[366] In an illustrative Tennessee case, a bystander was approached by an upset woman who said she had just been robbed in a nearby store and asked the bystander to observe the license tag of a van entered by a man leaving the robbed store. The bystander wrote down the tag number. The Tennessee Supreme Court held this writing related to the startling event of the robbery victim's interaction with the bystander.[367]

Conversely, the statement may be totally unrelated to the event and, accordingly, not qualify for this hearsay exception. For example, in *State v. Burns*[368] the defendant was charged with aggravated child abuse for burns suffered by a three-year-old child. At trial a social worker testified that the victim began to scream and cry when the defendant's name was mentioned. The Tennessee Court of Criminal Appeals

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[362] *952 S.W.2d 817 (Tenn. 1997)*. *Gordon* was cited in *State v. Burns, 29 S.W.3d 40, 47 (Tenn. Crim. App. 1999)*, where a child abuse victim began screaming and crying when an investigator mentioned the defendant's name. The *Burns* court found that *Gordon* was distinguishable because the startling event in *Burns* (hearing the defendant's name mentioned) was not proven to be related to the charged offense. If this means that the relationship between the startling event and the charged offense must be more than required under Rule 401's minimal relevance standard, then *Burns* has established a test that, it is submitted, is not consistent with Rule 401.

[363] *State v. Franklin, 308 S.W.3d 799, 824 (Tenn. 2010)*.

[364] MCCORMICK ON EVIDENCE 471 (6th ed. 2006); *Noe v. Talley, 38 Tenn. App. 342, 350, 274 S.W.2d 367, 371 (1954)* (plaintiff enmeshed in wrecked vehicle and bleeding exclaimed, "My Lord, I am dying! Who is driving that truck without lights?").

[365] *Contrast* Rule 804(b)(2) on dying declarations, which must be "concerning the cause or circumstances of … impending death."

[366] *State v. Gordon, 952 S.W.2d 817, 820 (Tenn. 1997)* (rape victim's identification of rapist related to the startling event of painful urination, when the pain was the product of vaginal tears caused by the rape); *State v. Ramos, 331 S.W.3d 408, 415 (Tenn. Crim. App. 2010)* (three-year-old's statement that defendant touched "me here [in vaginal area], it hurts" relates to a startling event); *Kendrick v. State, 454 S.W.3d 450, 478 (Tenn. 2015)* (same).

[367] *State v. Franklin, 308 S.W.3d 799, 824 (Tenn. 2010)*.

[368] *29 S.W.3d 40 (Tenn. Ct. App. 1999)*.

held that the child's reaction was not an excited utterance because there was insufficient proof that it was related to the burns as opposed to some other totally unrelated event.

[d] Stress of Excitement

Rule 803(2) mandates that the statement be made *while the declarant was under the stress of excitement*. The "ultimate test," according to the Tennessee Supreme Court, is whether the "statement suggests spontaneity" and is logically related to the startling event.[368.1] This is the most significant indicium of reliability. Unfortunately, older Tennessee common-law decisions often depended on the number of minutes that had elapsed between the event and the statement. That problem should not exist under the present rule, because statements made "while the declarant was under the stress of excitement" come in. The litmus test for the court deciding admissibility is whether circumstances show the declarant was actually under stress at the moment of speaking. The time interval is material only as a circumstance bearing on the issue of continuing stress.[369] Other relevant circumstances include the nature and seriousness of the event or condition;[369.1] the appearance, behavior, outlook, and circumstances of the

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[368.1] *Kendrick v. State, 454 S.W.3d 450, 478 (Tenn. 2015)*. *See also* *State v. Shettles, 2016 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. 2016)* (quoting the "ultimate test" standard set forth in *Kendrick* and holding that because witness' 911 statement was made during an ongoing emergency, where she was alarmed by the events that were transpiring, it constituted a non-testimonial excited utterance; her primary purpose was to seek assistance, not provide testimonial evidence against the defendant); *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Ct. App. July 25, 2018)* (quoting "ultimate test" standard). *See also*, *State v. Marshall, 2018 Tenn. Crim. App. LEXIS 710 (Tenn. Crim. App. 2018)* (rape victim's hysteria during phone call after the rape showed that she was still under the stress of the incident and that her statements during the call directly sprang from the rape); *State v. Collins, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. 2018)* (victim's girlfriend could testify as to what witness told her right after the victim's shooting, because the startling event was that the victim had just been shot, the witness's statement was directly related to that startling event, and the statement was made while the witness was still under the stress of the shooting).

[369] *See* *State v. Lagrone, 2016 Tenn. Crim. App. LEXIS 751 (Tenn. Crim. App. 2016)* (1.5-hour delay in making 911 after a shooting incident did not bar statement's admissibility as excited utterance; the court noted that delay is just one fact the trial court may consider in determining admissibility, and since the witness was able to provide a plausible explanation for her delay, said she was afraid during the call, and also said that the incident had been "just awful" and that she "did not know where to go that was safe", the court could properly find that she was still "under the influence of the stressfull nature of the shooting"; therefore, trial court properly admitted the 911 call as an excited utterance); *State v. Ramos, 331 S.W.3d 408, 415 (Tenn. Crim. App. 2010)* (statement by child sex abuse victim made "almost immediately" after assault occurred); *State v. Binion, 947 S.W.2d 867, 873 (Tenn. Crim. App. 1996)* (fact that statement was made 30–45 minutes after startling event greatly diminished any likelihood of deliberation and fabrication); *State v. Stout, 46 S.W.3d 689, 700 (Tenn. 2001)* (12-hour delay between killing and statement is factor in whether declarant was under stress when statement made; circumstances suggest declarant was upset and crying when statement made); *State v. Dellinger, 79 S.W.3d 458, 484 (Tenn. Crim. App. 2001)* (declarant made statement to officer shortly after altercation); *State v. Banks, 271 S.W.3d 90, 115 (Tenn. 2008)* (statement made 4–6 hours after startling event may qualify as excited utterance; time interval is a factor bearing on whether there was continuing stress at the time of the statement).

[369.1] *Popick v. Vanderbilt Univ., 2017 Tenn. App. LEXIS 171 (Tenn. Ct. App. 2017)* (nurse's statements were not made while she was under the stress of excitement, where the only evidence was that the nurse may have yelled and the fact that the doctor had declared a "level one" emergency when transferring plaintiff to the operating room after a failed bedside tracheostomy; doctor testified that the plaintiff's vital signs remained stable and that he declared a level-one emergency solely to obtain the necessary time in the operating room that day); *State v. Fuller, 2016 Tenn. Crim. App. LEXIS 862 (Tenn. Crim. App. 2016)* (trial court did not err by admitting statements the victim made while on the phone with an inmate under the excited utterance exception to the hearsay rule because the statements occurred as defendant approached the victim with a gun while the victim was sitting in his car, unarmed); *State v. Tittle, ___ S.W.3d ___, 2017 Tenn. Crim. App. LEXIS 925 (Tenn. Crim. App. Oct. 23, 2017)* (victim's statements in response to questions from officers upon arrival at crime scene did not lack spontaneity, where they were made shortly after defendant held a knife to the victim's throat and dragged her down a dark driveway toward a scrap yard; the victim was physically very near the scene of the attack, the events were serious in nature, and the victim was injured).

declarant, including such characteristics as age and physical or mental condition;[370] and the contents of the statement itself, which may indicate the presence or absence of stress.[371]

A case from the Tennessee Court of Criminal Appeals illustrates the typical excited utterance.[372] A homicide victim was shot in the back. He immediately turned to a friend and said that he had seen "Cocaine" (the defendant's nickname) and saw him shoot. The injured victim then fled and later collapsed. A police officer found the conscious victim. When asked who shot him, the victim said, "Cocaine did it." The statement to the police officer was admitted as an excited utterance. The appellate court noted that the victim had just been shot when he made the statement and the officer testified that the victim's speech was rapid and excited.

By contrast, where the defendant attempted to introduce his 911 call as an excited utterance but he did not sound emotional, distraught, or excited, and the statements were primarily self-serving, the Court of Criminal Appeals held the statement inadmissible due to the lack of emotion.[372.1]

The declarant under stress is often a participant in the startling event. However, under Rule 803(2), that need not be the case.[372.2] A bystander who witnesses an event and is sufficiently startled can utter an excited utterance. There was no limitation excluding bystanders' declarations under traditional Tennessee law,[373] and the current rule imposes no such stricture. The real problem with bystander testimony may be

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[370] *See also* State v. Smith, 868 S.W.2d 561 (Tenn. 1993) (statements were made under stress because of the interval between the startling events and the statement, the nature and seriousness of the events, and the appearance, behavior, outlook, and circumstances of the declarant); State v. Gordon, 952 S.W.2d 817, 820 (Tenn. 1997); Davidson v. Lindsey, 104 S.W.3d 483 (Tenn. 2003) (one factor in whether declarant was under stress is declarant's age at time of statement; here declarant was nineteen years old and had just pulled two victims, one of whom was dead, from truck shortly before truck exploded; was stressful event and declarant was under stress when made statement to police officer shortly thereafter); State v. Banks, 271 S.W.3d 90, 117 (Tenn. 2008) (factors in assessing whether declarant was under stress at the time of the statement include the time between the event and the statement; whether the statement was in response to a question; the nature and seriousness of the event or condition of the declarant; the appearance, behavior, outlook and circumstances of the declarant—including age and physical and mental condition; and the contents of the statement itself); State v. Franklin, 308 S.W.3d 799, 823 (Tenn. 2010).

[371] *See, e.g.*, United States v. Brown, 254 F.3d 454, 459 (3d Cir. 2001) (statement may establish its admissibility by being proof of startling event); Kendrick v. State, 454 S.W.3d 450, 478 (Tenn. 2015). State v. Bishop, 2016 Tenn. Crim. App. LEXIS 939 (Tenn. Crim. App. 2016) (in child abuse case, victim's statements to two witnesses, in which victim said the defendant hit him and caused his injuries, were improperly admitted as excited utterances, because there was no evidence to support the conclusion that the victim was under stress or excitement when he made his statement, since witnesses testified that he was not upset, that he was calm though scared, and that his disclosure was hesitant; the victim also was not, and had not recently been, upset, hysterical, crying, in shock, or in discomfort or pain); State v. Tittle, ___S.W.3d___, 2017 Tenn. Crim. App. LEXIS 925 (Tenn. Crim. App. Oct. 23, 2017) (victim's statements to officers did not lack "spontaneity," where the victim was injured and described herself as scared because she was still worried that defendant might come back and continue his attack on her, and two officers described the victim as hysterical, frantic, terrified, traumatized, and distraught).

[372] State v. Summerall, 926 S.W.2d 272 (Tenn. Crim. App. 1995).

[372.1] State v. Waggoner, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019) (recording of defendant's 911 call statements was not admissible under excited utterance exception to hearsay because, although the shooting of the victim was a startling event and defendant's statements related to the shooting, defendant failed to establish that the statements were made while under stress or excitement; even though it appeared that defendant made the call shortly after the shooting, he did not sound emotional, distraught, or excited, but instead was calm, and the statements were primarily self-serving).

[372.2] Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015) (declarant does not have to be actual participant in startling event).

[373] Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967).

establishing that the event was startling, the declarant was under stress when the statement was made and the declarant had personal knowledge.[374]

The fact that a question prompted the excited answer is a circumstance relevant to stress, but it does not automatically bar the statement's admission under Rule 803(2). Certainly this rule contains no such provision and, accordingly, the Tennessee Supreme Court clearly permitted the admission of a declarant's excited utterances made in response to an inquiry by another person.[375]

[4] Competency or Knowledge of Declarant

There need not be a finding that the excited utterance declarant had capacity to understand an oath or affirmation. The only competency requirement for an excited utterance under Rule 803(2) is that the declarant must have had an opportunity to observe the facts contained in the extrajudicial statement.[376] In other words, the personal knowledge requirement of Rule 602 applies to excited utterances.[377]

The excited utterance is inadmissible if the declarant lacked personal knowledge.[378] Often the statement itself will provide sufficient proof that the personal knowledge requirement of Rule 602 is satisfied. This principle is illustrated by *State v. Land*[379] where the declarant told a police officer that the appellant "stole my car." The Tennessee Court of Criminal Appeals held that the statement, though an excited utterance, was inadmissible because the declarant lacked personal knowledge that the appellant had taken her car. She had neither seen nor otherwise perceived the theft.

[5] Opinions

Nothing in the excited utterance rule excludes an excited declaration just because it is in opinion form.[380] The only limit on the lay witness's opinion is the general limit contained in Rule 701's provisions regulating lay opinion proof.

[6] Impeachment

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[374] *See*, *e.g.*, ***United States v. Mitchell, 145 F.3d 572 (3d Cir. 1998)*** (anonymous note on seat of getaway car not excited utterance because there was no proof declarant was under stress).

[375] *State v. Smith, 857 S.W.2d 1 (Tenn. 1993)*. *See also Management Services, Inc. v. Hellman, 40 Tenn. App. 127, 145, 289 S.W.2d 711, 719 (1955)* (sister asked brother why he was crying and holding his head; brother responded, "I ran into the rope!"); *United States v. Joy, 192 F.3d 761 (7th Cir. 1999)* (excited utterance admissible even though most of declarant's statements were in response to 911 dispatcher's questions); *State v. Banks, 271 S.W.3d 90, 116 (Tenn. 2008)* (statement made in response to questions may still be excited utterance if the declarant is under the excitement or stress of the event; fact that statement was made in response to a question is a relevant circumstance on the issue of stress but does not automatically bar the statement as an excited utterance); *State v. Franklin, 308 S.W.3d 799, 824 (Tenn. 2010)* (statement in response to question, though facts vague); *Kendrick v. State, 454 S.W.3d 450, 478 (Tenn. 2015)* (statements responding to questions may be excited utterance if declarant is under stress, but if the statement is self-serving it may be the result of reflective thought); *State v. Tittle, 2017 Tenn. Crim. App. LEXIS 925 (Crim. App. Oct. 23, 2017)* (statements made in response to questions may still be admissible if the declarant is under the excitement or stress of the event; accordingly, whether the victim's statements were prompted by questions from law enforcement is not dispositive of their admissibility).

[376] *State v. Franklin, 308 S.W.3d 799, 823* n. 28 (Tenn. 2010) (test satisfied because bystander-declarant saw license tag number on van, then wrote it down); *Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015)* (same).

[377] *See above § 6.02[2]*.

[378] *See*, *e.g.*, *Miller v. Keating, 754 F.2d 507 (3d Cir. 1985)* (no proof unidentified accident witness had firsthand knowledge).

[379] *34 S.W.3d 516 (Tenn. Crim. App. 2000)*.

[380] McCORMICK ON EVIDENCE 473 (6th ed. 2006) (better view admits excited utterance in opinion form).

A pre-rules Tennessee judicial opinion[381] contained dicta suggesting that a lawyer could not impeach an excited utterance with the usual impeachment tools, such as prior inconsistent statements. With the advent of Rule 806, this pre-rules authority is no longer applicable. Impeachment of hearsay declarants is freely permissible and there are no artificial limits on the methods of impeaching a declarant who makes an excited utterance.

[7] Fresh Complaint Distinguished

[a] In General

Some Tennessee common law decisions suggested that there was a fresh complaint hearsay exception applicable in sexual assault cases. Contrary to erroneous language in some appellate opinions[382] that a fresh complaint constitutes a hearsay exception, the Tennessee Rules of Evidence contain no such "exception"—and it probably never existed. But, as discussed in the next two sections, fresh complaint may be admissible in certain cases to corroborate other evidence.

[b] Adult Victim

Tennessee recognizes a fresh complaint rule that permits certain evidence to be used to corroborate an adult victim's allegations in sexual assault cases. In *State v. Kendricks*[383] a woman alleged that the defendant forced her to have oral sex. The defendant admitted the sexual act but claimed that the victim was a prostitute who became angry when he refused to pay the amount initially agreed upon. The trial judge admitted two statements made by the victim shortly after the alleged rape. The first statement, given to a detective forty minutes after the incident, was in question-and-answer form and was tape recorded. Although the victim had not testified at the time the statement was introduced into evidence, the trial judge admitted it as a "fresh complaint" to corroborate the victim's testimony. The second statement, also admitted as fresh complaint, was introduced by the prosecution as rebuttal evidence at the end of the defendant's proof to counter the defendant's efforts to impeach the victim. It consisted of the investigating police officer's incident report which contained a summary of what the victim told the investigating officer about the incident within an hour of it.

The Tennessee Supreme Court held that the doctrine of fresh complaint, though not specifically mentioned in the Tennessee Rules of Evidence, is part of Tennessee evidence law through the common law. Fresh complaint evidence satisfies Rule 402 because it makes the existence of a consequential fact more probable than it would be had the evidence not been introduced.

The *Kendricks* court noted that fresh complaint has ancient common law origins. It was designed to counter a common law assumption that a victim who did not raise a "hue and cry" was somehow implicated in the crime and could not prosecute the case. Thus, when a woman made a "fresh complaint" about a rape, her statement became admissible to counter any negative inference that she was not truthful if she had not so complained. This created what was called an "anticipatory rebuttal," which permitted the prosecutor to bolster the victim's credibility before the victim testified or had been attacked.

In response to a concern that the fresh complaint rule would permit the jury to hear a witness repeat the victim's exhaustive version of the crime without having those details subject to immediate cross-examination, the *Kendricks* opinion distinguished between the facts and the details of the crime included in a fresh complaint. The state may use the facts of the crime during its case-in-chief before the victim's credibility has been attacked. These facts "can include the nature of the complaint and the identity of the wrongdoer."[384] A fresh complaint that recites the details of the crime is admissible only after the victim's

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[381] ***Williams v. State, 542 S.W.2d 827 (Tenn. Crim. App. 1976)***.

[382] *E.g.*, *Conboy v. State, 455 S.W.2d 605 (Tenn. Crim. App. 1970)*.

[383] *891 S.W.2d 597 (Tenn. 1994)*. *See also* *State v. Tizard, 897 S.W.2d 732 (Tenn. Crim. App. 1994)* (pre-*Kendricks* decision discussing origins of fresh complaint rule).

credibility has been attacked. These details can be used to prove "that the victim related the same story soon after the incident."[385]

Kendricks also dealt with the difficult question of when the statement must have been made to qualify as a "fresh complaint." The court noted that, to qualify as an excited utterance under Rule 803(2), a statement must have been made while the declarant was under the stress of an exciting event. But because fresh complaint is admitted as corroboration and not as substantive evidence, the under-stress rule is not applicable. Rather, fresh complaint is subject to a far less rigorous time rule. According to *Kendricks*, the timeliness requirement for fresh complaint is not as stringent as for the excited utterance. It need not be contemporaneous with the incident. Yet, there is some concept of a time limit which *Kendricks* did not resolve. According to the court, "The timeliness of the complaint is still an important requirement for admissibility, but whether a complaint was timely depends upon an assessment of all the facts and circumstances."[386] In *Kendricks* both statements easily satisfied this rule since they were made within an hour after the occurrence. Another Tennessee case found fresh complaint when the statement was made three or four days after the event.[387]

Kendricks also held that fresh complaints may be given in response to questions by law enforcement officers. The admissibility of such a statement is determined by the nature, type, and purpose of the questioning to ascertain whether it was really a complaint. If too coercive or suggestive, the resulting statement may not be the product of the victim and the statement can be excluded.[388]

[c] Child Victim

While *Kendricks* established fresh complaint for an adult, it specifically did not address the question of whether there is any such rule in cases involving children. Fresh complaint in cases involving children was resolved in *State v. Livingston*,[389] where the Tennessee Supreme Court held that the doctrine does not apply in abuse cases involving children. The court found that children, unlike adults, are not expected by juries to complain immediately when subjected to abuse. But the court was careful to note that evidence of fresh complaint may be admissible as substantive evidence under some other hearsay exception or as corroborative evidence by means of a prior consistent statement.

In *State v. Binion*,[390] for example, the equivalent of fresh complaint was admitted as an excited utterance by a minor victim under Rule 803(2). Within thirty minutes of being the victim of an attempted rape, the minor victim, still upset and crying, described the event to a friend and her mother. The Tennessee Court of Criminal Appeals admitted both statements as excited utterances since they were made while the declarant was under the stress of excitement and both related to that startling event.

The different results in *Livingston* and *Kendricks* depend on whether the victim is an adult or child. If the former, fresh complaint may be admissible; in the latter situation it is not. But what distinguishes an adult from a child? One possibility is the age of majority. In Tennessee an adult has attained the age of eighteen

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[384] *State v. Kendricks, 891 S.W.2d 597, 603 n.7*.

[385] *Id. at 606*.

[386] *Id. at 605*.

[387] *State v. Schaller, 975 S.W.2d 313 (Tenn. Crim. App. 1997)*.

[388] *State v. Kendricks, 891 S.W.2d 597, 605 (Tenn. 1994)*.

[389] *907 S.W.2d 392 (Tenn. 1995)*.

[390] *947 S.W.2d 867 (Tenn. Crim. App. 1996)*.

years. In *State v. Schaller*,[391] however, the Tennessee Court of Criminal Appeals held that an "adult" for purposes of fresh complaint is thirteen years old or older. The court looked for guidance at the sexual battery and rape laws, which use age thirteen as a demarcation.

[8] Hearsay Exception for Children in Sex Abuse Cases Distinguished

Rule 803(25), discussed later in this chapter, contains a limited hearsay exception for out-of-court declarations of children in certain child sex abuse cases.[392] Unlike fresh complaint, described above, this rule is a hearsay exception and admits statements to prove their truth rather than merely to corroborate other evidence.

A related issue, though not involving the hearsay rule, is the admissibility of other sex crimes in prosecutions for sex offenses. In *State v. Rickman*,[393] the Tennessee Supreme Court refused to adopt a "sex crimes" exception to the general ban against evidence of other crimes. Another issue is the admissibility of videotaped testimony by children in certain child and criminal sex abuse cases. Tennessee statutes authorize this in limited circumstances.[394]

[9] Present Sense Impression Distinguished

The Tennessee Advisory Commission advised the Tennessee Supreme Court not to adopt an exception similar to that in the Federal Rule 803(1), admitting statements "describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter." Such an exception, called the present sense impression, was viewed by the Tennessee Commission as largely unnecessary, since the declarant is often available. Much more importantly, the Advisory Commission was concerned that there was no assurance the present sense impression is reliable.

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391 *975 S.W.2d 313 (Tenn. Crim. App. 1997)*.

392 *See below §§ 8.30[2]–[5]*.

393 *876 S.W.2d 824 (Tenn. 1994)*. *See above § 4.04[16]*.

394 *See above § 8.02[4]*.

§ 8.08 Rule 803(3). Then Existing Mental, Emotional, or Physical Condition

[1] Text of Rule

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

The following are not excluded by the hearsay rule:

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.

Advisory Commission Comment:

This is the state of mind hearsay exception, long recognized by Tennessee courts. Combining the hearsay exception with relevancy principles, declarations of mental state will be admissible to prove mental state at issue or subsequent conduct consistent with that mental state.

Normally such declarations are inadmissible to prove past conduct. Most jurisdictions, however, admit express mental state to prove the prior making or revocation of a will. Tennessee is in the minority by excluding the evidence in wills cases. *Hickey v. Beeler, 180 Tenn. 31, 171 S.W.2d 277 (1943)*. The proposal would change the *Hickey* result and make declarations of mental state competent to prove past conduct in lawsuits concerning wills.

The Commission contemplates that only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception. It views decisions such as *Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945)*, as based on faulty analysis.

In addition to declarations of mental state, this proposal also governs declarations of present ("then existing") physical condition. The declaration need not be made to a doctor; any witness who overheard the hearsay statement could repeat it in court under this exception.

[2] State of Mind Hearsay Exception

Rule 803(3) provides a hearsay exception for statements of the declarant's state of mind or physical condition. The exception applies only to statements of the declarant's then existing state of mind or physical condition. This somewhat misleading term refers to the declarant's mental state at the time of the statement. It does not refer to the declarant's mental state at the time of the trial or any other event. It also does not refer to the state of mind of anyone other than the declarant.[395]

Although Rule 803(3) is commonly referred to as the state of mind hearsay rule, it extends to a number of mental processes that stretch the concept of state of mind. Thus, by its own terms Rule 803(3) reaches emotions, sensations, and physical condition. As illustrations of these processes, the rule cites seven examples: "intent, plan, motive, design, mental feeling, pain, and bodily health." It should be obvious that these

[395] *State v. Stevens, 78 S.W.3d 817, 839 (Tenn. 2002)* (proper to exclude multiple hearsay statement by deceased declarant who repeated state of mind statement of third person).

examples reflect an intent that this hearsay exception be read broadly to embrace virtually all mental processes that the declarant can describe.

As described in the next sections, statements falling under Rule 803(3) can be used to prove mental condition,[396] conduct,[397] and physical condition.[398]

[3] Declarations of Existing Mental State to Prove Present Mental Condition

[a] In General

The state of mind hearsay exception was firmly established in Tennessee common law before the Tennessee Rules of Evidence.[399] Rule 803(3) continues the tradition. Among its many uses, it permits a declarant's statement of his or her current mental state to prove that very mental state. The trial lawyer should become familiar with this exception, as it offers many opportunities for placing competent hearsay before the jury.

Other Possible Hearsay Exceptions. Of course, mental state may also be admissible through other hearsay exceptions. A declarant's statement about his or her mental condition may be an admission if used against the declarant by another party.[400] But this approach is unavailable if the declarant seeks to introduce his or her own prior statement or a party wants to use a non-party's statement. In such cases the present rule, 803(3), as well as Rule 803(4), dealing with statements for purposes of medical diagnosis and treatment, and Rule 803(2), the excited utterance provision, may provide a hearsay exception to admit this evidence.

Reliability. While one might understandably question whether a declarant's express prior declaration of then existing thoughts lurking in the recesses of that declarant's brain should be taken as true, a modest indicium of reliability can be found by asking whether the declarant's later court testimony about the nature of those earlier thoughts would be more likely true than the prior statement overheard or reduced to writing.[401]

Probably the prior utterance, describing the declarant's mental processes at the very time of the utterance, is the more reliable. Necessity may lead to the same conclusion. How can we determine what a person thinks or feels? We can investigate the person's words and actions and the surrounding circumstances. Surely we should not ignore the declarant's own declarations. This exception, as with virtually all others in Rule 803, does not require that the declarant be unavailable to testify.

Illustrations of Declarant's Mental State. In order for Rule 803(3) to apply, the declarations of mental condition should expressly assert the declarant's mental state. Common examples include statements of

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[396] *See below* *§ 8.08[3]*.

[397] *See below* *§§ 8.08[5]*, *8.08[6]*.

[398] *See below* *§ 8.08[7]*.

[399] Unfortunately, many of the older cases confused the legitimate exception with the meaningless and illegitimate term, "*res gestae*," discussed in *§ 8.07[2]*. *See*, *e.g.*, *State v. McAlister, 751 S.W.2d 436 (Tenn. Crim. App. 1987)* (statement of intent is part of *res gestae* and admissible despite hearsay rule).

[400] *Tenn. R. Evid. 803(1.2)*.

[401] *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295, 12 S.Ct. 909, 36 L.Ed. 706 (1892)*, states:

> [The declarant's] own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

Details of *Hillmon* are discussed in *§ 8.08[5] below*.

love ("I love Karen"), fear ("I'm afraid Adolph will kill me"), and hate ("I hate him"). Many times a statement does not literally assert the declarant's mental state when offered to prove that mental state. If so, the statement should be admitted as nonhearsay because it is not admitted to prove its truth. One must not carp about statements that in common parlance are universally understood for an obvious inference about a person's mental state. In any event, both circumstantial declarations of mental state and express declarations of mental state are admissible over hearsay objections.[402]

To conclude this section by summary, any express statement of present mental state offered to prove the same present ("then existing") mental condition is admissible. Case law provides many examples.[403] Some examples of admissibility include:

- To prove Declarant's affection, Witness testifies: "I heard Declarant say, 'I love Karen.' "
- To prove Declarant's domicile, Witness testifies: "I heard Declarant say, 'I intend to reside permanently in Knox County, Tennessee.' "
- To prove Declarant's intent to revoke a will, Witness testifies: "I heard Declarant say, 'I intend to revoke this will.' "
- To prove Declarant's emotional distress, Declarant's letter to a friend reads: "I am very upset."
- To prove a Declarant's fear of her father, Witness testifies: "I heard Declarant say, 'I am afraid of Daddy.' "[404]
- To prove Declarant's fraud, Witness testifies: "I heard Declarant say, 'I intend to convey Blackacre to my son so my creditors can't reach it by process.' "
- To prove absence of malice, Witness testifies: "I heard Declarant say, 'I harbor no ill feeling towards Victim.' "[405]

[b] Fact Statements Included as Mental State Statements

Sometimes a declarant's statement about his or her mental state will include assertions about a fact other than the mental state. For example, a man could say, "I love Karen because she gave me a shirt." His statement about his amorous feelings for Karen would be admissible as proof of his state of mind, but his statement that she gave him a shirt is admissible under Rule 803(3) only to the extent it sheds light on his state of mind. A limiting instruction under Rule 105 or exclusion under Rule 403 may be appropriate to prevent the jury from misusing the statement about the shirt.

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[402] Circumstantial declarations are nonhearsay, *See above* *§ 8.01[8]*, while direct evidence of state of mind is admissible under Rule 803(3).

[403] *See*, *e.g.*, *State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App. 1993)* (statement of intent to kill a class of persons is admissible on intent to kill a person in that class).

[404] *See*, *e.g.*, *State v. Smith, 868 S.W.2d 561 (Tenn. 1993)* (homicide victim's statements of fear of her husband-defendant qualified as state of mind, but were irrelevant on identity of killer; would have been relevant had defendant proved that the couple were reconciling and, therefore, he had no motive to kill his wife); *State v. Bragan, 920 S.W.2d 227, 242 (Tenn. Crim. App. 1995)* (victim's statement to wife that victim believed defendant would kill victim for the insurance proceeds is admissible to prove victim's state of mind—fear, but the victim's fear was irrelevant on whether the defendant had murdered the victim); *State v. Leming, 3 S.W.3d 7, 18 (Tenn. Crim. App. 1998)* (victim's statement that he feared the defendant was irrelevant on issue of whether defendant killed the victim); *State v. Burns, 29 S.W.3d 40, 47 (Tenn. Crim. App. 1999)* (child abuse victim's fear of defendant was not "directly probative" of whether the defendant burned the victim; since at issue was victim's crying and screaming when defendant's name was mentioned, it is arguable that the evidence was not a direct statement of mental condition, was not embraced by Rule 803(3), and may not have been a "statement"—and therefore, not even hearsay).

[405] *Cf.* *Garrison v. State, 163 Tenn. 108, 40 S.W.2d 1009 (1931)*, a leading older authority marred by "*res gestae*" analysis and arguably an application of the excited utterance rather than state of mind exception. The Tennessee Supreme Court reversed a lawyer's second degree murder conviction for shooting a deputy sheriff, holding that a defense witness should have been allowed to testify that the accused said after the shooting, "I wouldn't have killed [the deputy] for anything." The self-serving nature of the statement is immaterial under this and most hearsay exceptions.

[4] Declarations of Existing Mental State to Prove Future or Past Mental State

It only takes application of the traditional definition of relevance in Rule 401 to conclude that a declarant's expression of his or her present mental state is admissible to prove that the declarant had the same mental state on a later date or at an earlier time. The boundaries are those of common sense and probability. For example, assume that a defendant is charged with a homicide of Sam that occurred on Thursday. On Wednesday, the previous day, the defendant said, "I have no bad feelings about Sam." The defendant's statement made the day before Sam was killed is relevant to prove the defendant's sentiments about Sam the next day.

This principle can be illustrated by the statement on Monday, "I love Karen." If the issue is whether the declarant loved Karen on that day, the statement is hearsay but admissible under Rule 803(3) as state of mind. If the issue is whether the declarant loved Karen on Sunday (the day before the statement was made), the statement is also admissible. The declarant's statement is admissible under Rule 803(3) as expressing a "then existing" state of mind because it asserted his feelings at the time the statement was made (Monday). Using the rules of logic inherent in Rule 401's test of relevance, the declarant's feeling toward Karen on Monday are some evidence of the declarant's feelings toward her the day before. By a parity of reasoning, the declarant's feelings toward Karen on Monday may also be used to prove the declarant's feelings toward her on Tuesday. Logically, a declarant's feelings toward a person on one day are at least some evidence of the declarant's feelings toward that person the next day.[406] At some point, however, mental state on one day may become irrelevant or only slightly helpful in assessing mental state far in the future or past.[407]

[5] Declarations of Existing Mental State to Prove Concurrent and Future Conduct

[a] In General

Once we accept the settled proposition that declarations of present mental state are admissible to prove the declarant's mental state at that time, it follows under relevance principles that consistent contemporaneous or future *conduct* can likewise be proved by such declarations of mental state.[407.1] In other words, if a person has a mental state that suggests conduct would be forthcoming because of that mental state, the existence of that mental state can be used as some proof that the conduct occurred.[407.2] The most frequent

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[406] *See*, *e.g.*, *State v. Trusty, 326 S.W.3d 582, 602–03 (Tenn. Crim. App. 2010)* (homicide victim's hearsay statement, made shortly before her death, that she feared the defendant is admissible as state of mind to show her mental state when she made the statement as well as her probable mental state and behavior at the time of her death, including whether she likely initiated contact with the defendant or accompanied him to her vehicle).

[407] *See*, *e.g.*, *United States v. Hedgcorth, 873 F.2d 1307 (9th Cir. 1989)* (defendant's earlier writings have no bearing on his state of mind years later when the alleged offenses occurred).

[407.1] *See, e.g., State v. Bishop, 2016 Tenn. Crim. App. LEXIS 939 (Tenn. Crim. App. 2016)* (in sex abuse case, victim's testimony that he was scared was properly admitted under the state of mind hearsay exception, because the state's theory was that the victim was not being truthful when he stated, to school officials and at trial, that he fell from a swing; thus, the victim's fear was relevant to explain his later conduct, i.e., why he gave untrue accounts of how he had been injured).

[407.2] *See, e.g., State v. Trusty, 326 S.W.3d 582 (Tenn. Crim. App. 2010)* (victim's statement that she was fearful of the defendant admissible to show her probable mental state and behavior at the time of her death); *State v. Johnson, 2015 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. 2015)* (pursuant to the state of mind exception to the hearsay rule, trial court did not err in admitting the testimony of the victim's daughter regarding the victim's statements that she felt sorry for defendant, that defendant had a hard life, and that she wished she could help defendant; the victim's statements were relevant as they established the nature of the victim's relationship with defendant at the time of her murder, and suggested possible future conduct on the part of the victim as it related to the defendant—namely, that because the victim was friendly with and cared about the defendant, she likely would have allowed the defendant into her home).

example is a statement of intent ("I intend to shoot Harry") used to prove that the intent was carried out. This principle is followed by Rule 803(3).[408]

As discussed later in this section, the declarant's mental state may not be used to prove that a third party acted in accordance with the declarant's mental state.

This view reflects pre-rules Tennessee law. In *Kirby v. State*,[409] one Elrod told a fellow citizen of Sparta that he was going to Pine Mountain the following day to look for a saltpeter cave. Elrod's body was found on the mountain, and Kirby was convicted of first degree murder. The Tennessee Supreme Court held Elrod's declaration admissible to prove he was at Pine Mountain,[410] but it was reversed due to other errors.

In *Carroll v. State*,[411] the soon-to-be victim told a witness he intended to travel to Nashville with Carroll to trade for some silver ore buried in a river bottom. The victim's body was found, and the defendant was on trial. The court held the evidence admissible.[412] Corroborating evidence, proving that the victim and Carroll were seen riding and walking toward Nashville, tied the accused to the murder, but corroborating circumstances are not required by Rule 803(3) when the declaration of intent is offered to show only the declarant's later conduct.

[b] The *Hillmon* Case

The classic American case on this issue, *Mutual Life Insurance Company of New York v. Hillmon*,[413] posed the macabre query, "whose corpse is it?" The case involved a young man named Frederick Adolph Walters, a cigar maker in search of adventure, who arrived in Kansas from Iowa. There he fell in with John W. Hillmon, a genuine cowboy of sorts who had also spent time as a soldier, a miner, a buffalo hunter, and hog dealer. Hillmon wanted to ascend society's ladder to that rung reserved for cattle or sheep ranchers. He

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[408] *See* Tenn. R. Evid. 803(3) Advisory Commission Note ("declarations of mental state will be admissible to prove mental state at issue or subsequent conduct consistent with that mental state"). *See also* ***State v. Hutchison, 898 S.W.2d 161, 172 (Tenn. 1994)*** (statement, I'm going fishing with the boys, used to prove intent to fish); State v. Ruane, 912 S.W.2d 766, 778–79 (Tenn. Crim. App. 1995) (victim's statement, several months before victim was shot by defendant, that the victim should have killed the defendant at an earlier time, is admissible to establish the victim's state of mind when issue is whether defendant killed victim in self-defense); State v. Wilson, 164 S.W.3d 355, 364 (Tenn. Crim. App. 2003) (homicide victim's hearsay statement that he intended to be buried rather than cremated qualifies as state of mind hearsay exception); State v. Robinson, 239 S.W.3d 211, 223 (Tenn. Crim. App. 2006) (statement by homicide victim that victim intended to go to Loft Apartments to meet with the defendant and Brown admissible as state of mind to prove the victim's subsequent conduct; not to prove the defendant's conduct); State v. Bess, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 866 (Tenn. Crim. App. 2018) (statements made by murder victim the day before she died, which expressed her plans to leave the defendant and end her marriage, were properly admitted pursuant to the state of mind exception, since they were offered to show her subsequent conduct consistent with the her established mental state; defendant had contended that the victim committed suicide, thus placing the victim's mental state at issue).

[409] 15 Tenn. 259 (1834). *See also* State v. Woods, 806 S.W.2d 205, 209 (Tenn. Crim. App. 1990) (declaration of intent to engage in conduct is generally relevant, unless it is general in character and has no apparent relationship to crime which follows).

[410] Sad to say, the Court became mired in the mud of "res gestae": "It is part of the transaction, explains the reasons why Elrod was in the Pine Mountain, and constitutes a fact in the cause." Kirby v. State, 15 Tenn. 259, 262 (1834). Yet the result would fit Rule 803(3).

[411] 22 Tenn. 315 (1842).

[412] "*Res gestae*" was the official excuse, but this fact pattern likewise satisfies Rule 803(3).

[413] 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892). The case was tried six times, resulting in four mistrials and two plaintiffs' verdicts, both set aside by the United States Supreme Court. The case was finally settled. The opinion under discussion disposes of an appeal following the third trial. *See also* Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208, 23 S.Ct. 294, 47 L.Ed. 446 (1903) (appeal after the sixth trial).

bought $25,000 of life insurance from MONY, New York Life, and Connecticut Mutual, with all policies naming Sallie E. Hillmon as beneficiary. John Hillmon and John E. Brown, a longtime acquaintance, set out from Wichita westward to Medicine Lodge and on west to Elm Creek and to Crooked Creek.[414] Perhaps Walters was along for the ride; at least that was the crux of the insurors' defense.

A body was found near the campfire at Crooked Creek. Was it Hillmon, the insured, or was it Walters, the prototype fall guy? To prove it was Walters, the insurance companies that had insured Hillman offered two letters Walters wrote about two weeks before the corpse was found. One was to his sister, Elizabeth Rieffenach, which she testified to have read in part as follows, the original being lost: "I expect to leave Wichita with a certain Mr. Hillmon, a sheep trader, for Colorado and parts unknown to me." The second letter was to his betrothed, Alvina Kasten, and read substantially:

> I will leave Wichita next week to see the best part of Kansas, Indian Territory, Colorado, and New Mexico. I am going with a man by the name of Hillmon, who intends to start a sheep ranch.[415]

The trial judge sustained objections to both offers of proof.

Reversing, the United States Supreme Court held that the letters were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.[416]

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[414] It is difficult to ascertain just where the expedition stopped. Most references in an insurance lawyer's report, preserved by JOHN H. WIGMORE, PRINCIPLES OF JUDICIAL PROOF (1913), are to Crooked Creek, but John Brown made an affidavit (being prone to making inconsistent affidavits) that the location was Elm Creek. In any event, the United States Supreme Court's opinion and all commentators mention Crooked Creek. Research by Rex K. Travis of the Oklahoma City Bar reveals that present day Elm Creek was once called Crooked Creek.

[415] The United States Supreme Court altered and sanitized the version reproduced in the summary in JOHN H. WIGMORE, PRINCIPLES OF JUDICIAL PROOF 875 (1913). The unexpurgated version reads:

> Wichita, Kansas, March 1, 1879.
>
> Dearest Alvina: Your kind and ever-welcome letter was received yesterday afternoon, about an hour before I left Emporia, so I did not have time to answer it at Emporia. I will stay here until the fore part of next week, and then will leave here to see part of the country which I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else, I concluded to take it for a while, at least until I struck something better. There is so many folks in this country that have got the Leadville fever, and if I would not have got the situation that I have now, I would of went there myself; but as it is at present, I will get to see the best part of Kansas, Indian Territory, Colorado and New Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent; besides I get good wages. I will drop you a letter occasionally until I get settled down, then I want you to answer it, (you bet, honey.) Don't it? So you can see that I will not get home for a few months yet, but cannot tell how soon I will get back. I am as anxious to see you as you are to see me; but I do not want to go back there without a cent of money, for that is not what I left for (you know). When I get back you will get to see me in about the same way we parted (you bet). If anyone asks that [*sic*] I am doing, tell them you were not informed, for it is none of their business. And another thing: don't ask me to write long letters, for I would without being asked, if I could find the words when I write, as I am generally busy from my (old woman) sweet little girl. But you know how this is without being told. So I will not have to waste any more paper on that subject at present. I will have to come to a close before long, or I will have to do as that other fellow—write two sheets, and swindle the postmaster out of three cents, and you know that I don't like to do that, pet. Please give compliments to inquiring friends, and all the love that you can embrace for yourself, and nobody else. I will close for this time, love, to let you hear from me soon again.
>
> Yours, as ever,
>
> F. A. Walters.
>
> P.S.—Much obliged for that poetry, and I done as you said, (thought of you when I read it.)

[416] *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295–96, 12 S.Ct. 909, 36 L.Ed. 706 (1892)*.

This opinion became the cornerstone of the modern state of mind hearsay exception. Yet the *Hillmon* court's statement of the rule raises several problems, which are solved under *Tennessee Rules of Evidence 803(3)*. First, the court's pronouncement is internally inconsistent; the Supreme Court did accept the letters as "proof that he [Walters] went away from Wichita." Second, the suggestion of corroboration being necessary is not carried over into Tennessee Rule 803(3), which requires no corroboration.

[c] Conduct of Others

Third, and most important, the *Hillmon* court goes too far by stating that a declarant's [Walters'] statement of intention is competent to prove another's [Hillmon's] conduct. The leap of faith taken by some authorities is that a declarant's statement of mental condition requiring cooperative conduct to carry out is admissible to prove the cooperating party's conduct as well.[417] The flaw is in failing to realize that logic requires a supposition that the declarant and third party agreed in the past to do an act together. Declarations of mental state generally are not admissible to prove anyone's—even the declarant's—past conduct.[418]

A pre-rules Tennessee opinion, specifically disapproved in the Tennessee Advisory Commission Comment, is *Ford v. State*,[419] a murder case. Ford's wife left work at a Krystal restaurant in Chattanooga around midnight. She told a co-worker she intended to meet her husband. Over a month later Mrs. Ford's body was found floating 78 miles downstream in the Tennessee River with a bullet in her head. Did Ford kill her? The jury thought so, and the Tennessee Supreme Court affirmed the second degree murder conviction. As to the deceased's declaration of intent, the court held it admissible "as bearing on the determinative issue of whether she met with her husband."[420] The most that should be inferred from declarations of intent is the present or future conduct of the declarant, not another person.

Today, the evidence in *Ford* would be objectionable under Rule 803(3). The Tennessee Advisory Commission Comment to Rule 803(3) states:

> The Commission contemplates that only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception.[421]

In *State v. Farmer*,[422] for example, the state sought to introduce into evidence a statement by the homicide victim stating that (1) the victim intended to steal marijuana, (2) the victim intended to do so with the

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[417] *See*, *e.g.*, MICHAEL H. GRAHAM, 4 HANDBOOK OF FEDERAL EVIDENCE 115 (6th ed. 2006). The House Judiciary Committee specifically intended FED. *R. EVID. 803(3)* to admit only a declarant's conduct, but federal case law, though split, favors admissibility.

[418] *See below § 8.08[6]*.

[419] *184 Tenn. 443, 201 S.W.2d 539 (1945)*.

[420] *Ford v. State, 184 Tenn. 443, 452, 201 S.W.2d 539, 542 (1945)*. The Court called upon "*res gestae*" as the avenue for admission.

[421] *Tenn. R. Evid. 803(3)* Advisory Commission Comment. *See also* ***State v. Hutchison, 898 S.W.2d 161 (Tenn. 1994)*** (co-conspirator testified that victim had said that on a fishing trip the victim thought that a man named Gaylor had pushed the victim into the water; Supreme Court held the victim's statement was third party conduct barred by Rule 803(3), but the facts do not appear to support the conclusion that this was state of mind testimony at all, unless it involved memory of a past act, clearly barred by Rule 803(3)); *State v. Smith, 868 S.W.2d 561 (Tenn. 1993)* (homicide victim told her boyfriend not to come to the victim's house on Sunday because she was afraid the defendant would be there and there might be a conflict; victim's statement was admissible to prove the victim's plan for Sunday; the Tennessee Supreme Court raised the question whether it may have been improper to use the victim's statement to establish the defendant's conduct on Sunday, citing the Advisory Commission's comment on Rule 803(3)); *State v. Long, 45 S.W.3d 611 (Tenn. Crim. App. 2000)* (cannot prove third party's conduct under Rule 803(3); would have been admissible to prove declarant-victim feared defendant and did not commit suicide).

defendant, and (3) the plan to steal marijuana was the defendant's. The Tennessee Court of Criminal Appeals excluded the first statement as irrelevant, and the second and third as proving the conduct of a third party rather than the declarant.

Similarly, in *State v. Leming*[423] a homicide victim told Wallace that the victim was afraid of the defendant. The trial court permitted Wallace to so testify as a statement of the victim's then existing state of mind. The Tennessee Court of Criminal Appeals reversed, holding that, unlike in *Farmer*, the victim's hearsay statement was actually being used to prove the defendant's conduct rather than the victim's state of mind. Although the court held that the victim's expression of fear was irrelevant to the issue of who killed the victim,[424] surely in some cases this proof would satisfy the minimal requirements of Rule 401.

In another illustrative case, defendant was charged with child rape.[424.1] He sought to introduce the testimony of a witness who would have testified the victims told the witness that no one had "hurt" them. The Tennessee Court of Appeals held the evidence was hearsay not covered under Rule 803(3) because it related to the conduct of a third person—the declarant.

[d] Threats

The future conduct aspect of Rule 803(3)'s state of mind exception makes threats competent even when not communicated to the intended victim. Communicated threats could come in on a nonhearsay basis to prove apprehension of the hearer if relevant, but an uncommunicated threat requires the hearsay exception if offered for truth—that the declarant intended to do some harm. In *State v. Butler*,[425] the accused was charged with murdering his estranged wife. He claimed self-defense. On the issue of who was the first aggressor, the court held that the trial judge should have allowed the jury to consider testimony of a witness who heard the victim threaten to "get rid of that son-of-a-bitch" with a pistol she toted in her purse. This result is consistent with Rule 803(3).

[6] Declarations of Existing Mental State to Prove Past Conduct; Wills

[a] In General

Although, as noted above,[426] Rule 803(3) permits a declarant's state of mind to be used to prove present or future conduct, it does not permit statements of mental condition amounting to memory or belief to prove the declarant's consistent past conduct. For example, a statement, "I remember that I killed William last year on this date," would not be admissible under the state of mind hearsay exception of Rule 803(3) to prove that the declarant killed William on that date.[427]

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[422] *927 S.W.2d 582 (Tenn. Crim. App. 1996)*. *See also State v. Thomas, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. Apr. 25, 2019)* (trial court properly excluded hearsay testimony from a proposed witness that, a few weeks prior to the murder, the victim was "worried" because his car was vandalized; the evidence was not offered to prove the victim's state of mind or subsequent conduct, but to prove the conduct of a third party, since the defendant sought to introduce the testimony to prove that an unknown third person killed the victim or to impeach the reliability of the police investigation).

[423] *3 S.W.3d 7 (Tenn. Crim. App. 1998)*.

[424] *Id. at 18*, *citing State v. Smith, 868 S.W.2d 561, 573 (Tenn. 1993)*.

[424.1] *State v. Howard, 2015 Tenn. Crim. App. LEXIS 627 (Aug. 4, 2015)*, *aff'd on this ground, rev'd on other grounds*, by *State v. Howard, 504 S.W.3d 260 (Tenn. 2016)*.

[425] *626 S.W.2d 6 (Tenn. 1981)*.

[426] *See above § 8.08[5]*.

[427] Of course it could be admissible under some other exception, such as an admission, Rule 803(1.2).

For example, in *United States v. Binder*,[428] the court excluded the defendant's statement explaining that he was in a daze because a business deal had collapsed a day or two before. The court held that the historical facts about the business deal were inadmissible under Rule 803(3).

Another illustration is *State v. Wilson*[429] where a homicide defendant told a friend that "I didn't do it." Although the defendant argued the hearsay statement was admissible as state of mind, the trial court properly excluded it as a statement regarding past conduct and not a statement of the defendant's then existing mental or emotion state, as required by Rule 803(3). The *Wilson* court also noted a general policy excluding such self-serving statements. A contrary solution would seriously undermine the exclusionary hearsay rule altogether.[430] Virtually every statement could be turned into state of mind by the addition of the phrase "I remember" or "I believe."

[b] Wills Exception

Rule 803(3) contains a useful relaxation of the prohibition against proof of mental condition to prove past conduct. This exception applies in wills cases, where the statement *relates to the execution, revocation, identification, or terms of declarant's will*. It means that evidence of a declarant's memory or belief may be used to prove various issues relating to the terms or validity of a will. Without this exception it would be difficult or impossible to establish the testator's true intentions about the disposition of his or her property. To illustrate the so-called wills exception, consider this example:

> To prove the Declarant made a second will that is generous to her nephew but is inconsistent with the one offered for probate, Witness testifies: "I heard Declarant say, 'I want my nephew to have the homeplace.' "

Under the wills exception in Rule 803(3), the testatrix's hearsay statement is competent to prove that she had the expressed intention and that she had earlier made a will devising the homeplace to her nephew.[431]

[7] Declarations of Existing Physical Condition

[a] In General

Though arguably distinctly different from the declarations of mental state, declarations of present bodily condition are lumped together with the former in Rule 803(3). In order to apply this rule accurately, one must distinguish statements of present pain or health, governed by both Rules 803(3) and 803(4), from statements of past bodily condition, a category governed by the far more restrictive provisions of Rule 803(4).[432]

Statements about physical condition offered under Rule 803(3), the instant exception, can be spoken or written to any hearer or reader. They do not have to be addressed to a medical professional or spoken for any particular purpose, such as to obtain medical care.[433] The statement may have been uttered in a casual

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[428] *794 F.2d 1195 (7th Cir. 1986)*. *See also* *United States v. Samaniego, 345 F.3d 1280, 1282 (11th Cir. 2003)* (apology for having stolen items is not admissible to prove he had stolen the items, but is admissible to show he felt remorse).

[429] *State v. Wilson, 164 S.W.3d 355 (Tenn. Crim. App. 2003)*.

[430] *Shepard v. United States, 290 U.S. 96 (1933)*.

[431] The hypothetical is based on the facts of *Hickey v. Beeler, 180 Tenn. 31, 171 S.W.2d 277 (1943)*, where the court excluded the evidence. But Rule 803(3) effectively overrules *Hickey*, as the Tennessee Advisory Commission noted. *Tenn. R. Evid. 803(3)* Advisory Commission Comment.

[432] *See below § 8.09[2]*.

gossip session among friends, in a serious conversation with the declarant's spouse, or in a doctor's office during a physical examination. The sole limitation is that the content of the statement be confined to then existing pain or bodily health, not medical history. An example of a proper offer would be:

> To prove that Declarant endured pain and suffering, Witness testifies: "I heard Declarant say, 'My leg hurts.' "[434]

[b] Contrast with Rule 803(4)

It must be stressed that Rule 803(3) does not reach statements of causation, but Rule 803(4) may admit such evidence in some cases. For example, assume a person says "my leg hurts because a dog bit me." The statement that "my leg hurts" would be admissible under Rule 803(3) as a statement of then existing physical condition, but the statement that a dog caused the injury would not be admitted under this exception. For example, in *State v*. Ramos a three-year-old sex abuse victim told her mother that "Jesus [the defendant's first name] touch me here, it hurts,"[435] The Tennessee Court of Criminal Appeals correctly held that Rule 803(3) admits the "it hurts" part but does not cover the allegation that "Jesus touch me here." The latter was inadmissible conduct of a third party. If the statement were made to a treating physician, however, Rule 803(4) would admit the causal statement because it is pertinent to medical diagnosis and treatment of the child victim.[436]

[433] Rule 803(4) provides a hearsay exception for statements for purposes of medical diagnosis and treatment. *See below § 8.09[2]*.

[434] *See also State v. Ramos, 331 S.W.3d 408, 415 (Tenn. Crim. App. 2010)* (child sex abuse victim told her mother, "it hurt"; is state of sensation or physical condition under Rule 803(3) (note that the statement was not in the present tense though the child was referring to how she felt at the time she made the statement).

[435] *331 S.W.3d 408, 415 (Tenn. Crim. App. 2010)*.

[436] *See below § 8.09[5]*.

§ 8.09 Rule 803(4). Statements for Purposes of Medical Diagnosis and Treatment

[1] Text of Rule

Rule 803(4) Statements for Purposes of Medical Diagnosis and Treatment

The following are not excluded by the hearsay rule:

Statements made for purposes of medical diagnosis and treatment describing medical history; 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 and treatment.

Advisory Commission Comment:

The proposal continues the Tennessee position of limiting declarations of past physical condition to those made to treating doctors. *See* Gulf Refining Co. v. Frazier, 15 Tenn. App. 662, 688–95 (1932). The declaration must be for both diagnosis and treatment. Declarations of present bodily condition fall within Rule 803(3).

It is important to distinguish declarations of bodily condition, admissible as substantive evidence, from similar declarations used by a physician to support an expert opinion. The latter are not evidence, but rather give weight to the opinion—which is the evidence. T.C.A. § 24-7-114; State v. Holt, 222 Tenn. 721, 440 S.W.2d 591 (1969); *see* Rule 703.

[2] Overview of Statements for Purposes of Medical Diagnosis and Treatment

[a] In General

Rule 803(4) provides a hearsay exception for statements made for purposes of medical diagnosis and treatment. These declarations are viewed as sufficiently reliable to be admissible because they are made for purposes of assisting the declarant regain health.[437] This motivation is considered stronger than the motivation to lie or shade the truth. Moreover, the information bears some external indicia of reliability since it is ordinarily reasonably relevant to the work of skilled professionals, such as physicians, who would not rely on the information absent some likelihood of accuracy. The exception has three elements, as described below.

[b] Confrontation

It is likely that, under *Crawford v. Washington*,[438] many statements satisfying the hearsay exception for statements for purposes of medical diagnosis and treatment will also satisfy the confrontation clause. The

[437] *See* State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997), *noted in* 66 Tenn. L. Rev. 875 (1999).

[438] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *See above* § 8.02[4].

key is whether the statement is considered to be testimonial. If made to medical personnel for purposes of medical diagnosis and treatment, most of the statements will be deemed to be nontestimonial and therefore will not violate *Crawford*.[439]

[c] Workers' Compensation

In workers' compensation cases, a different rule is applicable in certain situations. A Tennessee statute provides that a written medical report of a treating or examining physician is admissible at any stage of a workers' compensation claim in lieu of a deposition upon oral examination if proper notice is given and no timely objection is raised.[440] The report must be signed by the physician making the report or accompanied by an affidavit from that physician or the submitting attorney verifying the report's contents. If an objection is raised, the objecting party must depose the physician or waive the objection to the admission of the physician's written report. The obvious purpose of this provision is to avoid the deposition process in those cases where the physician's statements and findings are not disputed.

[3] Elements: Purposes of Medical Diagnosis and Treatment

[a] In General

Rule 803(4) mandates that the statement had been made *for purposes of medical diagnosis and treatment*. The key is why the statements were made. If for the proper purpose, the fact that no treatment is provided is immaterial.[441] The use of the word "and" indicates that a statement made solely for diagnostic purposes, with no follow-up treatment considered, is not covered by this exception.[442] According to the Tennessee Court of Criminal Appeals, "diagnosis" in this rule "refers to a diagnosis made for the purpose of determining what course of treatment should be prescribed for the patient."[443] Thus, this hearsay exception under Tennessee law does not admit a hearsay statement that a patient makes to a physician consulted solely for purposes of diagnosis and unrelated to subsequent treatment. Such statements are viewed as too likely to be unreliable because they may have been made for purposes of building a litigation file.

On the other hand, the fact that treatment is not given does not bar use of this hearsay exception. In a rape case, a victim told a hospital physician that there had been digital vaginal penetration.[444] The Court of

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[439] *See, e.g.,* State v. Cannon, 254 S.W.3d 287 (Tenn. 2008) (declarant's statements to medical personnel that declarant had been raped were not testimonial because were for medical diagnosis and treatment, but declarant-victim's statements to a nurse gathering evidence for a criminal prosecution were testimonial and subject to the confrontation clause). *Cf.* White v. Illinois, 502 U.S. 346, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1992).

[440] ***TENN. CODE ANN. § 50-6-235(c)*** (2008).

[441] State v. Spratt, 31 S.W.3d 587, 600 (Tenn. Crim. App. 2000).

[442] This differs from federal evidence law which reaches statements for medical diagnosis *or* treatment. FED. R. EVID. 803(4).

[443] State v. Rucker, 847 S.W.2d 512, 517 (Tenn. Crim. App. 1992), *overruled on other grounds* in State v. McLeod, 937 S.W.2d 867, 870 n. 2 (Tenn. 1996). *See also*, State v. Gray, 2018 Tenn. Crim. App. LEXIS 849 (Tenn. Crim. App. 2018) (trial court properly admitted victim's statement to nurse practitioner that she had been raped vaginally, since the nurse testified that the purpose of the interview was to obtain victim's medical history and to conduct a physical examination of the area where the victim said she had been assaulted; although the trial court was remiss in not holding a jury-out hearing regarding the circumstances surrounding the statement, the appellate court concluded that the nurse's testimony provided sufficient information from which the trial court could confirm the statement's reliability and determine that it was made for the purpose of medical diagnosis and treatment).

[444] State v. Edwards, 868 S.W.2d 682 (Tenn. Crim. App. 1993) (note that the physician included the victim's statements in the physician's report, thus creating multiple hearsay problems; although multiple hearsay was not discussed by the Court of Criminal Appeals, the report was probably admissible because the physician's records were a business record). *See also* State

Criminal Appeals held that this statement to the physician was pertinent to diagnosis and treatment because it informed the physician about the area to be examined and possible treatment for any injuries. Although no treatment may have been necessary, the statement still qualified under this hearsay statement because it was made for the proper purposes.

By way of contrast, in another rape case the victim's mother described the assault to a nurse practitioner (who worked for a rape crisis center) and to a social worker after the victim was brought to the hospital and examined by the medical staff. The Tennessee Court of Criminal Appeals excluded both statements as not made for purposes of medical diagnosis and treatment.[445] The record did not establish that the nurse practitioner played any role in either diagnosis or treatment, or that the victim's mother thought that the nurse did. Similarly, the record also failed to prove that the mother's statement to the hospital social worker was for purposes of medical diagnosis and treatment. Perhaps the result on this issue would have been different had a better foundation been laid.[445.1]

Another illustration is *State v. McLeod*,[446] where the defendant was charged with fondling his stepdaughter. About a month after the allegations against the defendant surfaced, the victim was taken to a pediatrician who took a medical history and conducted a physical examination as an evaluation for possible child abuse processing. During the medical evaluation, the victim told the pediatrician that the defendant had fondled the victim. The Tennessee Supreme Court refused to permit the pediatrician to repeat this statement as a Rule 803(4) exception to the hearsay rule. The Supreme Court noted the scant record and concluded that the statements were made for "evaluation" rather than for medical diagnosis and treatment. Because of the date of the statements (more than a month after the incidents) and the nature of the injury (fondling), there was little likelihood that the physical examination would be productive for diagnosis and treatment. Consistent with the Tennessee Supreme Court's view at the time that statements to psychologists are not covered by Rule 803(4) and perhaps therefore expressing some concern about purely psychological diagnosis and treatment,[447] there was no consideration in *McLeod* of whether the pediatrician would have recommended psychological treatment.

In *State v. Stinnett*,[448] the Tennessee Supreme Court again addressed this issue, stressing the importance of the reliability of the statements. A six-year-old sex abuse victim was examined by two physicians after the child told her mother about the abuse. The child then told both doctors about the incidents and identified the defendant as responsible. The Tennessee Supreme Court looked at all the circumstances and concluded that the child victim's statements to the doctors were for purposes of medical diagnosis and treatment. The court found the child to be old enough to understand the doctors were there to examine and,

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v. Spratt, 31 S.W.3d 587 (Tenn. Crim. App. 2000) (victim told physician she had been raped vaginally but not orally or anally; no medical treatment provided). *See below § 8.41[2]* (multiple hearsay).

[445] *State v. Rucker, 847 S.W.2d 512 (Tenn. Crim. App. 1992)*. *See also State v. Gleason, ___S.W.3d___, 2020 Tenn. Crim. App. LEXIS 78 (Tenn. Crim. App. Feb. 10, 2020)* (*Rucker* requires that statements made by a third party to a medical provider must be admissible under a hearsay exception, since they are not admissible as statements by a victim made for the purpose of medical diagnosis and treatment; accordingly, the trial court erred by admitting statements made by the minor sexual assault victim to the victim's parent, which were included in the victim's medical report—the statements were "hearsay within hearsay" since the parent relayed the statements to a medical provider, not the victim, and the statements were not admissible under any other hearsay exception).

[445.1] *See State v. Gray, 2018 Tenn. Crim. App. LEXIS 849 (Tenn. Crim. App. 2018)* (appellate court found no error in statement's admission where nurse practitioner's testimony provided sufficient detail from which the trial court could properly determine that the statement was for the purpose of diagnosis and treatment).

[446] *937 S.W.2d 867 (Tenn. 1996)* (the facts in the text are actually from *McLeod's* companion case, *State v. Young*, joined with *McLeod* and included in the *McLeod* opinion).

[447] *State v. Barone, 852 S.W.2d 216 (Tenn. 1993)*.

[448] *958 S.W.2d 329 (Tenn. 1997)*.

if necessary, treat her. The victim used child-like terms and was consistent in her statements to both doctors. Moreover, the child was examined shortly after the event and there was no indication the child was motivated to be untruthful to the physicians.

[b] Child Abuse

As noted above, the Tennessee Supreme Court has held that in child abuse cases, the child-victim's statements under Rule 803(4) during the course of a medical examination merit special scrutiny because the child may not be able to understand the need to be truthful in a medical setting.[449] If that occurs, the primary rationale for Rule 803(4)—that a declarant is motivated to tell the truth in order to get the best medical diagnosis and treatment—is not present. Accordingly, in such cases courts must examine the child-victim's statements especially carefully. There should be a jury-out hearing to assess admissibility under Rule 803(4).

Before admitting the evidence, the trial court should make an "affirmative finding" that the Rule has been satisfied. Facts a court should use in assessing admissibility under Rule 803(4) include the circumstances surrounding the making of the statement, the child's age, the timing and content of the statement, whether the statement was inappropriately influenced by another, whether it was in response to suggestive or leading questions, whether the child's statements were internally consistent, and any other appropriate factor.

An illustration of this approach is *State v. Gordon*[450] in which a three-year-old child was allegedly raped by the defendant. Shortly after the event, the child was taken to two hospitals, then referred to a facility that evaluates cases of suspected child sexual abuse. The next morning the child-victim was taken to the evaluation facility where she was interviewed by a psychologist who took a history of the alleged rape. Then a nurse practitioner conducted a physical exam which was based to some extent on the psychologist's history. At the trial, the nurse practitioner testified. Since the psychologist did not testify, the nurse practitioner read the psychologist's interview into evidence.

The Tennessee Supreme Court in *Gordon* held that the child's statements to the psychologist were made for purposes of medical diagnosis and treatment, and admissible under Rule 803(4). The Court noted that the child had pain when urinating and was soon transported to a hospital for treatment. She refused hospital treatment and was referred to the special facility for sexually abused children. At that facility she was interviewed by a psychologist and, according to the nurse practitioner, that interview was taken for the purpose of proper diagnosis and treatment. The psychologist did not use leading or suggestive questioning and the child's statements suggested no motive other than seeking medical treatment. The physical exam revealed vaginal injury within the past day. There was no evidence of improper influence or any motive inconsistent with seeking medical treatment. And the Tennessee Supreme Court also found no other factor affecting the victim's trustworthiness. No investigative referral had been made at that time. The Court in *Gordon* found that the totality of circumstances supported an inference that the victim's motive in talking with the psychologist was for the purpose of medical diagnosis and treatment.

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[449] *State v. Stinnett, 958 S.W.2d 329 (Tenn. 1997)*; *State v. McLeod, 937 S.W.2d 867 (Tenn. 1996)*. *See also State v. Gordon, 952 S.W.2d 817 (Tenn. 1997)* (same as *McLeod*). *See also Tenn. R. Evid. 803(25)* and *below § 8.30* (hearsay exception for certain child's statements).

[450] *952 S.W.2d 817 (Tenn. 1997)*. *See also State v. Wallace, ___S.W.3d___, 2020 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. Feb. 14, 2020)* (trial court did not abuse its discretion by admitting a physician's testimony about the victim's statements to her, because the physician testified that she was examining the victim for the purpose of making a medical diagnosis of child sexual abuse); *State v. Rimmer, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. 2019)* (trial court properly admitted seven-year-old victim's statement to nurse under hearsay exception for medical diagnosis and treatment, where 1) evidence showed that the victim spoke only with the nurse about the abuse; 2) the nurse used the information given by the victim to examine her, test her for sexually transmitted diseases, and treat her; 3) the victim was escorted to the sexual assault resource center by a police officer late at night and was old enough to understand she was in a medical setting and needed to be truthful; and 4) she used child-like terms to describe the abuse, and nothing indicated that she was motivated to lie).

[4] Elements: Broad Content Covered

Rule 803(4) broadly describes the subjects qualifying for admission. It embraces medical history, past or present symptoms, pain, sensations, and the general character of the cause or external cause of the symptoms. Thus, it permits the statement to recite extensive facts about the declarant's medical history, including past symptoms, pain or sensations. This differs markedly from Rule 803(3), which reaches only a "then existing" physical condition.[451]

The most problematic subject of this hearsay exception involves hearsay statements about the cause of the symptoms. These statements are admissible only if reasonably pertinent to diagnosis and treatment, as discussed in the next section.[452]

[5] Elements: Reasonably Pertinent to Diagnosis and Treatment

[a] In General

Tennessee Rule 803(4) also provides that the statement made for purposes of diagnosis and treatment is admissible only "insofar as reasonably pertinent to diagnosis and treatment." The Tennessee Supreme Court has stressed that the statement must be "reasonably pertinent to *both* diagnosis and treatment."[453]

In *State v. McLeod*[454] the Tennessee Supreme Court specified what must be reasonably pertinent to diagnosis and treatment. The court held:

> We construe 803(4) as having only two requirements: (1) the statement must be made for the purpose of diagnosis or [sic] treatment: (a) describing medical history, or (b) past or present symptoms, or (c) pain or sensation; or (2) the statement may address the inception, cause, or source of the problem if it is reasonably pertinent to diagnosis and treatment.[455]

Thus, in Tennessee a statement under Rule 803(4) must be "reasonably pertinent to diagnosis and treatment" only to the extent that it deals with the inception, cause or source of the problem. Statements about medical history, past or present symptoms, or pain or sensation must be made for the purpose of medical diagnosis and treatment, but according to *McLeod* there does not have to be a finding that they are "reasonably pertinent to diagnosis and treatment."[456]

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[451] *See above* *§§ 8.08[7]*.

[452] *See below* *§ 8.09[5]*.

[453] *State v. Lynn, 924 S.W.2d 892, 898 (Tenn. 1996)* (emphasis in original). The corresponding federal rule covers statements made for purposes of medical diagnosis *or* treatment, a more inclusive hearsay exception than the Tennessee version covering statements for purposes of medical diagnosis *and* treatment. *See* FED. *R. EVID. 803(4)*.

[454] *937 S.W.2d 867 (Tenn. 1996)*.

[455] *Id. at 870 n.2*. In what must have been a typographical error in footnote 2 of *McLeod*, the court used the word "or" instead of the word "and" in stating "diagnosis or treatment." The next footnote in the *McLeod* opinion makes clear this clerical mistake. *See* *937 S.W.2d at 871 n.3*. *See also* *State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997)* (correcting this clerical error).

[456] The test was restated in *State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997)*, as follows:

> As we stated in *State v. McLeod*, *Tenn. R. Evid. 803(4)* permits the admission of a statement describing medical history, past or present symptoms, pain, or sensations, when made for the purposes of diagnosis and treatment. A statement regarding the general character, cause, or source of the problem is also admissible if in addition to the above requirement, such statement is reasonably pertinent to diagnosis and treatment (*citation omitted*).

Perhaps these statements about medical history or symptoms are so obviously pertinent to diagnosis and treatment that no such showing is necessary. On the other hand, some statements about the inception or cause of the problem, that the declarant intends to be used for assisting in diagnosis and treatment, are nevertheless not admissible under Rule 803(4) because they have little bearing on treatment.[457]

The test for determining whether a statement was made for purposes of diagnosis and treatment is the same for both children and adults. The court must consider all the circumstances surrounding the statement.[458] In the case of children, the Tennessee Supreme Court cautions that these circumstances are especially important "because the child's ability to articulate the reason for the statement may be affected by age or developmental maturity.[459] The doctor's testimony that the statement was for purposes of medical diagnosis and treatment is a factor to be considered in light of all the circumstances.[460] But the doctor's testimony that the doctor examined the patient but did not intend to offer treatment is not dispositive since the issue is why the patient made the statement.[461]

[b] Causation; Child Abuse Cases

The most important issue of whether a statement is reasonably pertinent to diagnosis and treatment concerns a statement of causation. For example, assume that an emergency room patient tells the treating physician, "Mary Jones hit me with a hammer." Although the fact that the declarant was hit with a hammer may be pertinent to diagnosis and treatment, the name of the person who delivered the blow is not pertinent and should not be admissible under this exception. Similarly, a patient's statement that she had been raped was pertinent to treatment of her physical and mental condition, but an identification of the perpetrator was not.[462] On the other hand, on rare occasions, such as in a child abuse case, identification

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[457] *See*, *e.g.*, Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991) (excluding declarant-patient's statement to doctor stating that foot injury occurred when patient stepped through rusted-out step and then slipped on greasy floor; doctors testified causation was not pertinent to treatment); State v. Lynn, 924 S.W.2d 892 (Tenn. 1996) (statement including reference to a baseball bat may not be admissible under Rule 803(4) because the state's expert witness testified that the nature of the item *(i.e.,* whether a baseball bat or a pool cue) was irrelevant on the issue of treatment); State v. Spratt, 31 S.W.3d 587, 600–01 (Tenn. Crim. App. 2000) (admitting rape victim's statements that she had been penetrated vaginally but excluding her statements that she had been attacked at work by a black man who requested information).

[458] State v. Stinnett, 958 S.W.2d 329, 331–32 (Tenn. 1997), *noted in* 66 Tenn. L. Rev. 875 (1999).

[459] Id. at 332.

[460] Id. at 332 n. 7. *See also* State v. Dickerson, 2016 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. 2016) (trial court did not err by admitting the child victim's statements under the medical diagnosis and treatment exception to the hearsay rule because a nurse practitioner testified that the statements regarding the victim's abuse, which were relayed to her by a forensic social worker, were a necessary part of the nurse practitioner's diagnosis and treatment of potential infections; and nothing suggested that the victim's statements were made in response to leading questions, were the result of improper influence, or were otherwise made under circumstances indicating untrustworthiness).

[461] State v. Spratt, 31 S.W.3d 587, 601 (Tenn. Crim. App. 2000); State v. Croom, 2014 Tenn. Crim. App. LEXIS 685 (July 11, 2014) (doctor prepared treatment plan but would not do the treatment).

[462] *Cf.* United States v. Iron Thunder, 714 F.2d 765 (8th Cir. 1983). *See also* State v. Williams, 920 S.W.2d 247, 256–57 (Tenn. Crim. App. 1995) (events before rape and description of assailant are not pertinent to medical diagnosis and treatment of adult rape victim); State v. Mervan Eyup Ibrahim, 2016 Tenn. Crim. App. LEXIS 622 (Tenn. Crim. App. 2016) (in aggravated rape case, court admitted some statements made by the victim, which were contained in a forensic report, because they were reasonably pertinent to her medical diagnosis and treatment—i.e., how defendant pulled her hair and dragged her up the steps of a vacant house, the events of the attack, and how she injured her arm during her escape; but the remainder of the report, containing statements regarding the events before the rapes and the description of the assailant, should have been redacted, because those statements were extraneous and did not relate to diagnosis or treatment)..

of the perpetrator may be quite pertinent to proper psychological treatment of the victim and should be admissible under Rule 803(4).[463]

The Tennessee Supreme Court in *State v. Livingston* held that:

> [S]tatements made to a physician identifying a perpetrator who is a member of the child's household may be reasonably pertinent to proper diagnosis and treatment of emotional and psychological injury [in a child sex abuse case.][464]

The court specifically did not resolve the issue whether identification of the perpetrator irrespective of residence may also be reasonably pertinent to diagnosis and treatment. However, the *Livingston* court held that the child's feelings about the abuse are not reasonably pertinent to diagnosis and treatment.

The physician's evaluation of what is reasonably pertinent to treatment should be given weight, but it is not conclusive.[465] On rare occasions, expert testimony could be introduced on the issue.

[6] Statements About Another Person's Health

[a] In General

Ordinarily statements covered by Rule 803(4) are made by the person whose health is described in the statement, but nothing in Rule 803(4) bars proof of statements about another person's health. For example, assume that mother sees her son hit by a car and takes the child to the hospital emergency room. There she tells the attending physician what she saw. Her statements are admissible under Rule 803(4) as long as made for purposes of, and reasonably pertinent to, diagnosis and treatment.[466] Thus, the physician could testify about the mother's description of how the car struck the child, how the child was lying after the collision, the sounds the child made when lifted into the car, and the way the child clutched his arm while traveling to the hospital. But the statements by the doctor to the patient are not covered by this exception.[467]

[b] Multiple Hearsay

Sometimes these statements about another's health will involve multiple hearsay. However, under Rule 805 multiple hearsay is admissible if each hearsay link is covered by an exception.[468] Often Rules 803(3) and 803(4), both covering statements of then existing physical condition, will admit the first step of multiple hearsay involving physical condition. Returning to the example of the mother and son, if the son tells his

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[463] *See, e.g.,* State v. Hunter, 926 S.W.2d 744, 747 (Tenn. Crim. App. 1995) (in sexual assault case involving minor victim, the identity of the defendant who lived in the same household as the victim was pertinent to treatment and diagnosis); United States v. Shaw, 824 F.2d 601 (8th Cir. 1987) (statements of child sex abuse victim to treating physician are for medical diagnosis and treatment, including the identity of abuser); United States v. Bercier, 506 F.3d 625, 632 (8th Cir. 2007) (identity of person assaulting 18 year-old woman may be essential to diagnosis and treatment).

[464] State v. Livingston, 907 S.W.2d 392, 397 (Tenn. 1995). *See also* State v. Stinnett, 958 S.W.2d 329, 333 (Tenn. 1997).

[465] State v. Stinnett, 958 S.W.2d 329, 332 n.7 (Tenn. 1997). *See also* Davis v. State, 2016 Tenn. Crim. App. LEXIS 864 (Tenn. Crim. App. 2016) (victim's statement about petitioner having "freaked on" her was made during the course of the interview, and the victim's statement to the doctor was made for the purposes of medical diagnosis and treatment).

[466] *See*, *e.g.*, State v. Rucker, 847 S.W.2d 512, 516–17 (Tenn. Crim. App. 1992) (mother of sexual assault victim told hospital social worker and nurses about incident).

[467] *See, e.g.*, Field v. Trigg County Hosp., Inc., 386 F.3d 729 (6th Cir. 2004) (statements by doctor to patient not covered by medical statements exception).

[468] *See below* § 8.41[2].

mother how he is feeling, the mother can repeat it to a treating physician and the physician can repeat it in court. The child's statement to the mother is covered by Rule 803(3) and perhaps 803(4), and the mother's statement to the physician is covered by Rule 803(4) as a statement for purposes of medical diagnosis and treatment.

Although it is arguable that Rule 803(4) permits one person to describe another person's health to a health professional, the rule does not reach communications from the health professional to the patient.[469] These statements lack indicia of reliability since they are not made by or on behalf of the person seeking better health.

[7] Statements to Non-Physicians

Rule 803(4) ordinarily involves statements to physicians, but its rationale extends its reach to anyone to whom a statement, pertinent to—and made for purposes of—medical diagnosis and treatment is made. The Tennessee Supreme Court summarized the principle as follows:

> [A]lthough Rule 803(4) ordinarily involves statements made to physicians, the scope of the rule applies to any person to whom a statement is made for purposes of or pertinent to medical diagnosis and treatment.[470]

Thus, it can be made to medical professionals, such as nurses,[471] ambulance attendants, orderlies, and hospital attendants, as well as to other medical workers, such as social workers,[472] clerks and administrative personnel. It can also be made to people unconnected with the health professions or health facilities. An example is a child's statement to a parent indicating that the child's head hurts. If the statement is for purposes of medical diagnosis and treatment (perhaps the parent will give the child an aspirin), the child's statement is admissible under Rule 803(4).

While the witness repeating a patient's statement under this exception will often be the treating doctor, anyone who overheard the statement can testify. That could be a nurse or a bystander. The declarant may also repeat what he or she said if the rule is otherwise satisfied. The key is that the purpose of the statement was to seek treatment as well as diagnosis.

The Tennessee Supreme Court and lower Tennessee courts have experienced some evolution in their approach to interpreting Rule 803(4). In *State v. Barone*,[473] a three-year-old child, allegedly the victim of rape perpetrated by her father, made statements to her psychologist regarding the crime. The Supreme Court held

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[469] *See*, *e.g.*, *Bulthuis v. Rexall Corp., 789 F.2d 1315 (9th Cir. 1986)*.

[470] *State v. McLeod, 937 S.W.2d 867, 869 (Tenn. 1996)*.

[471] *See*, *e.g.*, *State v. Rucker, 847 S.W.2d 512 (Tenn. Crim. App. 1992)* (statements to nurses at hospital); *State v. Rimmer, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. 2019)* (seven-year-old victim's statements to nurse were admissible in child rape case); *State v. Gray, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 849 (Tenn. Crim. App. 2018)* (rape victim's statement to nurse was admissible); *State v. Danoff, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 503 (Tenn. Crim. App. 2018)* (rape victim's statements to nurse practitioner were admissible); *State v. Batts, 2017 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 2017)* (trial court did not err by letting certified nurse practitioner testify about statements made by the victim or by allowing the state to introduce the nurse's report that contained the victim's statements into evidence; they were admissible under Rule 803(3), as the nurse testified and her report confirmed that she used the victim's statements to diagnose and treat her medically); *Coleman v. State, 2017 Tenn. Crim. App. LEXIS 11 (Tenn. Crim. App. 2017)* (nurse who treated victim was allowed to read victim's report at trial, since her testimony was admissible under the hearsay exceptions for business records and for statements related to medical diagnosis and treatment).

[472] *See*, *e.g.*, *State v. Hunter, 926 S.W.2d 744 (Tenn. Crim. App. 1995)* (Rule 803(4) covers a statement to a social worker who took medical history of patients at hospital for sexually abused children).

[473] *852 S.W.2d 216 (Tenn. 1993)*, *noted in* James J. Webb, Jr., Case Comment, *Evidence—State v. Barone: Limiting the Scope of the Hearsay Exception in Tennessee Rule* 803(4), *25 U. Mem. L. Rev 835 (1995)*.

that, although these statements were made for purposes of diagnosis and treatment, they were not admissible under Rule 803(4) because they were not made to a physician. A distinction was drawn between the trustworthiness of statements made to a physician regarding health matters, which would presumably be made out of an interest for improving the declarant's health, and statements made to a psychologist, in which case the declarant might not be as aware of the necessity for telling the truth. The court did not address the question of admissibility of the statements if the child's health care professional had been a psychiatrist, and thus a licensed physician, rather than a psychologist. Arguably, Rule 803(4) permits such statements because, if made to a physician, they are for the purpose of "medical diagnosis and treatment." The court in *Barone* appears to draw a distinction between the diagnosis and treatment of physical problems, as opposed to mental or emotional difficulties.

In *State v. Rucker*,[474] the Tennessee Court of Criminal Appeals examined the admissibility of various statements made by the child rape victim's mother to individuals at the hospital where the child was treated. Her statements included remarks that identified the child's father as the rapist. The court admitted the majority of the history given to the emergency room nurse, including the child's identification of the father as the perpetrator, finding these statements to have been made for purposes of medical diagnosis and treatment. However, similar statements made in histories given by the mother to the hospital social worker and a rape crisis center nurse practitioner were found to be inadmissible under Rule 803(4) because they were not sufficiently related to medical diagnosis and treatment.

The continued validity of *Barone* and *Rucker* is questionable after *State v. Gordon*[475] in which a three-year-old rape victim described the incident and identified the alleged rapist during an interview with a psychologist at a facility that handled child sexual abuse cases. The psychologist's interview was used by the nurse practitioner as an important piece of information in her subsequent physical examination of the child. The psychologist did not testify at trial, but the nurse practitioner was permitted to read into evidence the report of the psychologist's interview with the child-victim. The Tennessee Supreme Court admitted the psychologist's interview under Rule 803(4). The Court did not discuss whether the statement to the psychologist should be banned as in *Barone*, because of the psychologist's lack of a medical degree. It should be noted, however, that the psychologist's interview was part of the facility's routine procedure as a first step in a total evaluation of the sexual assault victim and was used by the nurse practitioner in diagnosing and treating the victim's medical needs.

[8] Declarations of Present Physical Condition; Rule 803(3) Compared

Although Rule 803(4) covers by its terms declarations of "present symptoms, pain, or sensations," sometimes the offering party should consider the more liberal exception in Rule 803(3). As noted above,[476] declarations of present pain may be admissible under Rule 803(3) even if not made for either medical diagnosis or treatment. Indeed, Rule 803(3) does not ask why the statement was made. Accordingly, a statement made to a diagnosing physician where no treatment is considered, therefore inadmissible under Rule 803(4), still may be admissible under Rule 803(3) if the statement is about the declarant's current physical condition. On the other hand, statements about the cause of a condition or about past medical history are not admissible under Rule 803(3), but may be admissible under Rule 803(4).

[9] Bases of Expert Testimony Distinguished

A doctor, testifying as an expert, will sometimes repeat a patient's statements. These statements may be admissible as substantive evidence under Rules 803(3) or 803(4). However, if the patient's statements are not covered by a hearsay exception, the expert witness still may be permitted to repeat them under Rules 703[477]

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[474] *847 S.W.2d 512 (Tenn. Crim. App. 1992)*.

[475] *952 S.W.2d 817 (Tenn. 1997)*.

[476] *See above § 8.08[7]*.

and 705[478] to help the trier of fact evaluate the expert testimony. In such cases, however, the patient's statements are not substantive evidence,[479] and the jury may be so instructed.[480]

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[477] *See above § 7.03[2]*. Note that Rule 703 requires the trial judge to screen facts used by an expert but not admissible on their own.

[478] *See above § 7.05[2]*.

[479] The same is true under *Tenn. Code Ann. § 24-7-115* (2000), which makes medical expert opinions, but not the bases of opinions, admissible in a civil suit even though the expert merely examines and evaluates a condition and even though the bases are subjective.

[480] *See above § 1.05[2]*.

§ 8.10 Rule 803(5). Recorded Recollection

[1] Text of Rule

Rule 803(5) Recorded Recollection

The following are not excluded by the hearsay rule:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's 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.

Advisory Commission Comment:

The proposed rule recognizes the traditional Tennessee hearsay exception for past recollection recorded, but it expands common law in two respects. It allows the admissibility of the contents of a document reflecting past recollection recorded even though the witness has some recollection of the recorded facts but not enough to testify "fully and accurately." Second, it permits the witness to adopt a record made by another not acting under the witness's supervision. The safeguard is the requirement of adoption at the time when the witness could vouch for the document's correctness.

The proposal restricts the common law by confining presentation of the document to reading the contents rather than exhibiting the paper to the jury. Tennessee law presently permits the writing to be handed to the jurors and, in civil cases, to be taken to the jury room. *T.C.A. § 20-9-510*. This change is designed to prevent the jury from giving more weight to this hearsay evidence than would have been given to the declarant's live testimony had the declarant been able to testify from present memory.

But note *T.C.A. § 55-10-114(b)* **and *McBee v. Williams, 56 Tenn. App. 232, 405 S.W.2d 668 (1966)*, concerning accident reports. *See* the Comment to Rule 803(8).**

[2] Past Recollection Recorded and Present Recollection Refreshed

[a] In General

American evidence law has distinguished between *past recollection recorded*, which is a hearsay exception, and *present recollection refreshed or revived*, which does not involve hearsay. For both categories of information, a witness has trouble remembering an event and is presented with something, such as a written statement, to "jog" the witness's recall.

[b] Present Recollection Refreshed

For *present recollection refreshed*, the witness's memory is successfully restored and the witness testifies from present memory. This does not involve hearsay because the witness is not testifying about a prior

statement, but rather is relating what is in the witness's current memory. If a writing is used to refresh a witness's memory while testifying, Rule 612 gives the adverse party certain rights to inspect and use the writing.[481]

[c] Past Recollection Recorded

For *past recollection recorded*, on the other hand, the witness's memory is effectively useless; the witness does not remember the event and, accordingly, cannot testify from present memory. In such cases, Rule 803(5) establishes a hearsay exception which admits into evidence a writing made or adopted by the witness when the matter was fresh in the witness's memory and that describes the event at issue. Ordinarily, the writing is read to the jury in lieu of the witness's live testimony about the details of the event. The underlying theory for this hearsay exception is that the recorded statement is necessary (since by definition the declarant cannot testify adequately from memory) and probably trustworthy (the court must find that the recorded statement correctly reflected the declarant's knowledge of the events). Moreover, Rule 803(5) mandates that the declarant must testify,[481.1] enabling the trier of fact to assess the declarant's demeanor and general credibility.

[3] Elements of Past Recollection Recorded

[a] In General

The hearsay exception provided for past recollection recorded by Rule 803(5) contains six elements. These requirements are designed to minimize the danger that the witness's mind will "remember something that never happened."[482]

[b] Memorandum or Record

The past recollection hearsay exception applies only to a *memorandum or record*. This suggests that the exception applies to a document. It does not apply to an oral statement unless reduced to writing. The rule is unclear whether it embraces tape recordings and the like. One Tennessee decision held that the record may be a tape recording, but in that case there was both an audio recording and a written transcript of that recording.[483]

[c] Concerning Matter About Which Witness Once Had Knowledge

Past recollection recorded must involve *a matter about which a witness once had knowledge*. This is, in part, a restatement of the personal knowledge principle in Rule 602.[484] It must be shown that the declarant had personal knowledge of the subject of the earlier written statement.

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[481] *Tenn. R. Evid. 612* (if witness uses a writing while testifying to refresh memory, adverse party entitled to inspect it, to cross-examine witness on it, and to introduce in evidence those portions which relate to the testimony of the witness).

[481.1] *See* *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Ct. App. July 25, 2018)* (since decedent was not available to refresh her recollection or testify, videos of decedent did not fall under the recorded recollection hearsay exception and were properly excluded).

[482] *Mitchell v. Archibald, 971 S.W.2d 25, 28 (Tenn. Ct. App. 1998)* (*quoting* *Martin v. Caution, 1986 Tenn. App. LEXIS 2834*).

[483] *Mitchell v. Archibald, 971 S.W.2d 25, 28 (Tenn. Ct. App. 1998)*. *See also* *United States v. Sollars, 979 F.2d 1294, 1298 (8th Cir. 1992)* (admitting taped statement as past recollection recorded) *See also*, *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Ct. App. July 25, 2018)* (videos excluded as inadmissible hearsay due to unavailability of decedent to testify; although the court did not specifically address the issue of whether a video constitutes a "record" under 803(5), one might infer that the court's silence silence on the matter suggests that, had the videos otherwise met the requirements of Rule 803(5), the court would have held them to be "records" within the scope of the rule and admitted the evidence).

[d] Insufficient Recollection to Testify Fully and Accurately

Rule 803(5) applies if the witness once had personal knowledge but *now has insufficient recollection to enable the witness to testify fully and accurately*.[485] This language suggests that total lack of memory is not required. The lawyer can use past recollection recorded even if the witness remembers some of the events described in the writing, but cannot remember enough to testify "fully and accurately." Thus, this hearsay exception may be helpful if the witness directly remembers some but not all of the facts, or where the recall is hazy and mistaken. Ordinarily, lack of memory is established if the memorandum or record is shown to the witness who then testifies that he or she still cannot remember the event sufficiently and clearly to be able to testify accurately.[486]

An interesting issue is whether Rule 803(5) is satisfied if the declarant's lack of memory is feigned. In *State v. Davis*,[486.1] the declarant made a written statement that he saw the murder defendant shoot the victim. At trial the declarant testified he had no memory of seeing the victim get shot. The Tennessee Supreme Court held that a feigned memory loss satisfied Rule 803(5)'s requirement of insufficient recollection to testify fully and accurately. The earlier statement was sufficiently reliable to satisfy the truth-finding policy behind Rule 803(5).

It is unlikely that this exception would admit documents created by the witness on the eve of trial. While the trial lawyer would often like to be able to read from a document instead of presenting facts through the testimony of an occasional unsavory witness, courts would probably not permit this procedure with recently made or adopted documents. A judge might reasonably be dubious that a witness has insufficient recollection on trial day while professing sufficient recollection a few days before.

[e] Statement Made or Adopted by the Witness

Rule 803(5) provides that past recollection recorded involves a memorandum or record *made or adopted by the witness*. The witness must either have "made" the document or at least must have "adopted" it, even though another person was the author.[487] For example, the exception would apply to a document prepared by A but signed by B as B's document. But even a signature is unnecessary. An unsigned statement may satisfy the rule as long as there is sufficient proof of who made or adopted it.

In a case where a sexual assault victim was interviewed and the interview was video recorded, the Tennessee Court of Criminal Appeals held that the video recording could not be used as past recollection

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[484] *See above* § 6.02[2].

[485] *United States v. Humphrey, 279 F.3d 372, 377 (6th Cir. 2002)* (memorandum about events is not admissible as past recollection recorded when declarant remembers the events and can adequately testify about them by using the memo to refresh his recollection).

[486] *See*, *e.g.*, *State v. Mathis, 969 S.W.2d 418 (Tenn. Crim. App. 1997)* (witness could not remember much of what defendant had told witness or what the witness had repeated in signed statement to law enforcement officer); *Mitchell v. Archibald, 971 S.W.2d 25 (Tenn. Ct. App. 1998)* (eyewitness to collision had brain surgery and could remember nothing about accident, but recalled making statement about it a few days after the accident).

[486.1] *State v. Davis, 466 S.W.3d 49 (Tenn. 2015)*.

[487] The "record" may be something other than a writing. A leading treatise suggests that a video or audio recording is a "record." McCormick On Evidence 485 (6th ed. 2006). *See above* § 8.10[3][b].

recorded under Rule 803(5) even though the assault victim testified she could not remember the interview. The court reasoned that the recording was not made or adopted by the victim.[487.1]

[f] Made or Adopted While Matter Fresh in Witness's Memory

The document must have been made or adopted by the witness *when the matter was fresh in the witness's memory*. This important element provides a strong indicia of accuracy. It means that the document must have been either prepared or adopted when the event described in it was still fresh in the memory of the witness. Note that there is no specific time limit stated in Rule 803(5). Presumably the exception would apply to a statement made days, months, or even years after an event, as long as the witness's memory of the event was fresh when the statement was made or adopted.[488]

[g] Accurately Reflects Witness's Knowledge

The final and theoretically most difficult element of past recollection recorded is that the document must reflect the witness's knowledge accurately. Since the witness, by definition, cannot remember the event at all or very well, often this element is proven by the witness's conclusory statement that he or she remembers the document and knows that it is an accurate reflection of the event. Perhaps the witness will note that he or she has prepared hundreds of such documents and they are all accurate because they were prepared shortly after the incidents they describe and were all written truthfully.

[4] Proof of Document; Exhibits

Under Rule 803(5), a document admitted as past recollection recorded does not become an exhibit after the fashion of most documents,[488.1] but the contents do become substantive evidence for the jury's consideration. Under Rule 803(5), however, the opposing party may make the recorded recollection an exhibit. The theory behind this exception is that the self-serving concerns of receiving the recorded recollection as an exhibit are alleviated if the party not introducing the document wants the jury to have it in the jury room.

The proper procedure is to read relevant parts of the writing to the jury. Reading can either be by the lawyer, the witness, or someone else. The court reporter should make a full record of the event. While ordinarily a recorded recollection statement is in the form of a written document, the rule also embraces other forms of statements. It may include an audio recording.[489]

Since Rule 803(5) specifically provides that the memorandum or record is not ordinarily received as an exhibit unless offered as an exhibit by the party which did not introduce the item, the memorandum or record should not be placed with the exhibits, which may find their way to the jury room in civil cases.[490] The purpose of excluding a recorded recollection as an exhibit in most cases is to avoid giving this written statement more

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[487.1] *State v. Ackerman, 397 S.W.3d 617, 639 (Tenn. Crim. App. 2012)* (it can be argued that as long as the *statement* was made by the witness, it is irrelevant whether the victim actually made the video recording; video could have been challenged as not having been made while the matter was fresh in the victim's memory since there was no testimony to that effect), *overruled on other grounds, State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)*.

[488] *See, e.g., United States v. Smith, 197 F.3d 225, 231 (6th Cir. 1999)* (statements made fifteen months after event were sufficiently fresh in declarant's mind for past recollection recorded).

[488.1] *See, e.g. Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Ct. App. July 25, 2018)* (*Tenn. R. Evid. 803(5)* clearly provides that if the memorandum or record can be shown to be a recorded recollection, it can only be read into evidence; it cannot be received as an exhibit unless offered by an adverse party).

[489] *Mitchell v. Archibald, 971 S.W.2d 25, 28 (Tenn. Ct. App. 1998)*. *See above § 8.10[3]*.

[490] *Tenn. Code Ann. § 20-9-510* (2009) (judge may permit civil jury to take exhibits admitted into evidence to jury room). In a criminal case the jury ordinarily takes exhibits, other than depositions, to the jury room. *Tenn. R. Crim. P. 30.1*. *See above § 4.01[20]*.

weight than it would have had if the witness had remembered the event and testified about it. In the latter case, the jury would not have in the jury room a transcript of the witness's testimony; the jury would have to rely on its collective memory to recall the witness's testimony. If the recorded recollection is taken into the jury room, the jury could pay more attention to it than to oral evidence that would be more difficult to recall in detail.

[5] Accident Reports

The past recollection recorded exception standing alone would seem to make parts of vehicle accident reports admissible if the officer on the stand could satisfy the foundation requirements. But a statute stands in the way. *Tennessee Code Annotated § 55-10-114(b)* excludes accident reports, including those made by investigating officers, from evidence "in any trial, civil or criminal."[491]

[6] Sample Examination

Q. I show you an inventory of the contents of your house before the fire. Does it refresh your recollection?

A. No, there are too many items. I remember virtually nothing about the exact contents.

Q. Who prepared the inventory?

A. My spouse.

Q. Did you examine it and check its accuracy?

A. Yes, I went through the house and compared the list with the actual items we owned.

Q. With what result?

A. It was correct as to all items listed. I added two things my spouse had overlooked.

Q. Your Honor, we offer the contents of this inventory under the recorded recollection to the hearsay rule, and I ask that I be permitted to read the list to the jury.

End of Document

[491] *McBee v. Williams, 56 Tenn. App. 232, 405 S.W.2d 668 (1966)*.

§ 8.11 Rule 803(6). Records of Regularly Conducted Activity

[1] Text of Rule

Rule 803(6) Records of Regularly Conducted Activity

The following are not excluded by the hearsay rule:

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 and a business duty to record or transmit 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 or by certification that complies with Rule 902(11) or a statute permitting certification, 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, profession, occupation, and calling of every kind, whether or not conducted for profit.

Advisory Commission Comment:

This rule essentially is the same as the Uniform Business Records as Evidence Act, T.C.A. § 24-7-111 [repealed]. To avoid interpretive mistakes such as that in *Wheeler v. Cain, 62 Tenn. App. 126, 459 S.W.2d 618 (1970)*, the proposal specifically requires that the declarant have "a business duty to record or transmit" information. Without that duty, a business record would lack the trustworthiness necessary to carve out a hearsay exception.

1994 Advisory Commission Comment:

Police reports of traffic accidents are inadmissible under *T.C.A. § 55-10-114(b)* and *T. R. EVID. 803(8)*.

2001 Advisory Commission Comment:

Amended Rule 803(6) in conjunction with new Rule 902(11) eliminates the need to call the custodian of records as a trial witness. Such a procedure has been in effect by statute for medical business records. *See T.C.A. § 24-9-101(8)* and *68-11-401 et seq*.

[2] Overview of Business Records

The business records hearsay exception of Rule 803(6) is familiar to Tennessee practitioners, who for years worked with the now-repealed Uniform Business Records as Evidence Act.[492] The present rule is much like the Uniform Act.

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[492] TENN. CODE ANN. § 24-7-111 (1980), repealed by 1991 Tenn. Pub. Acts 273.

Historically, business records have been admissible as a hearsay exception because they are viewed as sufficiently trustworthy to be used by the trier of fact as evidence. They are considered reliable because businesses rely on them in their day to day business decisions, clerical employees' jobs hinge on their capacity to keep accurate records, and the business has countless opportunities to receive feedback on the accuracy of its records and to make the necessary changes to ensure the records are correct. Moreover, the need to admit these records in evidence is great if the legal system is to provide some degree of predictability in business transactions. Records admitted under this hearsay exception are admissible to prove the truth of their contents, but are not necessarily conclusive on the issues they are used to prove.

[3] Broad Definition of Business

Although the hearsay exception in Rule 803(6) is traditionally referred to as the "business records" exception, its actual reach stretches the concept of a business. Indeed, the word "business" is not in the official title of the exception, which refers to a "regularly conducted activity." Rule 803(6) extends to records of *every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit*. Thus, it reaches profit and non-profit endeavors. It also extends to both government and private activities, to professional and non-professional businesses, and to legal and illegal businesses. More particularly, it applies to such entities as banks, government agencies, unions, schools, institutions, doctor's offices, hospitals, warehouses, manufacturers, gambling establishments, and drug dealers.

A statute extends the definition of business to include creditors who acquire credit card accounts or instruments evidencing outstanding debt from a previous creditor and also acquire business records of the previous creditor.[492.1] The business records of the previous creditor may be submitted as business records of the creditor who acquired the account or instrument and the records about that account or instrument.[492.2]

[4] Personal Knowledge

Rule 803(6) mandates that information in the business record be provided by or entered by a *person with knowledge*. But this requirement must not be taken to require proof of which specific person actually provided the information or made the entry in the business record. It is sufficient if the person laying the foundation for the record testifies that the regular business procedure is for a person with personal knowledge of the recorded event to provide information or make the entry.[493.1] As long as the person had the necessary firsthand knowledge, others in the business can take and record this information.

Courts often do not inquire into whether the person providing information actually had firsthand knowledge. For example, in *Witter v. Nesbit*,[493] the court admitted a medical record from the Tennessee State Penitentiary Health Center to prove prior back problems. Although the custodian of the records was unable to verify that the

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[492.1] *Tenn. Code Ann. § 47-22-301* (Supp. 2013).

[492.2] *Tenn. Code Ann. § 47-22-302* (2013). *See also* *Midland Funding, LLC v. Thuy Chau, ___S.W.3d___, 2019 Tenn. App. LEXIS 298 (Tenn. Ct. App. June 14, 2019)* (trial court properly admitted documents by which a judgment creditor proved the debt pursuant to *Tenn. Code Ann § 47-22-302*, because they attested to the indebtedness, the debtor's liability, and expressly provided that documents were obtained by the creditor from an original creditor in the regular course of business).

[493.1] *See, e.g.*, *Tenn. State Bank v. Mashek, 2020 Tenn. App. LEXIS 228 (Tenn. Ct. App. May 21, 2020)* (bank employee's affidavit met the requirements under Rule 803(6) to be admitted as a record of the bank's regularly conducted activity; although the defendant argued that the bank employee could not have had personal knowledge of his line of credit because defendant had not personally dealt with her, the court determined that the affidavit sufficiently demonstrated the employee's personal knowledge since (1) the affidavit identified her as "a Senior Vice President and the Special Assets and Credit Analyst Manager" for the bank, (2) it stated that she had been the primary bank officer involved in the bank's debt collection effort relating to defendant's loan, and (3) the affidavit was attached to a detailed loan history summarizing the relevant time span of the loan, including each transaction and whether it was an advance, payment, or finance charge).

[493] *878 S.W.2d 116 (Tenn. Ct. App. 1993)*.

entries were made by properly authorized personnel, the court found a proper foundation was laid. As described below,[494] all or parts of the record can be excluded if the source of information is deemed untrustworthy.

[5] Business Duty to Record or Transmit Information

The essential ingredient of the business records hearsay exception in Rule 803(6) is that all declarants either furnish or record facts while under *a business duty* to do so. The Tennessee language is quite explicit on the business duty requirement. The information must come from a person who not only has "knowledge," but who also has *a business duty to record or transmit*, Rule 803(6). The federal counterpart, in contrast, requires only "knowledge."[495] Case construction of the federal rule, however, generally requires a business duty.[496]

It is insufficient if even one declarant who contributed to the record had no such duty. With multiple declarants, which is often the case with business records, each person whose credibility is necessary to relevance must speak or write under a business duty. Accordingly, a bystander's declaration to a business person, who records it in a business record, is inadmissible through the business records hearsay exception to prove the truth of the bystander's assertion. Since the bystander had no business duty to report accurately, there is no guarantee the bystander's information is trustworthy.[497] Another example, based on the substantially similar federal rule, involves an electric company's monthly listings of the names of former customers and the reasons why these people terminated their service.[498] The trial court excluded the lists because the source of the information—former customers—had no business duty to provide the information.

Sometimes the source of information is unknown. In such cases courts must carefully examine the facts of the case to determine whether the business duty rule was satisfied. In *Kanipes v. North American Phillips Electronics Corp.*,[499] handwritten notes on a bill of lading were introduced into evidence to prove that a truck was loaded with less merchandise than listed on the original bill of lading. The Court of Appeals held that the handwritten notes on the bill of lading were inadmissible because the notes were made by an unknown person. There was no proof that the author of the handwritten notes had a business duty to report the information.

[6] Made and Kept in Regular Course of Business

In order to have sufficient indicia of trustworthiness to qualify as a business record under Rule 803(6), the record must have been made in the *regular practice of that business activity*, and it must have been *kept in the course of a regularly conducted business activity*. An extraordinary report prepared for an irregular purpose, particularly when prepared with litigation in mind, may not be made in the regular course of business and may be inadmissible as a business record under Rule 803(6).

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[494] *See below* § 8.11[8].

[495] FED. R. EVID. 803(6).

[496] MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE 235 (6th ed. 2006). The U.S. Supreme Court Advisory Committee's Note to Federal Rule 803(6) cited with approval *Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930)*, a leading case requiring business duty.

[497] There is another avenue to admit the bystander's statement. Under Rule 805, multiple hearsay is admissible if each link in the evidentiary chain is covered by a hearsay exception or is not hearsay. *See below* §§ 8.11[12], 8.41[1]. If the bystander's statement fell under a hearsay exception, such as a Rule 803(2) excited utterance, the bystander's statement may be admissible in the business record if the other facets of Rule 803(6) are satisfied.

[498] *City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1227 (N.D. Ohio 1980)*, *aff'd*, *734 F.2d 1157, 1984-1 Trade Cas. (CCH) P66016 (6th Cir.)*, *cert. denied*, ***469 U.S. 884 (1984)***.

[499] *825 S.W.2d 426 (Tenn. App. 1991)*. *See also* *State v. Conway, 77 S.W.3d 213, 222 (Tenn. Crim. App. 2001)* (sheriff's department alcohol log containing results of breath tests is inadmissible because there was no proof of who made the entry and whether that person had a business duty to do so).

For example, in *Arias v. Duro Standard Products Co.*,[500] a worker's compensation case, a physician examined plaintiff (at her lawyer's suggestion) and prepared a report indicating the plaintiff suffered certain work-place harm to her health. The trial court admitted the report as a business record under Rule 803(6). The Tennessee Supreme Court reversed, holding the report was prepared for litigation by a non-treating physician who had become unavailable to testify and therefore could not be cross-examined. These facts rendered it sufficiently untrustworthy to be excluded under Rule 803(6).

On the other hand, an investigative accident report compiled by a business as a routine matter should not be excluded solely because litigation sometimes ensues following an accident.[501] There are many illustrations of the types of records satisfying this rule.[502]

[7] Made At or Near Time of Event

Rule 803(6) mandates that the memorandum must have been *made at or near the time of* the event, act, condition, opinion, or diagnosis contained in the record. This requirement precludes admissibility of reports drawn up long afterwards, when memories may be hazy. It should be noted, however, that federal authorities interpreting the same language have been liberal in determining whether the memorandum was made in a timely fashion.[503] The key issue is whether the lapse of time between the event and the record of the event interferes with the likely accuracy of the business record.

An illustrative case involving medical malpractice held that a letter from a doctor was hearsay and not covered by the business record exception because it was not made at or near the time of the occurrence of the matters set forth in the letter.[504] The letter, written a year after the defendant doctor read an MRI, stated that the declarant doctor would have interpreted the MRI scan the same way the defendant doctor did a year earlier. The Tennessee Court of Appeals held that the letter was not timely since it was written a year after the initial MRI reading by the defendant doctor. It is unclear how the letter would have fared under the business record exception had the court considered the event to be the second doctor's reading of the MRI (and immediate drafting of the statement at issue) rather than the defendant doctor's reading a year earlier.

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[500] *303 S.W.3d 256, 262–63 (Tenn. 2010)*.

[501] McCormick On Evidence 492 (6th ed. 2006) *See also* *State v. Dean, 76 S.W.3d 352 (Tenn. Crim. App. 2001)* (sexual assault center's records are admissible as business records because they were prepared in the regular course of business; their use in litigation is "incidental"; they were not prepared for purpose of litigation). *See also*, *In re Alyssa W, 2017 Tenn. App. LEXIS 803 (Tenn. Ct. App. 2017)* (where defendant objected to affidavit of lab's custodian of records during the testimony of the lab technician who performed drug tests, claiming the affidavits were prepared "well after" the collection of samples and only for the purpose of litigation; the appellate court ruled that the affidavit satisfied the requirements of *Tenn. R. Evid. 902(11)*, and the mere fact that the affidavit was prepared to allow the records to be introduced at trial did not render it inadmissible under Rule 803(6)).

[502] *See*, *e.g.*, *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (business records include a business's customer list, unsigned draft contract, trucking company's shipping records, map, letter of intent, and two other business-related letters); *State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019)* (Dept. of Homeland Security chain-of-custody form was admissible as a "business" record since 1) it was made at or near the time of the event recorded; 2) was routinely kept in the course of business; 3) the persons signing the form were under a business duty to do so; and, 4) unlike a police report, the form did not contain opinion or hearsay); *State v. Murchison, 2016 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. 2016)* (where lab reports were prepared in the regular course of business and did not contain an opinion or conclusion that was not based upon personal observation, the reports were admissible); *State v. Moody, 2016 Tenn. Crim. App. LEXIS 194 (Tenn. Crim. App. 2016)* (testimony by an employee of the Crime Victim Center, Order of Protection Department, was properly admitted under the business records exception to the hearsay rule because it was relevant to the issue of defendant's intent and motive in strangling the victim).

[503] *See*, *e.g.*, *Seattle-First Nat'l Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976)* (record must be made contemporaneously or a "reasonable" time after event).

[504] *Godbee v. Dimick, 213 S.W.3d 865 (Tenn. Ct. App. 2006)*.

[8] Untrustworthy Records

Tennessee Rule 803(6) contains an important bar to admissibility of records otherwise qualifying under the exception. This rule permits a court to exclude an otherwise qualified business record on the grounds that *the source of information or the method or circumstances of preparation indicate lack of trustworthiness*. The lack of trustworthiness safeguard prevents irresponsible use of "facts" as truth just because the evidence was generated in a business organization.[504.1] Note that the trustworthiness caveat focuses on two potential origins of untrustworthiness: the declarant who furnished the information[505] and the preparation of the record. Lawyers resisting admission of business records should direct discovery and trial proof toward exposing both possible weaknesses. The trial judge has considerable discretion on this issue, and objecting counsel bears a formidable burden of proof.[505.1] Minor inaccuracies or defects in the records are ordinarily insufficient to bar admission of a business record.[506]

An excellent example is *Arias v. Duro Standard Products*,[507] a workers' compensation case where plaintiff's lawyer suggested plaintiff be examined by a specific physician. After the examination, the doctor wrote a report indicating occupational asthma resulting from dust at the workplace. The Tennessee Supreme Court held that this report was not admissible as a business record under Rule 803(6) because of lack of trustworthiness. The physician was hired only for litigation, not treatment, and the report was prepared with litigation in mind. The Court also noted the result was consistent with the hearsay rule's policy of admitting hearsay only exhibiting "inherent trustworthiness and indicia of reliability."

[9] Form of Business Record

Rule 803(6) embraces many forms of business records, including records, reports, statements, or data compilations in any form. Since much business information is stored in computers, the rule covers this modern phenomenon by reaching computer printouts, clearly constituting a "data compilation." It is also clear, however, that Rule 803(6) applies only to written or otherwise recorded business records. It does not extend to unrecorded oral statements which are far less accurate than written business records, but it does apply to interoffice memoranda and other internal records.

[504.1] *See, e.g.*, State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019) (police reports are inadmissible hearsay under Tenn. R. Evid. 803(6), because the information contained in them is hearsay and mere opinions or conclusions not based on personal observation).

[505] *See*, *e.g.*, Romano v. Howarth, 998 F.2d 101 (2d Cir. 1993) (in prisoner's civil rights case over improper medical treatment, court excluded a nurse's progress notes because the source of the information—a correctional officer—was a defendant, was aware of plaintiff's threat to blame his injuries on correctional officers, and had a "motive to fudge the truth"); Overstreet v. Shoney's, Inc., 4 S.W.3d 694 (Tenn. Ct. App. 1999) (evaluation of nursing student was inadmissible because of questions of trustworthiness; there was no evidence of who performed the evaluation, how the evaluation was performed, or what basis was used for the evaluation); State v. Robinson, 971 S.W.2d 30, 39 (Tenn. Crim. App. 1997) (unattributed hearsay about homicide victim's reputation for violence, contained in informational summary of autopsy report, was inadmissible because the actual source of reputation information was unknown). *See also*, State v. Morris, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 391 (Tenn. Crim. App. 2018) (trial court did not err in excluding daycare accident report, because the teacher who prepared the report did not observe the minor victim's tantrum first-hand and, thus, the report lacked trustworthiness).

[505.1] Federal Rule 803(6) now specifies that the opponent has the burden of showing the possible sources of information or other circumstances indicate lack of trustworthiness.

[506] *See*, *e.g.*, United States v. Panza, 750 F.2d 1141 (2d Cir. 1984) (insurance company files admissible even though some papers missing); Delta Dev. Corp. v. F. Fani Gulf Int'l, 393 S.W.3d 185, 194 (Tenn. Ct. App. 2012) (minor misrepresentations in company's ledger does not render the ledger untrustworthy as a whole).

[507] 303 S.W.3d 256, 262–63 (Tenn. 2010).

[10] Content of Business Record

Rule 803(6) permits a business record to include acts, conditions, opinions, or diagnoses. These terms include normal business transactions, such as sales or service calls. The inclusion of "opinions or diagnoses" broadens the exception to embrace much of the content of medical and hospital records.[508]

[11] Authentication: Custodian or Other Qualified Witness; Certification

One of the purposes of the business records hearsay exception is to facilitate the presentation of business records without unduly disrupting the business's activity. Certainly there is no requirement that all declarants be called away from work to testify about a business matter reflected in a business record. Rather, the business records themselves may be introduced into evidence if properly authenticated[509] and they otherwise satisfy Rule 803(6) and the other evidence rules. Rule 803(6) specifically provides two ways of authenticating a business record.

[a] Testimony of Qualified Person

The first, representing the traditional method, is for the *custodian or other qualified witness* to testify in court about the foundational facts. Rule 803(6). Typically, that witness will be in charge of maintaining records of the particular business, but other employees or officers or appropriately informed witnesses could be used as well. The key is that the witness must have knowledge of the method of preparing and preserving the business records at issue.[510] The Tennessee Supreme Court held that the witness must be able to testify as to the identity of the record, the mode of preparation, and whether the record was made in the regular

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[508] *See also* Tenn. Code Ann. § 24-7-115 (2000) (in civil case, opinions of medical experts as to medical findings are admissible whether based on subjective or objective findings). Although Tenn. R. Evid. 803(6) permits evidence of "opinions and diagnoses" in business records to be admitted assuming all foundational requirements are met, "hearsay within hearsay" problems and Confrontation Clause hurdles are common in these types of records, which may bar their admission. *See, e.g.*, State v. Gatewood, 2018 Tenn. Crim. App. LEXIS 209 (Tenn. Crim. App. 2018) (rape victim's medical records contained hearsay within hearsay and the State failed to satisfy foundational requirements for each piece of hearsay; since the victim and mother went to a child advocacy center the day after the alleged rape, and at the direction of police, the purpose of visit was not for medical treatment but to collect evidence of abuse for the purpose of a later criminal prosecution; accordingly, victim's statements to the nurse practitioner who administered rape kit could not be admitted via medical records under Tenn. R. Evid. 803(6), since the statements were testimonial and the Confrontation Clause barred their admission in the absence of showing that the victim-declarant was unavailable as a trial witness and that she was subjected to cross-examination).

[509] *See* Cobble v. McCamey, 790 S.W.2d 279, 282–83 (Tenn. Ct. App. 1989) (deceased's personal records, written in composition books and containing notes of payments and debts, were not business records since no one was available to authenticate them). *See also*, State v. Hicks, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018) (bills of sale were improperly admitted into evidence where no one testified as a record's custodian as required under Tenn. R. Evid. 803(6) and the bills were not accompanied by an affidavit from the record's custodian or other qualified person to make them self-authenticating under Tenn. R. Evid. 902(11)).

[510] *See, E.g.*, Alexander v. Inman, 903 S.W.2d 686, 701 (Tenn. Ct. App. 1995) (lawyer is qualified custodian for law firm's computer work records since he was familiar with the system; he does not have to be personally familiar with each fact recorded or even know who recorded each bit of information; he also did not have to have examined each time slip, identify the personnel responsible for collecting and recording the time slips, identify the particular software used in the record system, or explain the computer system); State v. Dean, 76 S.W.3d 352 (Tenn. Crim. App. 2001) (forensic nurse examiner for sexual assault center was qualified to provide foundation about center's business records which contained information about the rape victim's initial examination at the center); State v. Flatt, 227 S.W.3d 615, 619 (Tenn. Crim. App. 2006) (TBI employee in charge of maintaining sex offender records who had knowledge of the manner in which they were preserved and prepared is qualified to authenticate such records). *See also*, State v. Scott, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 16 (Tenn. Ct. App. 2018) (trial court properly admitted Tennessee Bureau of Investigation (TBI) laboratory reports as business records because a TBI agent testified that the reports were maintained by the TBI crime laboratory as part of its regular business practices and remained in its custody; the agent testified at great length about the TBI's rigid laboratory processes and procedures regarding the analysis of controlled substances submitted by law enforcement).

course of business at or near the time of the event recorded in the business record.[511] On rare occasions, the witness may be someone other than an employee of the relevant business.

[b] Certified Record

The second method of authenticating a business record under Rule 803(6) is designed to be simpler than the traditional way. Rule 803(6) now permits a party to use a certification process to authenticate a business record. This certification must comply with Rule 902(11)[512] or a statute authorizing such certification.[513] Under the simplified certification approach, a record that is properly certified is deemed authenticated without the need to have a live witness testify. Of course the parties may obviate the need for either method of authentication by stipulating to the authentication of the business records.[514]

[12] Hospital and Doctor Records

Rule 803(6) specifically makes "opinions and diagnoses" admissible if other foundation requirements are satisfied. Often both are presented in hospital records, which are covered by Rule 803(6).[515] Assuming compliance with other evidence rules,[516] the court should admit those portions of business records containing

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[511] *Fusner v. Coop Constr. Co., LLC, 211 S.W.3d 686, 693 (Tenn. 2007)* (chief compliance officer of business was qualified to lay the foundation for the admission of the company's business record). *Cf. State v. Kiser, 284 S.W.3d 227, 264 (Tenn. 2009)* (handwritten note not authenticated as business record when supposed author testified that he had not written the note and the handwriting was not his); *State v. Carter, 2016 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2016)* (while receipt did not identify the company on its face, a worker, in a sworn affidavit, testified that it was a business record generated by a company employee to record the purchase of comic books and that the record was kept in the course of a regularly conducted business activity; this was sufficient to show that the receipt was a business record, inherent of trustworthiness, and the receipt was properly admitted under the business records exception and the sworn affidavit complied with Rule 803); *State v. Reynolds, 2017 Tenn. Crim. App. LEXIS 174 (Tenn. Crim. App. 2017)* (lieutenant testified that he was the records keeper for the sheriff's office and that he was responsible for maintaining the recordings of the telephone calls placed by inmates at the jail, and he testified about the procedures for an inmate to place a call and the manner of recording the calls onto the server; thus, the trial court did not err by admitting the jail call recordings).

[512] *See below § 9.02[13]. See also In re Gracie H. Y., 2020 Tenn. App. LEXIS 110 (Tenn. Ct. App. Mar. 16, 2020)* (drug test results properly admitted as an exhibit at trial, where report was accompanied by an affidavit signed by the custodian of records at the pediatric facility, demonstrating compliance with Rules 803(6) and 902(11)).

[513] *See below § 8.11[12]* (hospital records).

[514] *See, e.g., Tire Shredders, Inc. v. ERM-North Cent., Inc., 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (parties stipulated as to authenticity of business records but reserved right to make other objections of admissibility).

[515] *See*, *e.g.*, *State v. Goldston, 29 S.W.3d 537 (Tenn. Crim. App. 1999)* (hospital record of results of blood alcohol test admissible as business record). *See generally Tenn. Code Ann. §§ 68-11-301* (2001) *et seq*. (medical records act) & 68-11-401 (2001) *et seq.* (hospital records as evidence). *See also*, *State v. Martin, 2018 Tenn. Crim. App. LEXIS 735 (Tenn. Crim. App. 2018)* (victim's medical records properly admitted under *Tenn. R. Evid. 803(6)*, where it could be reasonably inferred from the affidavit of the medical records custodian that the individuals who created or prepared the records had knowledge of the events, as well as a business duty to create or transmit the record, and that the records were kept in the course of the regularly conducted activity of the hospital as a regular practice).

[516] Statutes may ease admission of some medical records. *See*, *e.g.*, *Tenn. Code Ann. § 68-11-306* (2001) (a reproduction or copy of destroyed hospital records is deemed an original for all purposes); *id.* §§ 68-11-402 to -407 (2001) (providing a simplified process to admit a hospital record provided pursuant to a subpoena, and minimizing the need for the custodian to appear in person at trial). *See also Tenn. Code Ann. § 40-35-311(c)* (2003) (allowing admission into evidence at parol revocation proceeding of defendant's drug test results without testimony of administering laboratory technician when accompanied by affidavit containing specified information, including a certification of the reliability and accuracy of the test results and a declaration that all established procedures and protocols were followed).

opinions from doctors and other professionals.[517] Medical records may also be admissible under one of several statutory hearsay exceptions.[518]

A special rule applies for doctor's reports in workers' compensation cases. Such reports may be admitted under the workers' compensation statutes[519] or under Evidence Rule 803(6).[520]

How do we know that the opinion comes from a qualified expert? As a practical matter, the objecting lawyer will have to show absence of qualifications. One way to do that is to take a discovery deposition of the expert.[521]

[13] Multiple Hearsay in Business Records

Hospital and other business records frequently contain multiple hearsay, with many declarants.[521.1] Rule 805 helps admit documents containing multiple hearsay by authorizing the process of combining hearsay exceptions.[522]

Consider a patient, Poe, who tells the emergency room nurse: "My leg hurts. I started across the street, stumbled in a pothole and fell; then Doe, driving while drunk, ran over my leg." The nurse writes down Poe's statements.

The doctor on duty examines the injured limb and makes this entry in the hospital record: "Fractured femur, apparently caused by automobile hitting patient." Lab tests are ordered, and the results are duly recorded in the same hospital report. Poe takes a turn for the worse, the hospital calls a priest, and Poe says in the presence of three people: a priest, a nurse, and a police officer, "Realizing I am about to die, I tell you truly that Doe, my

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[517] Opinions are not limited to medical opinions, but the opinion must be competent under the provisions of Article VII of the Tennessee Rules of Evidence, which would be the case if the declarants were called as witnesses.

[518] *See, e.g.*, Tenn. Code Ann. § 24-7-122; *see also* Tenn. Code Ann. 63-2-102(c), which not only contains the mechanism for authentication of medical records through an affidavit, but also specifically provides that such records qualify for the business records exception to the hearsay rule.; *see below* § 9.02[13].

[519] ***TENN. CODE ANN. §§ 50-6-235(c)*** (requiring opportunity to take doctor's deposition); 50-6-204(d)(6) (independent medical examiner reports); ***Williams v. United Parcel Service, 328 S.W.3d 497 (Tenn. Worker's Compensation Panel 2006)***.

[520] Arias v. Duro Standard Products Co., 303 S.W.3d 256 (Tenn. 2010); Carter v. Quality Outdoor Products, Inc., 303 S.W.3d 265, 268 (Tenn. 2010).

[521] See Tenn. R. Civ. P. 26.02(4), 35.02. A pre-rules opinion, ***Graham v. State, 547 S.W.2d 531, 538 (Tenn. 1977)***, contains this observation: "The qualifications of the individual preparing the record may be inquired into, may be challenged, or may be disputed, but this goes to weight and not admissibility." *See* MCCORMICK ON EVIDENCE 496 (6th ed. 2006): "While the requirement of qualification does not disappear, if it is shown that the record is from a reputable institution, it may be inferred that regular entries were made by qualified personnel in the absence of any indication to the contrary."

[521.1] *See, e.g.,* State v. Wright, 2020 Tenn. Crim. App. LEXIS 401 (Tenn. Crim. App. June 10, 2020) (although report by the Tennessee Child Protective Services investigative unit may have been admissible as a record of a regularly conducted activity under Rule 803(6), or as a public record or report under Rule 803(8), the social worker's statement contained within the report constituted "hearsay within hearsay" and, thus, it required an exception to the hearsay rule in order to be admissible); State v. Howard, 504 S.W.3d 260 (Tenn. 2016) (medical report included statements made by the victims during the medical exam; the court applied multiple-hearsay anaylsis to rule that the report itself satisfied the hearsay exception as a business record, and statements by the children given for the purposes of medical diagnosis and treatment, and thus, both the record and the statements in it were admissible uner Rule 803); State v. Gatewood, 2018 Tenn. Crim. App. LEXIS 209 (Tenn. Crim. App. 2018) (rape victim's medical records contained hearsay within hearsay and the State failed to satisfy foundational requirements for each piece of hearsay); State v. Morris, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 391 (Tenn. Crim. App. 2018) (trial court did not err in excluding a day care accident report because the teacher who prepared the report did not observe the minor victim's tantrum first-hand, and thus, the report lacked trustworthiness and did not meet all business record exception requirements; at best, the accident report contained hearsay within hearsay, no exception was proffered, and any error in excluding the report was harmless).

[522] *See below* § 8.41[2].

longtime enemy, threatened to run me down and did." Poe dies. Assume all three wrote their observations in the hospital record.

What parts of the hospital report will come into evidence in a wrongful death trial (Poe's Estate v. Doe) or in a vehicular homicide prosecution (State v. Doe)? Three declarants were under a business duty to the hospital: the nurse, the doctor, and the lab technician. Their declarations in the hospital report are admissible insofar as pertinent to the regular course of hospital business. The jury can assume the nurse recorded Poe's words accurately. Likewise, the jury can take the doctor's diagnostic opinion as true, although it is doubtful that the causation part is admissible unless shown to have medical significance. The jury may also consider the lab test results as true.

Poe was also a declarant, and credibility is crucial to the relevance of Poe's statement. Poe had no business duty to the hospital so Poe could not provide information for the hospital record under Rule 803(6). But the estate could use Rule 803(3) to admit Poe's statement about leg pain as a declaration of then existing physical condition and combine that exception with the business records exception, Rule 803(6). Perhaps parts of Poe's second sentence would come in by tacking together the excited utterance and recorded recollection exceptions. Doe could offer on contributory negligence Poe's admission concerning the pothole. The dying declaration could be admitted at a homicide trial, Rule 804(b)(2).

The point to remember is evident. Anytime business records are available, the advocate should be alert to the possibility of combining hearsay exceptions to span credibility gaps of multiple declarants, some of whom are not employees.

[14] Sample Examination

Q: What is your job at the store?

A: I keep the books and records.

Q: Please explain how daily sales are recorded.

A: [Witness explains.]

Q: I show you this page from the sales record. Was the first entry on that page made at or near the time of the same reflected there?

A: Yes.

Q: Did the clerk who handled the sale furnish the information?

A: Yes.

Q: Did that clerk have knowledge and act under a business duty to record the sale?

A: Yes.

Q: Is it the regular practice of your business to make records such as this?

A: Yes.

Q: And did you as custodian keep this record in the regular course of business?

A: Yes, I did.

Q: Your Honor, I offer this document into evidence as a business record and ask that it be shown to the jury.

[15] Confidentiality

Under Tennessee law, some business records are deemed confidential in order to protect privacy or other interests. The best example is a statute that provides that medical records of patients in state hospitals and medical facilities and those of people receiving medical treatment at the expense of the state are confidential and not open to the public.[523] The same statute also, and to various degrees, renders confidential an array of other records: investigative records of the Tennessee Bureau of Investigation, certain department of safety

[523] *Tenn. Code Ann. § 10-7-504(a)* (Supp. 2010).

records, various military and national guard records, student records, attorney general records and other materials relating to pending or contemplated legal proceedings, state agency records concerning the purchase of property, state contract proposals, and department of correction records.[524]

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[524] *Id. See above §§ 5.01 et seq*.

§ 8.12 Rule 803(7). [Reserved]

§ 8.13 Rule 803(8). Public Records and Reports

[1] Text of Rule

Rule 803(8) Public Records and Reports

The following are not excluded by the hearsay rule:

Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

Advisory Commission Comment:

The rule admits records of public officials acting under an official duty to report accurately. This is the traditional official records hearsay exception. *T.R.C.P. 44*; *T.C.A. §§ 24-6-105-107*.

Police reports are expressly excluded, just as they are under current law in some instances. *See McBee v. Williams, 56 Tenn. App. 232, 405 S.W.2d 668 (1966)*, construing *T.C.A. § 55-10-114(b)* to exclude accident reports. *See also T.C.A. § 55-12-108(b)*, excluding Department of Safety determinations of fault in automobile accidents.

The Commission borrowed language from subsections (A) and (B) of F. *R. EVID. 803(8)*, but it expressly rejected federal subsection (C) on factual findings from investigations. The term "activities" in proposed subsection (A) is limited to the internal operations of a public office, making this category of official records much like business records of a private organization. The introductory language cautions that sources of information must be trustworthy.

[2] Overview of Public Records Exception

Rule 803(8) provides a hearsay exception for various public records. Traditionally these have been excepted from the hearsay rule because they are considered sufficiently reliable, for their accuracy is checked regularly and the public employees have no reason to falsify the record. Also, there is often no other source of the important data contained in the records; no public employee remembers the event described in the public record. The hearsay exception is valuable because it lets public officials remain on the job rather than spend most of their time testifying in court.

This exception, like the business records exception,[525] admits a wide variety of information, including "records, reports, statements, or data compilations in any form," Rule 803(8). These items must set forth either the activities of the office or agency[526] or matters observed and reported pursuant to a legal duty.[527] Untrustworthy

[525] *Tenn. R. Evid. 803(6)*.

[526] *See below § 8.13[3]*.

public records can be excluded.[528] It should be noted that this exception, despite its title, does not reach only records open to the public. The term "public" refers to the source of the record, not its audience.

[3] Activities of Public Office or Agency

The first class of records admitted under Rule 803(8) is much like the business records exception. Here the "business" is a public office or a public agency. The records may *set forth the activities of the office or agency*, Rule 803(8). Records of the activities in the office or agency are admissible in a civil or criminal case to prove the truth of those activities and any party can rely on this exception. Since the detailed requirements of the business records exception in Rule 803(6) are not found here, counsel may find it advisable to use the public records exception in lieu of the business records exception in the many situations where both apply. Probably only a foundation that the memorandum reflects activities of a public office or agency is necessary to satisfy the public records exception. Examples of items covered by this exception are agency manuals, agency records of its employees' assignments, transcripts of public hearings,[529] and a list of people in jail at a particular time.[530]

[4] Matters Observed

[a] In General

The second class of records in this rule is of greater practical significance. It permits the public record to include *matters observed pursuant to duty imposed by law as to which matters there was a duty to report*, Rule 803(8). This rule permits reports by various public agencies to be introduced to prove the truth of the assertions in the report. As long as the information in a report comes from a declarant observing and reporting "pursuant to duty imposed by law," the report is admissible despite being hearsay. Examples of

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[527] *See below* *§ 8.13[4]*.

[528] *See below* *§ 8.13[5]*.

[529] *E.g.*, ***Federated Stores Realty v. Huddleston, 852 S.W.2d 206 (Tenn. 1992)*** (multistate tax audit manual admissible under Rule 803(8)).

[530] *United States v. Koontz, 143 F.3d 408 (8th Cir. 1998)*. *See also* *State v. Korsakov, 34 S.W.3d 534, 542 (Tenn. Crim. App. 2000)* (TBI certification of Intoximeter EC—IR and maintenance records of this device are public records).

"matters observed" by a public office or agency are the tribal roll identifying members of an Indian tribe[531] and a sheriff's return of process.[532] There are many other examples.[533]

[b] Police Reports

Police reports are specifically excluded under this rule. As the Tennessee Advisory Commission Comment states, that has long been the law in Tennessee.[534] Such reports are excluded in both civil and criminal cases.[534.1]

[c] National Crime Information Center (N.C.I.C.) Reports

Because of their hearsay and untrustworthy nature, computer print-outs of criminal records from the National Crime Information Center (N.C.I.C.) are inadmissible in Tennessee as a substitute for a certified copy of a criminal conviction. According to the Tennessee Supreme Court:

> We hold that computer print-outs from the N.C.I.C. are not admissible as a substitute for certified copies of court convictions nor for any other purpose. The information in such reports is pure hearsay, of a dubious degree of accuracy, prepared for purposes other than court use, contains information that is likely to be prejudicial under all circumstances and is not the best evidence of matters that can be proven by reliable, documentary evidence.[535]

[5] Untrustworthy Reports; Factual Findings

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[531] *United States v. Torres, 733 F.2d 449 (7th Cir.)*, *cert. denied*, ***469 U.S. 864 (1984)***.

[532] *United States v. Union Nacional de Trabajadores, 576 F.2d 388 (1st Cir. 1978)* (sheriff not law enforcement officer when serving process).

[533] *E.g.*, *Tenn. Code Ann. § 38-7-110* (Supp. 2010) (certain certified post-mortem and medical examiner records and TBI lab reports are admissible); State *ex rel. Witcher v. Bilbrey, 878 S.W.2d 567 (Tenn. Ct. App. 1994)* (letter from Tennessee Governor appointing special judge is a public record as an official act); *State v. Sensing, 843 S.W.2d 412 (Tenn. 1992)* (certified copy of tests and procedures of breath alcohol machine); *State v. Wingard, 891 S.W.2d 628 (Tenn. Crim. App. 1994)* (prison reclassification records); *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (public records include records computed by or submitted to a public entity known as Village of Forest View, Illinois; they include unsigned findings of fact and decision of the Village concerning a request for site approval for a resource recovery facility, a request for this local site approval, a Village ordinance, a waste disposal agreement between the Village and a company, and the Village's findings of fact and decision concerning the application for local siting); *Tenn. Code Ann. § 40-35-311(c)* (Supp. 2010) (at probation revocation proceeding, defendant's drug test results are admissible without testimony of administering laboratory technician when accompanied by affidavit containing specified information, including a certification of the reliability and accuracy of the test results and a declaration that all established procedures and protocols were followed); *Id.* at § 40-28-122 (2003) (same for parole revocation hearing); *State v. Conway, 77 S.W.3d 213 (Tenn. Crim. App. 2001)* (written certification of breathalyzer satisfies public records hearsay exception).

[534] *Tenn. Code Ann. § 55-10-114(b)* (2008), *construed in McBee v. Williams, 56 Tenn. App. 232, 405 S.W.2d 668 (1966)*. *See also Tenn. Code Ann. § 55-12-108(b)* (2008) (determination of fault inadmissible).

[534.1] Police reports are also inadmissible as business records under *Tenn. R. Evid. 803(6)*. *See State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019)* (police reports are inadmissible hearsay under *Tenn. R. Evid. 803(6)*, because the information contained in them is hearsay and mere opinions or conclusions not based on personal observation; *State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. 2019)* (a defendant's statement in a police report does not qualify as a "business record" under *Tenn. R. Evid. 803(6)*).

[535] *State v. Buck, 670 S.W.2d 600, 607 (Tenn. 1984)*. *See also State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994)* (N.C.I.C. report discounted as source of accurate information; cannot serve as basis for good-faith belief in existence of criminal conviction when court had held that the only other conviction was inadmissible).

The public records exception in Rule 803(8) specifically authorizes the court to exclude the public record if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. This provision, tracking similar language in the federal rule,[536] gives the trial judge considerable discretion in making a case-by-case analysis of the admissibility of a public record. Since this provision focuses on both the source of the information in the public record and the way the record was prepared, it opens the door to considerable exploration of the trustworthiness of evidence offered as a public record.

One area where the trustworthiness issue is clearly presented is where the public record contains information from sources outside the agency. Parts of this public record may be barred because of multiple hearsay, unless sufficient hearsay exceptions are present, Rule 805. In addition, parts can also be excluded if these sources are untrustworthy, Rule 803(8).

Tennessee Rule 803(8), in contrast to the federal counterpart, does not admit factual findings from an official investigation.[537] The omission is intentional. Officialdom does not always bring truth, especially where officials are drawing conclusions from declarants not shown to be trustworthy.

[6] Other Sources for Admissibility

Other provisions of the Tennessee Rules of Evidence cover various official records. Rule 803(9) treats records of vital statistics;[538] Rule 803(12) makes admissible marriage certificates issued by a public official;[539] Rule 803(14) concerns property documents recorded in a public office;[540] and Rules 803(22) and 803(23) admit certain court judgments.[541] The business records exception, Rule 803(6), may also be applicable since a government agency is considered to be a “business” for purposes of the business records rule.[542]

Statutes may pave avenues for admissibility.[543] Examples include certified copies of final court judgments[544] and certified copies of child support payment records.[545]

[7] Foundation

Other provisions of Tennessee law provide mechanisms to authenticate a public record. Evidence Rule 901(b)(7) details the process of laying a foundation to establish that a recorded document is from a public office.[546] Rules 902(1)–(5) render many domestic and foreign public documents to be self-authenticating,

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[536] FED. *R. EVID. 803(8)*. Federal Evidence Rule 803(8) now specifies that the opponent has the burden of showing the possible sources of information or other circumstances indicate lack of trustworthiness.

[537] *Cf.* FED. *R. EVID. 803(8)(C)*. These may include evaluative findings. *Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)*.

[538] *See below § 8.14[2]*.

[539] *See below § 8.17[2]*.

[540] *See below § 8.19[2]*.

[541] *See below §§ 8.27[2], 8.28[2]*.

[542] *See above § 8.11[3]*.

[543] *See above § 8.02[3]*.

[544] *Tenn. Code Ann. § 24-6-101* (2000).

[545] *Tenn. Code Ann. § 36-5-3006* (2010).

[546] *See below § 9.01[9]*.

greatly easing admissibility.[547] For example, Rule 902(4) provides that a certified copy of a public record is self-authenticating.[548]

Statutes also ease the admissibility of certain public records and must be consulted whenever a public record is to be offered in evidence.[549]

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[547] *See below* *§§ 9.02[3]–[7]*.

[548] *See below* *§ 9.02[6]*. Obtaining a certified copy is made possible by statute. Tennessee law mandates that state officials having custody of a public record or writing must provide a certified copy of the record upon demand and payment of a fee. *Tenn. Code Ann. § 24-6-105* (2000).

[549] *See*, *e.g.*, *Tenn. Code Ann. §§ 24-6-101* (2000) (certified copy of court judgment); 36-5-3006 (2010) (certified copy of payment record of child support).

§ 8.14 Rule 803(9). Records of Vital Statistics

[1] Text of Rule

Rule 803(9) Records of Vital Statistics

The following are not excluded by the hearsay rule:

Records or data compilations in any form of births, fetal deaths, deaths, marriages, or divorces, if the report was made to a public office pursuant to requirements of law.

Advisory Commission Comment:

Vital statistics, a particular variety of official records, come in under this exception. Tennessee law is unchanged. *T.C.A. §§ 68-3-101 et seq.*.

1991 Advisory Commission Comment:

This [1991] amendment adds divorce records to the list of vital statistics.

[2] Vital Statistics

[a] In General

The vital statistics hearsay exception in Rule 803(9) is an almost verbatim adoption of Federal Rule 803(9) and is part of the familiar official records exception. This exception is recognized because these routine records are virtually always accurate and may be the only reliable source of the information. In contrast to the public records exception in Rule 803(8), however, here the record need not be made by a public official. Rule 803(9) provides that the report must be made *to* a public office (rather than *by* a public official), pursuant to requirements of law. Either a private (such as a doctor, minister, or mortician) or an official declarant makes a written or computer-generated report of a birth, marriage, death (including fetal death) or divorce and sends the report to a public office as required by law.[550] The public official at that office is required by law to record the fact reported. The record from the public office is admissible to prove that a birth, marriage, divorce, or death occurred.

It is not clear whether this exception will permit proof of matters other than those enumerated in the rule. Due to the multiple hearsay sources and unreliability of some causal findings, it is likely Rule 803(9) was not intended to prove facts other than births, deaths, and the like. Rule 403 can be used to exclude the evidence if it is untrustworthy.

[b] Foundation

Rules 901(b)(7) and 902(1), (2), and (4) deal with the foundation needed to prove a record of a vital statistic.

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[550] *See* *Tenn. Code Ann. §§ 68-3-101* to 510 (2006 and Supp. 2010).

[c] Statutes

A Tennessee statute provides that numerous records of vital statistics, including death certificates, are *prima facie* evidence of the facts in the certificates.[551] Some information in these documents is inadmissible or subject to limited dissemination. For example, certain medical information in birth certificates and confidential information in marriage, divorce, or annulment certificates may only be disclosed for statistical or research purposes; they are not admissible before any judicial body. There are also limits on dissemination of birth certificates of people in the federal witness protection program.[552]

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[551] *Tenn. Code Ann. § 68-3-202(c)* (2006).

[552] *Tenn. Code Ann. § 68-3-205(d)(1)(C)* (Supp. 2010).

§ 8.15 Rule 803(10). [Reserved]

§ 8.16 Rule 803(11). [Reserved]

§ 8.17 Rule 803(12). Marriage, Baptismal, and Similar Certificates

[1] Text of Rule

Rule 803(12) Marriage, Baptismal, and Similar Certificates

The following are not excluded by the hearsay rule:

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament made by a member of the clergy, a public official, or another 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.

Advisory Commission Comment:

This exception is similar to those in Rules 803(8) and (9). Marriage and baptism necessarily involve religious or official participation, and the religious or public record is evidence of the fact of baptism or marriage.

[2] Sacramental and Ceremonial Certificates

[a] In General

Rule 803(12) provides a hearsay exception for various marriage, baptismal, bar mitzvah, confirmation, and related certificates. The theoretical basis for this exception is that the certificates are probably accurate because of their origins (religious or public officials) and timely completion. Also, on rare occasions there may be no other source for the information.

Ordinarily, these certificates would be issued by a religious official who performed a ceremony, such as a marriage or christening. The certificate would be signed by the religious leader and perhaps others, and given to the people involved in the ceremony to memorialize the event. The certificate may be kept as part of the family's written history. These certificates are often not filed with a government agency as official records. This hearsay exception permits the certificates to be used to prove that the ceremony occurred.

[b] Facts Provable

These certificates may be used to prove the fact that the maker of the certificate *performed a marriage or other ceremony or administered a sacrament*. The ceremony or sacrament, in turn, could be used as proof of such matters as marriage, birth, lineage, death, or age. It has been argued that the rule even includes certificates issued for a church confirmation, naturalization, induction into the ministry, and admission to practice law in a jurisdiction or court.[553]

[c] Source of Certificate

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[553] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE 868 (3d ed. 2006).

Rule 803(12) provides that the certificate may be made by *a member of the clergy, a public official, or another person authorized by the rules or practices of a religious organization or by law to perform the act certified*. If a member of the clergy is the declarant, law or church practice must authorize the declarant to do the act memorialized in the certificate. Public officials performing such acts must have legal authority to perform the act described in the certificate.

[d] Timely Issuance of Certificate

Rule 803(12) mandates that the certificate must *purport to have been issued at the time of the act or within a reasonable time thereafter*. Designed to ensure the accuracy of the certificate, this requirement means that the person performing the ceremony should complete the certificate memorializing the ceremony without undue delay. The date and language of the certificate itself would ordinarily be sufficient proof that this requirement was satisfied.

[e] Relationship to Other Rules

There is some overlap between this exception and the vital statistics exception, Rule 803(9),[554] if the declarant who administers a sacrament or performs a ceremony sends a certificate to a public office. Even in instances where there is no transmittal, under Rule 803(12) the certificate is evidence of the truth of its contents. If the certificate was issued by a public official, it may be self-authenticated under Rule 902(1).

End of Document

[554] *See above § 8.14[2]*.

§ 8.18 Rule 803(13). Family Records

[1] Text of Rule

Rule 803(13) Family Records

The following are not excluded by the hearsay rule:

Statements of fact concerning personal or family history contained in family Bibles, genealogies, engravings on rings, inscriptions on family portraits, engravings on burial urns, crypts, tombstones, or the like.

Advisory Commission Comment:

While not always trustworthy, family records of the kinds described here may be the only evidence available. In any event, once admitted through this hearsay exception, the facts can be rebutted.

[2] Family Records

Rule 803(13) provides a hearsay exception for a wide variety of fact statements contained in family records. The family record is admissible to prove the fact noted in the record. For example, this exception is one of several ways to prove pedigree.[555] More generally, it can be used to prove births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history.[556]

Rule 803(13) includes statements in many types of family records, including those in a family Bible, on a portrait, or in a genealogy. Engravings on a ring, such as a marriage date, are also admissible. Some engravings concerning pedigree are publicly displayed, as on tombstones, urns, or crypts. The list in Rule 803(13) is illustrative rather than exclusive.[557]

This rule raises unique questions about the role of the personal knowledge requirement of Rule 602.[558] Often it is simply impossible to know who provided the information in some family records such as Bibles or engravings on tombstones. The inclusion of this hearsay exception is an implicit recognition that Rule 602 is not to be applied strictly for items covered by this hearsay exception. Often the nature and circumstances of the statement, including the likely sources of the information, will provide sufficient data to satisfy the concerns of Rule 602.

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[555] *See also* *Tenn. R. Evid. 803(19)* (reputation), 803(23) (judgment), 804(b)(4) (statement). Birth, death, and marriage can be proved under *Tenn. R. Evid. 803(9)* (vital statistics) and marriage under *Tenn. R. Evid. 803(12)* (certificate).

[556] *See* H.R. Rep. No. 650, 93rd Cong., 1st Sess., at 15 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7088.

[557] Rule 803(13)'s inclusion of the phrase "or the like" makes allowance for other repositories of family information.

[558] *See above* *§ 6.02[2]*.

End of Document

§ 8.19 Rule 803(14). Records of Documents Affecting an Interest in Property

[1] Text of Rule

Rule 803(14) Records of Documents Affecting an Interest in Property

The following are not excluded by the hearsay rule:

The record of a document purporting to establish or affect an interest in property as proof of the contents 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.

Advisory Commission Comment:

This exception is a narrow one. It admits only three facts about a recorded deed, financing statement, or other property instrument: (1) the contents of a certified copy are identical to the filed original, (2) the original was executed, and (3) the original was delivered (if that step is necessary).

[2] Records of Property Documents

Rule 803(14) creates a hearsay exception for copies of recorded documents affecting an interest in property. The most important aspect of this hearsay exception, as the Tennessee Advisory Commission Comment suggests, is its limited scope. This hearsay exception is not a vehicle for proving that all statements in property documents are true.[559] Rather, the copy of a document affecting an interest in property offered in court—typically a certified copy[560]—is evidence that the recorded original contains the same words as the copy. The court may use this proof, with other evidence, to establish the truth of the matters in the document. In *Compton v. Davis Oil Company*,[561] decided under the virtually identical Federal Evidence rule, the court admitted proof of the contents of two warranty deeds as some proof that the two people who signed the deeds as husband and wife were actually married. This proof also establishes execution and delivery.

Both real property and personal property are encompassed. However, Rule 803(14) applies only to *a record of a public office* and only when *an applicable statute authorizes the recording*. Examples include warranty deeds, trust deeds, and financial statements. Such documents become a matter of record in a public office by statutory authority.

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[559] *Cf.* Tenn. R. Evid. 803(16) (ancient documents).

[560] *See below* § 9.02[6].

[561] 607 F. Supp. 1221 (D. Wyo. 1985).

End of Document

§ 8.20 Rule 803(15). [Reserved]

§ 8.21 Rule 803(16). Statements in Ancient Documents Affecting an Interest in Property

[1] Text of Rule

Rule 803(16) Statements in Ancient Documents Affecting an Interest in Property

The following are not excluded by the hearsay rule:

Statements in a document in existence thirty years or more purporting to establish or affect an interest in property, the authenticity of which is established.

Advisory Commission Comment:

If a document—be it a deed, security agreement, or other instrument—affects a property interest, and if it is thirty years old and authentic, the trier of fact may take as true statements within the document. Proposed Rule 901(b) makes thirty years of age one of the requisites for authentication, but the offering lawyer must also establish normal custody and lack of suspicion.

Tennessee decisions treat admissibility of ancient deeds, but the proposed exception updates the law to cover other property instruments. Otherwise, the rule is consistent with present Tennessee law. It departs markedly from F. *R. EVID. 803(16)* which provides a hearsay exception for any (not just property) documents at least twenty years old.

[2] Statements in Ancient Property Documents

Unlike Rule 803(14), discussed in a preceding section,[562] the present rule, often called the ancient documents hearsay exception, admits as substantive truth the statements within certain older property documents. There are three reasons why these aged hearsay documents are viewed as sufficiently reliable to be admitted into evidence. Since they are in written form, they are unlikely to be misunderstood. Also, because they are old, it is unlikely they were falsified for purposes of the current litigation. Another reason for admitting ancient documents is for practicality; often there is simply no other method of proving facts that occurred many years ago.

Under Rule 803(16), the document need not be publicly recorded, but it must have existed thirty years or more and it must be authenticated. Normally, authenticity is established by proving the elements of Rule 901(b)(8): over thirty years of age, unsuspicious condition, and place of likely custody.[563]

The document must *establish or affect* a property interest. Both personalty and realty are covered, and examples include a security agreement and a real estate deed. It should be noted that this ancient documents hearsay exception is considerably more limited than the federal version of the rule.[564]

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[562] *See above § 8.19[2].*

[563] *See below § 9.01[10].*

End of Document

564 The federal rule provides a hearsay exception for statements in documents in existence twenty or more years and is not limited to documents involving property. FED. R. EVID. 803(16).

§ 8.22 Rule 803(17). Market Reports and Commercial Publications

[1] Text of Rule

Rule 803(17) Market Reports and Commercial Publications

The following are not excluded by the hearsay rule:

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Advisory Commission Comment:

Tennessee's Uniform Commercial Code admits commodity market quotations in *T.C.A. § 47-2-724*. The proposed exception extends the exception to other publications generally relied upon by the public.

[2] Commercial Publications

[a] In General

Rule 803(17) provides a hearsay exception for various kinds of commercial publications. These documents would be used to prove such matters as the market price of a stock on a certain day, or the names and addresses of people in a certain national association. The publications are ordinarily reliable because they have been time-tested for accuracy, are relied on, and the author has a professional and financial incentive to be accurate. It would also be difficult to prove the information in these publications without considerable cost and inconvenience.

Evidence will be excluded under Rule 803(17) if it is not properly authenticated and its underlying data is too old or too generic to be probative of the issue at trial.[564.1]

[b] Publication

A threshold requirement is that the document be *published*. The term "publication" is not defined, but requires, at the least, that the item be in writing and circulated to others. Forms filed with a government agency have not been "published" for purposes of this rule.[565]

[c] Used and Relied Upon

[564.1] *See, e.g.*, *Perry v. State, 2012 Tenn. Crim. App. LEXIS 498 (Tenn. Crim. App. July 11, 2012)* (post-conviction court did not abuse its discretion in refusing to admit Carfax website printouts, where they (1) had been generated more than a year after the car thefts, (2) had not been properly authenticated, and (3) were not quotes of the actual vehicle that had been stolen, but instead, related to a vehicle that was merely the same make, model, and year).

[565] *White Industries v. Cessna Aircraft Co., 611 F. Supp. 1049, 1068 (W.D. Mo. 1985)*.

To ensure reliability, the rule requires that the evidence be *generally used and relied upon by the public or by persons in particular occupations*. Thus, an item used heavily and routinely by a few people is probably not included, even though its accuracy has been verified many times. This foundation could be provided by judicial notice,[566] stipulation, or the testimony of a witness familiar with the relevant area. Thus, a manuscript dealer could testify that *The Collected Works of Abraham Lincoln* were used by manuscript dealers to locate original Lincoln documents.[567]

[d] Types of Items

The rule specifically mentions *market quotations*,[568] *tabulations*, *lists*, and *directories*, but has a catch-all category for *other published compilations*. That category could include compilations of retail and wholesale used car values,[569] price catalogues, trade journals,[570] listings of real estate sales,[571] telephone books, city directories, interest rate charts, and mortality tables. There are countless other illustrations.[572] The exception does not ordinarily cover treatises, scholarly papers, research reports, or items generated for a particular company's use.

Rule 403 can be used to exclude evidence otherwise admissible under this exception. For example, in a tort case[573] for the negligent destruction of an expensive shredding machine, the court held that Tennessee Evidence Rule 803(17) embraced trade journals, but in the context of the case such journals were excluded pursuant to Rule 403. The defendants wanted to introduce advertisements in the journals to suggest the plaintiffs could have mitigated damages by obtaining a replacement shredder. The court barred the journals under Rule 403 because the general nature of the advertisements made them of little probative value and would waste time since the plaintiff admitted it had not consulted the trade journals.

End of Document

[566] *See above* §§ 2.01[2]–[4].

[567] *United States v. Mount, 896 F.2d 612 (1st Cir. 1990)*.

[568] *See also Tenn. Code Ann. § 47-2-724* (2001): Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

[569] *United States v. Johnson, 515 F.2d 730 (7th Cir. 1975)*.

[570] *See*, *e.g.*, *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (trade journals of recycling industry admissible under *Tenn. R. Evid. 803(17)*).

[571] *See*, *e.g.*, *United States v. Cassiere, 4 F.3d 1006, 1018 (1st Cir. 1993)* (monthly listing of property sold, sales price and date of sale).

[572] *See, e.g.*, *United States v. Woods, 321 F.3d 361, 362 (3d Cir. 2003)* (National Insurance Crime Bureau's list of vehicle identification numbers).

[573] *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)*.

§ 8.23 Rule 803(18). [Reserved]

§ 8.24 Rule 803(19). Reputation Concerning Personal or Family History

[1] Text of Rule

Rule 803(19) Reputation Concerning Personal or Family History

The following are not excluded by the hearsay rule:

Reputation among members of a person's family by blood, adoption, or marriage or among 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.

Advisory Commission Comment:

The rule admits reputation to prove pedigree, and that is the common law and Tennessee position. To introduce an individual's declaration to prove pedigree, see Rule 804(b)(4).

The proposal contains no requirement that the reputation have existed before the controversy developed.

[2] Reputation of Pedigree

Reputation, under Rule 803(19), is another way to prove a person's pedigree, just as family records can prove those facts under Rule 803(13)[574] and, if the person is unavailable, the person's own statement may be introduced pursuant to Rule 804(b)(4).[575] Reputation means more than a single interpretation of the alleged reputation; the key is the "general understanding" held by more than one person in the relevant community.[576]

The rule permits reputation evidence to be used to prove various aspects of pedigree, including birth, adoption, relationship, marriage, divorce, and death. This proof is considered sufficiently reliable to be presented to the trier of fact since rarely will general understandings of family and associates about such important matters be wrong.

For this hearsay exception covering reputation of personal or family history, there is no requirement that the witness have personal knowledge of the fact to be proven by the testimony or that the reputation have been formed prior to the controversy now on trial. What is required is that the reputation exist within a person's family circle, the person's associates, or in the person's community. The person testifying about this reputation would have to establish that he or she had sufficient familiarity with the reputation to be able to testify about it.[577] The

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[574] *See above § 8.18[2]*.

[575] *See below § 8.38*.

[576] *State v. Taylor, 240 S.W.3d 789, 798–99 (Tenn. 2007)*.

[577] A federal case construing the virtually identical rule observed that the reputation witness must be "truly familiar" with the relevant community. Moreover, the basis for the reputation must be likely reliable. The reputation cannot be based on rumors of

declarants must be familiar with the person's reputation and could be family members, co-workers,[578] or schoolmates with the person whose pedigree is in issue. For example, a party's father was permitted to testify about the common understanding of the place of the party's birth.[579]

The leading Tennessee case, *State v. Taylor*,[580] involved the admissibility of a police officer's statement that the defendant and another person were cousins. The officer knew about this relationship since Ms. Renfro told him. The Tennessee Supreme Court held that the officer's testimony did not qualify under Rule 803(19) because there was no foundation that the information from Ms. Renfro was based on reputation as opposed to the view of the single person (Ms. Renfro) with whom the officer spoke.

unknown origins or a single instance of "someone told me so." *Blackburn v. United Parcel Service, Inc., 179 F.3d 81, 101 (3d Cir. 1999)*.

[578] *See*, *e.g.*, *Blackburn v. United Parcel Service, Inc., 179 F.3d 81 (3d Cir. 1999)* (reputation at place of work).

[579] *United States v. Jean-Baptiste, 166 F.3d 102, 110 (2d Cir. 1999)*.

[580] *State v. Taylor, 240 S.W.3d 789 (Tenn. 2007)*.

§ 8.25 Rule 803(20). Reputation Concerning Ancient Boundaries

[1] Text of Rule

Rule 803(20) Reputation Concerning Ancient Boundaries

The following are not excluded by the hearsay rule:

Reputation in a community, arising before the controversy and existing thirty years, as to the boundaries of or customs affecting lands in the community.

Advisory Commission Comment:

The rule mirrors current Tennessee law.

[2] Ancient Boundaries

Rule 803(20) permits community reputation evidence to be used to prove boundaries (though not title) or customs affecting lands. This probably includes such matters as the way property was used, who had access to it, and who possessed it. In order to ensure that the reputation has not been manufactured for purposes of litigation, Rule 802(20) mandates that community members must have discussed the boundary and the reputation must have gelled before the dispute arose and at least thirty years before trial.[581]

[581] *Cf.* FED. *R. EVID. 803(20)*, where the reputation need not be "ancient" but must have arisen before the controversy developed. The federal provision also reaches reputation of events of general history; the Tennessee rule omits this coverage.

§ 8.26 Rule 803(21). Reputation as to Character

[1] Text of Rule

Rule 803(21) Reputation as to Character

The following are not excluded by the hearsay rule:

Reputation of a person's character among associates or in the community.

Advisory Commission Comment:

Character evidence primarily involves relevancy issues, but it requires a hearsay exception as well to gain admittance. This hearsay exception is standard.

The exception satisfies the hearsay exclusionary rule, but other evidence principles must be satisfied as well. *See* Proposed Rules 404, 405, and 408.

[2] Reputation of Character

The rules of evidence sometimes admit evidence of the reputation of a person's character. For example, reputation of character is often substantive evidence of conduct conforming to the character trait.[582] Similarly, reputation of character may be evidence affecting credibility.[583] When reputation of character is admissible, there is a hearsay problem because the community members who provide the reputation are declarants and the reputation may be viewed as hearsay. Rule 803(21) eliminates this problem by providing a hearsay exception for reputation of character.

Obviously this rule does not apply to one person's opinion about another person's character.[583.1] Reputation proof, by definition, is an aggregate view of a number of people. According to this rule, the reputation may be held by one's "associates or in the community." The term "associates" clearly applies to business associates,[584] and should be read as applying to a school or social setting as well. The term "community" refers to the area where one lives.

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[582] *Tenn. R. Evid. 404(a)(1)* & *(2)*, *405*.

[583] *Tenn. R. Evid. 608(a)*. The Tennessee Advisory Commission Comment to Rule 803(21) incorrectly refers to Rule 408 instead of Rule 608.

[583.1] *In re Michael B., 2016 Tenn. App. LEXIS 757 (Tenn. Ct. App. 2016)* (in a termination of parental rights case, trial court did not abuse its discretion by excluding letters from various individuals, including the mother's probation officer and other family members, to demonstrate her adjustment of circumstances; the letters were not admissible as a hearsay exception for reputation of character evidence, because the letters did not detail the mother's reputation in the community but instead discussed her current sobriety, past events, and opinions as to the mother's character).

[584] *See, e.g.*, *Blackburn v. United Parcel Service, 179 F.3d 81, 99 (3d Cir. 1999)* (a reputation among "associates" includes reputation at work).

End of Document

§ 8.27 Rule 803(22). Judgment of Previous Conviction

[1] Text of Rule

Rule 803(22) Judgment of Previous Conviction

The following are not excluded by the hearsay rule:

Evidence of a final judgment 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 prosecution in a criminal case 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.

Advisory Commission Comment:

The rule adopts the federal approach admitting felony conviction records to prove underlying facts necessary to the judgment. Tennessee has followed the common law view excluding such evidence. *Smith v. Phillips, 43 Tenn. App. 364, 309 S.W.2d 382 (1956)*.

Civil judgments are routinely admitted to bar relitigation on *res judicata* principles. In limited circumstances, federal constitutional law collaterally estops subsequent prosecutions.

The Commission believed that a jury's finding beyond a reasonable doubt that a serious crime was committed should be admitted in a later civil or criminal trial to prove the underlying facts necessary to the judgment of conviction. Because facts proving minor crimes may not have been developed at trial, the rule would exclude judgments for lesser infractions from this hearsay exception.

[2] Judgment of Conviction

[a] In General

Rule 803(22) creates a hearsay exception for certain criminal convictions. Although it does not reach civil judgments, the rule does permit criminal judgments to be admissible as evidence in a civil case. This rule creates a significant departure from pre-rules Tennessee law. Previously state courts would admit a guilty plea on an admissions theory, but criminal judgments of guilt beyond a reasonable doubt were inadmissible hearsay. The criminal court jurors are declarants, and traditionally courts found no guarantee of reliability. Modern teaching, reflected in Rule 803(22), is that the jurors' findings necessary for a verdict are sufficiently reliable to justify a hearsay exception, especially in light of the prosecution's heavy burden of proof and the fact that the judgment is viewed as sufficiently reliable to deprive the defendant of freedom.

[b] Convictions Covered

Rule 803(22) creates a hearsay exception for criminal convictions punishable by death or imprisonment for more than a year. The rule does not apply to acquittals.[585] It excludes convictions in minor cases because of a concern that the conviction may be untrustworthy as proof of the underlying facts since the defendant may have lacked sufficient motivation to offer a full defense.[585.1]

The rule also does not apply to juvenile adjudications. A separate statute generally bars the admission of juvenile adjudications.[586]

The word "punishable" in Rule 803(22) indicates that the test is the sanction that *could have been* imposed rather than the sentence that was *actually imposed* in this case. Moreover, this hearsay exception only applies to crimes punishable in excess of one year,[587] thus eliminating proof of misdemeanors, such as driving while intoxicated.

Although Rule 803(22) excludes misdemeanor convictions, such convictions are admissible in limited circumstances.[587.1] For example, Tennessee law provides that the punishment for a conviction for driving under the influence of an intoxicant may be enhanced if the offender had one or more prior convictions for this misdemeanor.[588] Convictions from Tennessee and other states may be used.[589] It is not clear what hearsay exception covers these misdemeanor convictions. Perhaps they constitute a statutory exception to Rule 803(22)'s bar against the use of misdemeanor convictions.

It should be noted that the hearsay exception applies even where the accused pleads not guilty but is convicted of a felony after a jury or bench trial. It also applies when the conviction is based on a guilty or *nolo contendere* plea.[590]

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[585] *Cf.* United States v. Sanchez, 992 F.2d 1143 (11th Cir. 1993) (Federal Rule of Evidence 803(22) does not apply to acquittals). Although evidence of an act resulting in acquittal is inadmissible hearsay under Rule 803(22), since only judgments are admissible, the prior acquittal-act evidence may be offered for admissibility under Rule 404(b). *See* State v. Jarman, 2020 Tenn. LEXIS 267, *41–42 (July 6, 2020), *overruling* State v. Holman, 611 S.W.2d 411 (Tenn. 1981). In *Jarman*, the Tennessee Supreme Court held that an act resulting in acquittal is admissible in a subsequent trial on a different charge as "prior act" evidence, but only if the requirements of Rule 404(b) are met. Since "Rule 404(b) is a rule of exclusion … the analysis deserves the *utmost scrutiny* in order to protect the fairness of the criminal trial (emphasis added)." *Id.*, *42. More specifically, the fact that a defendant was acquitted will "weigh heavily against" the act's admissibility under Rule 404(b), since the underlying act must be proven by clear and convincing evidence. *Id.*, *41–42.

[585.1] *See, e.g.*, State v. Lindsey, 2016 Tenn. Crim. App. LEXIS 481, *18–19 (Tenn. Crim. App. July 6, 2016) (a misdemeanor shoplifting conviction is inadmissible under Rule 803(22), since the rule "excludes convictions in minor cases because of a concern that the conviction may be untrustworthy as proof of the underlying facts").

[586] TENN. CODE ANN. . § 37-1-133 (b) (2010). *See also* Biscan v. Brown, 160 S.W.3d 462 (Tenn. 2005) (excluding evidence of juvenile court alcohol-related citations in tort case, citing statute).

[587] The precise language is, "a crime punishable by death or imprisonment in excess of one year." The Criminal Sentencing Reform Act of 1989, however, defines a felony as including a crime punishable by confinement of one year or more. Tenn. Code Ann. § 39-11-110 (2010).

[587.1] *See, eg.*, State v. Lindsey, 2016 Tenn. Crim. App. LEXIS 481 (Tenn. Crim. App. July 6, 2016) (trial court did not abuse discretion by admitting misdemeanor shoplifting conviction, since it was directly relevant to the defendant's alleged violation of community supervision in his parole revocation hearing, and the strict rules of evidence do not apply in such proceedings).

[588] Tenn. Code Ann. § 55-10-403 (Supp. 2010). In such cases, a certified computer printout from the department of safety of defendant's driving record is prima facie evidence of prior convictions and is admissible, absent defendant's proof that the printout is erroneous. Tenn. Code Ann. § 55-50-504 (2008). *See also* the Motor Vehicle Habitual Offenders Act, TENN. CODE ANN. § 55-10-605, which allows certified copies conviction records, for offenses within the purview of the Act, to be admitted; upon the entry of such records into evidence, a rebuttable presumption of their truth arises.

[589] *Id.*

Rule 803(22) expansively applies to convictions, irrespective of the jurisdiction. It covers convictions in federal and state courts, as well as in foreign countries. Rule 403 could be used to exclude proof of foreign convictions of questionable reliability.[591]

Rule 803(22) specifically provides that the fact that a conviction is under appeal does not affect the admissibility of the evidence, but may affect its weight. Since Rule 803(22) applies only to convictions, it does not provide a hearsay exception for any other variety of disposition, such as arrests, indictments, mistrials, acquittals, or possibly even convictions for which a judgment has not yet been entered.

[c] Essential Facts

Rule 803(22) permits a criminal judgment to be introduced to prove *any fact essential to sustain the judgment*. Typically, the exception will be useful when the convicted criminal defendant is also a defendant in a related civil litigation. The plaintiff's lawyer could introduce the official record of conviction rather than calling the witnesses who testified at the criminal trial. While the conviction is not conclusive as to the criminal jury's findings,[592] and the civil jury is entitled to believe the defendant's rebuttal proof instead of the record of conviction, the record is at least substantive evidence capable of supporting a civil verdict.

Under this rule a felony conviction is also admissible substantively in a subsequent criminal trial. The only limitation is that the government cannot offer convictions of third persons to establish "essential facts" against the accused. The exception was included to avoid confrontation problems.[593] A third person's convictions offered merely to impeach that person's credibility, on the other hand, are admissible if they satisfy Rule 609. Rule 803(22) specifically does not bar this use of a criminal conviction. It also does not preclude use of a third person's criminal convictions to help the criminal accused.

It is sometimes difficult to determine what facts were essential to sustain the judgment. When alternative theories were advanced at the criminal trial and the jury's verdict reflected that one of the two was accepted, in some cases it may be impossible to determine which one was found credible. In such cases, the facts uniquely supporting only one of the two views should not be provable under Rule 803(22). On the other hand, facts, such as identity of the culprit, may be established by a guilty verdict, irrespective of the theory adopted by the jury.

The use of a prior criminal conviction has obvious prejudicial dangers. The jury will learn of the prior offense and may give it too much attention. They may use it as proof of bad character, and then use the bad character to infer liability in the instant case. To avoid this possibility, the court may invoke Rule 403 to exclude the proof of conviction.[594] Counsel may offer to stipulate the facts underlying the conviction in order to avoid having certain details of the prior conviction revealed to the jury.[595]

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[590] *See* State v. Lindsey, 2016 Tenn. Crim. App. LEXIS 481 (Tenn. Crim. App. July 6, 2016) (a conviction based on a *nolo contendere* plea may be admissible to impeach under Rule 609 or as substantive evidence under rule 803(22); although Tenn. R. Evid. 410(2) bars evidence of a plea of *nolo contendere*, it does not exclude convictions resulting from such a plea where some other rule of evidence allows its admission).The equivalent federal evidence rule does not admit convictions based on a *nolo contendere* plea. FED. R. EVID. 803(22).

[591] *See*, *e.g.*, ***Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir.)***, *cert. denied*, ***439 U.S. 969 (1978)***.

[592] The present hearsay exception must be distinguished from res judicata and collateral estoppel, which do not involve evidence issues.

[593] *See* Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899).

[594] *See*, *e.g.*, Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978). *See also* State v. Scarbrough, 181 S.W.3d 650, 660 (Tenn. 2005) (prosecution may use final conviction for aggravated burglary as evidence of felony in felony murder trial but such conviction is not entitled to preclusive effect under collateral estoppel and defendant may contest the conviction by introducing contrary evidence and argument; trial court should assess admissibility under Rule 403).

[595] *See above* § 4.03[5] (role of stipulation in Rule 403 analysis).

1 Tennessee Law of Evidence § 8.27

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§ 8.28 Rule 803(23). Judgment as to Personal or Family History or Boundaries

[1] Text of Rule

Rule 803(23) Judgment as to Personal or Family History or Boundaries

The following are not excluded by the hearsay rule:

Judgments as proof of matters of personal or family history or boundaries, which matters were essential to the judgment.

Advisory Commission Comment:

The rule makes civil and criminal judgments admissible to prove boundaries and personal or family history. Reliability is relatively high, and need is great.

[2] Judgments of Pedigree and Boundaries

As we have seen, pedigree can be proved by family records or reputation,[596] and ancient boundaries can be proved by reputation.[597] A more trustworthy mode of proof is a court judgment, the subject of the present exception. Rule 803(23) creates a hearsay exception for "judgments as proof of matters of personal or family history or boundaries … ". Here the truth of the pedigree facts or boundary location has been established in court by at least a preponderance of evidence on competent proof. By way of contrast, reputation of personal or family history, also a hearsay exception,[598] is gossip.

As the Tennessee Advisory Commission Comment makes clear, this hearsay exception applies to both civil and criminal judgments. Note that it does not appear to limit proof to parties in the cases that reached judgment. In covering "personal or family history," it should include such matters as death, marriage, divorce, birth, adoption, legitimacy, and other familial relationships.

Note that Rule 803(23) admits the hearsay only to prove matters "essential to the judgment." This test, much like that applied in collateral estoppel issues, requires the court to determine which facts were essential to the judgment, sometimes a difficult task if the trier of fact has given no reasons for the decision.

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[596] *Tenn. R. Evid. 803(13)*, *803(19)*. *See also Tenn. R. Evid. 804(b)(4)*.

[597] *Tenn. R. Evid. 803(20)*.

[598] *See above § 8.24[2]*.

§ 8.29 Rule 803(24). [Reserved]

§ 8.30 Rule 803(25). Children's Statements

[1] Text of Rule

Rule 803(25) Children's Statements

The following are not excluded by the hearsay rule:

Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to TENN. CODE ANN. . § 37-1-102(b)(12), issues concerning severe child abuse pursuant to *TENN. CODE ANN. § 37-1-102(b)(21)*, or issues concerning termination of parental rights pursuant to *Tenn. Code Ann. § 37-1-147* and *Tenn. Code Ann. § 36-1-113*, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

1993 Advisory Commission Comment:

Rule 803(25) is a narrow exception. It applies only if the specified issues are material. Even then it is inapplicable if the minor declarant has reached age thirteen by the time of hearing and is available as a witness but does not testify.

Declarations under this hearsay exception are inadmissible if "circumstances indicate lack of trustworthiness." Courts should carefully consider the motivation of particular minor declarants and also the motivation of some adults to influence children. Also worthy of consideration is the presence or absence of evidence corroborating the hearsay statement. As with all hearsay offered at trial, balancing under Rule 403 is appropriate.

The exception is not limited to juvenile court hearings, although it replaces a portion of T. R. JUV. P. 28(c). This new exception applies, for example, in a circuit court trial concerning the itemized issues. The exception is limited by its terms to civil actions as opposed to criminal prosecution.

The bench and bar should keep in mind that other exceptions in Rules 803 and 804 may serve to admit children's hearsay declarations. Examples include excited utterances, declarations of mental state, declarations of physical condition, or former testimony. Also, some extrajudicial statements are relevant on a nonhearsay basis.

Certain juvenile proceedings other than adjudicatory hearings admit "reliable hearsay." *See* T. R. JUV. P. 15(b), 16(a), and 32(f).

[2] Policy

In cases involving child abuse or child neglect, the child victim is often the primary source of information about the event at issue. Frequently the critical occurrence involved only an adult and the child-victim. There were no

other direct witnesses. After the event, the child-victim may tell another person about it. At a subsequent trial, on the other hand, the child may be unable to testify adequately about the incident. Perhaps the child has become terrified of the defendant or has forgotten critical details. Although the child's earlier statement may be complete and credible, the rules of evidence may bar it as hearsay.

Rule 803(25) is designed to admit such statements on a limited basis. It provides a hearsay exception that will ease the ability to prove child abuse or neglect in some situations.

[3] Limited Applicability

[a] Statements by Child Victim

Rule 803(25) provides a hearsay exception only for statements made by a child alleged to be the victim of various kinds of abuse or neglect. It does not reach statements by adults or by children other than the child-victim. For example, if child *X* sees child *Y* psychologically abused and tells someone, Rule 803(25) does not admit child *X*'s statement to the third party since child *X* is a witness rather than a victim. On the other hand, if child *Y*, the actual victim, tells someone that *Y* was sexually abused, Rule 803(25) may be applicable to that statement.

[b] Thirteen-Year-Old Ordinarily Must Testify

Rule 803(25) applies to children irrespective of their age. However, in order to minimize the danger that the only trial testimony of older victimized children would be hearsay, the rule states that this hearsay exception is inapplicable unless a child who has reached age thirteen at the time of the hearing either testifies or is unavailable as defined by *Tennessee Rule of Evidence 804(a)*. If the thirteen-year-old (or older) child does testify, Rule 803(25) provides a hearsay exception to admit the child's earlier statement. For children who are under age thirteen at the time of the hearing, Rule 803(25) applies irrespective of whether the child testifies in person at the hearing.

[c] Limited to Certain Civil Actions

Rule 803(25) applies only in four types of civil proceedings, each of which is listed. It has no applicability in other civil matters or in any criminal case.

The four actions where Rule 803(25) is applicable include the issue of dependency and neglect covered by *Tennessee Code Annotated § 37-1-102(b)(12)* [now § 37-1-102(b)(13)]. Note that it does not apply to other issues in that same statute, such as delinquency.

The second statute covered by Rule 803(25) is *Tennessee Code Annotated § 37-1-102(b)(21)* [now § 37-1-102(b)(22)], severe child abuse. Since Rule 803(25) applies only to civil cases, however, it does not apply in any criminal case for conduct constituting severe child abuse.

The third set of statutes is *Tennessee Code Annotated § 37-1-147* and *§ 36-1-113*, which authorize the termination of parental rights for a broad range of misconduct and neglect.

The fourth category, likely used more frequently, applies in a civil trial relating to custody, shared parenting, or visitation. It may well arise in divorce proceedings. A child's statements about the child's own abuse or neglect is admissible under this hearsay exception. The rule covers several types of abuse: physical, sexual, and psychological. Each of these is quite important in the difficult parenting decisions that a court must address in divorce and other domestic relations matters.

[4] Discretion to Exclude Hearsay Statement

[a] Untrustworthy Circumstances

Rule 803(25) and the Advisory Commission Comments make it clear that there is a concern that the child's out-of-court statement may be inaccurate yet convincing. To counter this, the rule specifically authorizes the court to exclude the hearsay statement if the "circumstances indicate lack of trustworthiness." This is similar

to the language in two other Tennessee hearsay rules: Rules 803(6) (business records)[599] and 803(8) (public records).[600]

In assessing whether the circumstances indicate lack of trustworthiness, courts should look at all the facts to assess whether the statement is trustworthy. According to the Tennessee Advisory Commission Comment, this includes the motivation of the child-declarant and any adults who could have influenced the child, and the presence or absence of evidence that corroborates the child's statement.[601] Other factors may include the circumstances of the statement, including the child's demeanor and appearance; the time between the statement and the event described; and whether the environment where the statement was made was coercive or suggestive.[601.1]

In one illustrative case involving alleged child abuse of a three-year-old child, the child made statements about the alleged abuse to a forensic interviewer, a psychiatrist, her grandmother, and her mother.[601.2] These statements corroborated one another. Defense counsel also cross-examined each of these "conveyors" of the child's disclosures. The statements were sufficiently trustworthy to be admissible under Rule 803(25).[601.3]

[b] Rule 403

Just as the trial court can exclude evidence under Rule 803(25) if the circumstances indicate lack of trustworthiness, it can also exclude the testimony under Rule 403. This would require the court to balance the probative value and the danger of unfair prejudice and the like.[602]

[c] Judicial Discretion

As with other types of evidence, the trial court is given much discretion in resolving admissibility issues under Rule 803(25).[603] Deference is given the trial court's determination of credibility of witnesses and trustworthiness of statements. This decision will not be overturned absent an abuse of discretion.[604]

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[599] *See above* *§ 8.11[8]*.

[600] *See above* *§ 8.13[5]*.

[601] *See* *State v. Purcell, 955 S.W.2d 607 (Tenn. Ct. App. 1997)* (statements were admissible under Rule 803(25) because circumstances did not militate against trustworthiness; there was evidence corroborating the statements made by the child or children concerning abuse).

[601.1] *See, e.g.*, *In re R.L., ___S.W.3d___, 2018 Tenn. App. LEXIS 704 (Tenn. Ct. App. 2018)* (trial court did not abuse its discretion in admitting child's statement where witnesses testified the child informed them voluntarily and unprompted about the father's inappropriate touching, which indicated trustworthiness of the statements, and the witnesses also testified that the child was referring to the father when she said "daddy"); *In re Alyssa W., 2017 Tenn. App. LEXIS 803 (Tenn. Ct. App. 2017)* (in a termination of parental rights case, hearsay testimony regarding the children's statements were admissible, because there was no competent evidence that their statements were not trustworthy; the children described the mother's drug use consistently at different times to the Child Protective Services investigator and the foster mother).

[601.2] *In re Emmalee O., 464 S.W.3d 311 (Tenn. Ct. App. 2015)*.

[601.3] Id. *See also*, *In re L.M.H., 2017 Tenn. App. LEXIS 657 (Tenn. Ct. App. 2017)* (allowing a foster mother to testify about a child's statements regarding the father's abuse was not error where the child made the statements unsolicited and made the same statements to a therapist, and the statements were corroborated by the child's half-brother).

[602] *See above* *§§ 4.03[3]–[7]*.

[603] *State v. Purcell, 955 S.W.2d 607 (Tenn. Ct. App. 1997)*.

[604] *Id.*

[5] Other Avenues for Admission

As the Tennessee Advisory Commission Comments to Rule 803(25) make clear, this rule is only one of several avenues for admitting a child's hearsay statement about abuse or neglect. Hearsay evidence may fail to satisfy Rule 803(25) and still be admissible pursuant to some other rule. This could possibly admit a child's earlier statement in cases not covered by Rule 803(25), including criminal cases.

Often a child's hearsay statement may be admissible as an excited utterance under Rule 803(2) since it may be made while the child was under the stress of a traumatic event.[605] It may also qualify as a statement of mental, emotional or physical condition covered by Rule 803(3) or for purposes of medical diagnosis and treatment under Rule 803(4). If the statement involved an identification of the offender, Rule 803(1.1) may provide an avenue for admissibility. On occasion the child's earlier statement may have been given at another hearing that would satisfy the former testimony exception of Rule 804(b)(1). Finally, some of the child's earlier communications may be admitted as nonhearsay. For example, if the child were crying after an encounter with the offender, a person who saw the child crying could testify to that fact because the act of crying is probably not hearsay and would not be subject to exclusion because of hearsay problems. It will not qualify as fresh complaint, since the Tennessee Supreme Court has held that the concept of fresh complaint does not apply to the child declarant.[606]

[605] *See above § 8.07[3].*

[606] *See above § 8.07[7].*

§ 8.31 Rule 803(26) Prior Inconsistent Statement of a Testifying Witness

[1] Text of Rule

Rule 803(26) Prior Inconsistent Statement of a Testifying Witness

The following are not excluded by the hearsay rule:

A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

(a) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(b) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(c) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

2009 Advisory Commission Comment

Subsection (26) alters Tennessee law by permitting some prior inconsistent statements to be treated as substantive evidence. Many other jurisdictions have adopted this approach to address circumstances where witnesses suddenly claim a lack of memory in light of external threats of violence which cannot be directly attributed to a party, for example. This rule incorporates several safeguards to assure that the prior inconsistent statements are both reliable and authentic.

To be considered as substantive evidence, the statement must first meet the traditional conditions of admissibility which include the procedural aspects of inconsistent statements as addressed in Rule 613. This reference also makes clear that only prior inconsistent statements, not consistent statements, are within the ambit of this rule.

Assuming the inconsistent statement is otherwise admissible to impeach the testifying witness, the party may then seek to have the statement treated as substantive evidence by complying with the rule's other requirements. Other rules address authenticity of documents and recordings which clearly apply here. *See, e.g.*, Rule 1001. However, this rule contains additional express requirements regarding the form of the prior statement so that the jury is assured that the statement contains the actual "words" of the witness on a prior occasion. For example, the prior statement must be an audio or video recorded statement. A "police report" or insurance investigator's "transcription" of the recorded statement would not qualify since it is not literally the witness's own words contained on audio or video media.

If not recorded, the prior statement can be in written form (created by the witness or by another) but then must be signed by the witness. The commission intends that the "signed" requirement must be equated with an actual signature as opposed to some email document which happens

to have the witness's name on the address. Finally, the rule permits a prior statement to be treated as substantive evidence if given under oath.

The rule requires that the party seeking to have the statement treated as substantive evidence request a hearing out of the presence of the jury to satisfy the judge "by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness." This is to prevent fraud such as where a parent tape records a child after training the child to say "bad things" about the other parent in anticipation of a custody dispute. Rules 703 (Bases of Opinion Testimony by Experts) and 803(6) (Records of Regularly Conducted Activity) contain similar judicial gate-keeping requirements.

[2] In General

Rule 803(26) is a significant departure from both traditional evidence law and from prior Tennessee practice. Until this hearsay exception was added, a prior inconsistent statement in Tennessee was admissible to impeach in-court testimony but not admissible as substantive evidence.

This traditional rule created an artificial distinction that many people thought was unrealistic. The trier of fact under prior law would hear the prior inconsistent statement but would be instructed to consider it only on the witness's credibility, not for the truth of its contents. There were serious doubts whether jurors could make such gossamer-thin distinctions. Accordingly, many jurisdictions, including the federal, rejected the traditional rule and, like Tennessee with Rule 803(26), make at least some prior inconsistent statements admissible as substantive evidence.

Rule 803(26) contains a number of restrictions that will result in many prior inconsistent statements not being covered by the hearsay exception. Though not embraced by this hearsay exception, they may still be used to impeach.

[3] Limits on Use: Declarant Must Testify and Be Subject to Cross Examination

One significant limit on Rule 803(26) is that it only apples when the declarant both testifies at the trial and is subject to cross-examination concerning the statement. This means that a hearsay declarant, whose hearsay statement is admitted at trial under some other hearsay exception, may not have a prior statement introduced under Rule 803(26) unless the declarant actually testifies at trial. For example, if a declarant makes a dying declaration (and then dies) and if this statement is admitted under Rule 804(b)(2), the deceased declarant's prior inconsistent statements may not be introduced as substantive evidence under Rule 803(26) since the declarant did not testify at trial and was not subject to cross examination about the prior statement. This means that a trial court cannot make a ruling on whether the hearsay is admissible under Rule 803(26) until after the witness has offered testimony at trial.[606.1]

It should be noted that this result differs from that when the prior inconsistent statement is used only to impeach. Under Rule 806, a hearsay declarant may be impeached by prior inconsistent statement without being allowed an opportunity to explain or deny it.[607] This permits the impeachment of an unavailable declarant whose hearsay statement is admitted at trial despite the declarant's absence, perhaps even death. Under Rule 803(26), however, the declarant will be able to explain or deny the prior inconsistent hearsay statement admissible as substantive evidence. By definition, the declarant under 803(26) must testify at trial and be subject to cross- examination concerning the statement. This means that either during cross-examination or redirect examination the declarant will be able to explain or deny the prior inconsistent statement. It also means that Rule 803(26) may not be used if the declarant is unavailable at trial, but in such cases involving an absent declarant the prior statement may still be admissible solely for impeachment.

606.1 *State v. Ackerman, 397 S.W.3d 617 (Tenn. Crim. App. 2012)*, *overruled on other grounds, State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)*.

607 *See below § 8.42*.

Consistent with other areas of evidence law, the declarant under Rule 803(26) must be "subject to cross-examination about the statement." He or she need not be actually cross-examined about it. For example, if adversary counsel chooses not to cross-examine the declarant, Rule 803(26) is still satisfied as long as counsel had an opportunity to do so.

[4] Limits on Use: Statement Must Be Recorded, Written, or Under Oath

Another limit on this hearsay exception is that the prior inconsistent statement must be in a form that ensures some degree of accuracy. Rule 803(26) covers only three types of prior statements: recorded by audio or video, written and signed by the witness, or made under oath.

The Advisory Commission Comment to Rule 803(26) seems to suggest that the Rule's limitations on the form of the prior statement must be interpreted literally. The Comment notes that a police report or insurance investigator's transcription of a recorded statement would not satisfy Rule 803(26); the trier of fact must hear the witness's own words on the recorded statement. However, if the declarant actually signs the transcript, it would seem that Rule 803(26) would be satisfied since it covers prior written statements "signed by the witness." The Rule does not require that the witness actually have written or typed the statement.[608] The signature requirement is satisfied where the declarant is injured and cannot sign the statement, but has another person sign on his or her behalf under facts demonstrating trustworthiness.[608.1]

These limits mean that many prior inconsistent statements will not qualify as admissible substantively under Rule 803(26). For example, if a testifying declarant made a prior inconsistent statement to a neighbor over coffee, that statement would not be included under Rule 803(26). To have it admissible as substantive evidence, counsel must find some other hearsay exception for the neighborly remarks. On the other hand, if the prior statement were made in a deposition, formal court proceeding under oath, or in a situation (such as police interrogation) when recorded electronically, the prior hearsay statement would be covered by Rule 803(26) and possibly admissible as substantive evidence.

[4A] Limits on Use: Statement Must Be Inconsistent with Trial Testimony

To be admissible under Rule 803(26) the prior statement must be inconsistent with testimony at trial. The term "inconsistent" is not defined, but cases interpreting the same word in Rule 613[608.2] are likely applicable. The Tennessee Supreme Court has held that a claim at trial of being unable to remember an event somehow described in an earlier writing is inconsistent with the earlier statement.[608.3] This is true even if the lack of

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[608] The Advisory Commission Comment to Rule 803(26) specifically states that the written form may be "created by the witness or by another."

[608.1] *See* State v. Nolan, 2015 Tenn. Crim. App. LEXIS 818 (Tenn. Crim. App. 2015) (while the exception regarding prior inconsistent statements requires the statement to be signed by the witness, the factual circumstances in this case supported the trial court's determination that the signing of the victim name by a police station secretary, at victim's direction, satisfied the requirements of the rule; his hands were injured and he testified several times that the signature was his, albeit written by another person at his request).

[608.2] *See above* § 6.13.

[608.3] State v. Davis, 466 S.W.3d 49 (Tenn. 2015). *See also* State v. Moore, 2020 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. May 15, 2020) (where witness had suffered a brain injury and could not recall the incident, his audio recorded police statement was admissible as a prior inconsistent statement under Rule 803(26)); State v. Wilson, 2015 Tenn. Crim. App. LEXIS 991 (Tenn. Crim. App. 2015) (extrinsic evidence of a prior inconsistent statement is appropriate if the witness "denies or does not recall making the statement;" thus, where witness clearly asserted that she did not remember the shooting and that she had "totally blocked it out," and further testified that her police statement did not refresh her memory about what she told the police, saying "I don't remember this," she clearly repudiated her prior statement to law enforcement before she was impeached with that statement).

memory is feigned.[608.4] If a prior statement is both consistent and inconsistent with trial testimony or contains irrelevant information, the trial court should redact the inadmissible parts.[608.5]

[5] Procedures: Judicial Screening for Trustworthiness

Even though a declarant testifies in court and is available for cross examination and the prior statement is in an accepted form, such as written and signed by the declarant, the statement is still not admissible under Rule 803(26) unless the court first conducts a hearing outside the presence of the jury[608.6] and determines by a preponderance of the evidence that the prior inconsistent statement was made under circumstances indicating trustworthiness.[608.7]

In an especially egregious illustrative case, the trial judge erroneously admitted a prior statement under Rule 803(26) without a jury-out hearing or questioning the declarant about the circumstances of the statement, or even listening to the prior recorded statement.[608.8]

Because of the severe limits on the circumstances of the prior statements, it is likely that a large percentage of them offered under Rule 803(26) will be found to be sufficiently trustworthy to be admissible.[608.9]

However, in an illustrative case, the Tennessee Court of Criminal Appeals found a prior statement untrustworthy under Rule 803(26).[608.10] Among the factors suggesting untrustworthiness, the court noted that

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608.4 *State v. Davis, 466 S.W.3d 49 (Tenn. 2015)*. *See also* *State v. Wilson, 2015 Tenn. Crim. App. LEXIS 991 (Tenn. Crim. App. 2015)* (no abuse in admitting prior inconsistent statement where the trial court explained that the witness came to the police, gave a statement, and signed it, the trial court opined that the witness was lying and feigning his memory loss, and a detective testified that during the interview the witness appeared to understand what was occurring and did not appear to be intoxicated).

608.5 *State v. Foust, 482 S.W.3d 20, 40 (Tenn. Crim. App. 2015)*.

608.6 *State v. Nolan, 2015 Tenn. Crim. App. LEXIS 818 (Tenn. Crim. App. 2015)* (error where prosecution did not request a jury-out hearing for the judge to determine statement was made under circumstances indicating trustworthiness)

608.7 *See, e.g.*, *State v. Lindsey, 2019 Tenn. Crim. App. LEXIS 495 (Tenn. Crim. App. Aug. 16, 2019)* (witness's inconsistent audiotaped statement was made under circumstances indicating trustworthiness and, thus, was admissible under Rule 803(26)).

608.8 *State v. Foust, 482 S.W.3d 20, 40 Tenn. Crim. App. 2015*).

608.9 There are many examples of where the courts have admitted prior inconstent statements. *See., e.g.*, *State v. Rimmer, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 2019)* (where witness stated he had head injuries that impacted his memory and said he could not recall making certain statements during police interview but also denied making other statement and drawings; the trial court ruled that the statements and drawings he denied making could be admitted under Rule 803(26), since they were prior inconsistent signed statements, denied by the declarant, made under trustworthy circumstances; in determining their trustworthiness, the trial court noted the level of detail contained in the witness's answers and found that the statements appeared to come from a competent person, not someone who was intellectually disabled); *State v. Levy, 2016 Tenn. Crim. App. LEXIS 408 (Tenn. Crim. App. 2016)* (in a first degree premeditated murder case, prior statements of witnesses were admissible in court due to their indicia of trustworthiness; the witnesses all gave statements to police, and the statements were reviewed before they were signed; moreover, the statements were redacted to reflect only the information each witness was questioned about during trial and/or to remove hearsay); *State v. Bates, 2015 Tenn. Crim. App. LEXIS 1002 (Tenn. Crim. App. 2015)* (audio recordings of two witnesses' statements were admissible under *Tenn. R. Evid. 803(26)* and *613(b)*, as the first witness's prior statement was inconsistent with the overall tenor of his trial testimony and the second witness's statement was made under circumstances indicating trustworthiness and the witness was subject to cross-examination at trial); *State v. Boyd, 2015 Tenn. Crim. App. LEXIS 1032 (Tenn. Crim. App. 2015)* (trial court held a hearing and determined that a witness's statement was given under circumstances indicating trustworthiness; the statement was admissible as substantive evidence as the procedural hurdles of the rules on prior inconsistent statements were met); *State v. Hollis, 2016 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. 2016)* (trial court did not err by admitting prior statements of two witnesses into evidence during defendant's trial where the trial court followed appropriate procedures for each by holding jury-out hearings to discuss the admissibility of the prior statements, found that the statements were made under conditions suggesting their trustworthiness, and there was no error in the trial court's discussing one witness' testimony during a bench conference).

the witness, a co-defendant, had a strong motive to blame the other defendants and that at trial the witness admitted he lied in his earlier statement.

[6] Procedures: Compliance With Rule 613.

Before a prior inconsistent statement is admissible as substantive evidence under Rule 803(26), it must satisfy Rule 613's procedures concerning the admissibility of prior inconsistent statements.[609] Previously, Rule 613 had applied only to prior inconsistent statements used solely for impeachment, not as substantive evidence.

Compliance with Rule 613, discussed more fully elsewhere, requires that on request the prior statement be disclosed to adversary counsel and, if extrinsic evidence of the prior statement is introduced, the declarant must be afforded an opportunity to explain or deny it and, in most cases, the adversary party must be afforded an opportunity to interrogate the witness about the prior statement.

[7] Prior Inconsistent Statement Solely to Impeach Unaffected

While Rule 803(26) expands the effect of some prior inconsistent statements by allowing them to be admitted as substantive evidence, it does not alter previous Tennessee law permitting their introduction solely to impeach a witness.[610] Thus, prior inconsistent statements that were admissible to impeach before the adoption of Rule 803(26) are still admissible under exactly the same terms as before the new rule was added.

This means that statements satisfying Rule 803(26) may also be admissible to impeach, plus those that do not comply with Rule 803(26) and are not admissible as substantive evidence may nevertheless be admissible solely to impeach.[610.1] Returning to the illustration above of a prior inconsistent statement made to a neighbor that does not satisfy Rule 803(26) because it was an oral, unrecorded statement, the statement may still be introduced to impeach the declarant but is not admissible as substantive evidence of the prior statement's hearsay contents.

[8] Other Rules Also Unaffected

Before a statement is admissible under Rule 803(26), it must, of course, also satisfy the other applicable evidence rules. For example, it may have to be properly authenticated under Rule 901 and satisfy the so-called best evidence rule of Rules 1001–1008. And it may be excluded under Rule 403 if the probative value is substantially outweighed by various risks involving unfair or inefficient proceedings.

[608.10] *State v. Foust, 482 S.W.3d 20, 40 (Tenn. Crim. App. 2015)*.

[609] *See above § 6.13*; *State v. Foust, 482 S.W.3d 20, 39 (Tenn. Crim. App. 2015)*. *See also State v. Beaty, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. 2016)* (before videotaped statement could be admitted as substantive evidence under Rule 803(26), it needed to satisfy Rule 613(b); after reviewing the admissibility issues related to 803(26), the court ultimately excluded the substance of the tape as inadmissible hearsay, but allowed defense counsel to use it during cross examination to establish a prior inconsistent statement); *State v. Bates, 2015 Tenn. Crim. App. LEXIS 1002 (Tenn. Crim. App. 2015)* (audio recordings of two witnesses' statements were admissible under *Tenn. R. Evid. 803(26)* and *613(b)*, as the first witness's prior statement was inconsistent with the overall tenor of his trial testimony and the second witness's statement was made under circumstances indicating trustworthiness and the witness was subject to cross-examination at trial).

[610] *See above § 6.13*.

[610.1] *See, e.g., State v. Beaty, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. 2016)* (videotaped statement could not be admitted as substantive evidence, but could be used to establish a prior inconsistent statement during cross-examination); *State v. Daniels, 2017 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. 2017)* (trial court properly allowed trial court appeared to admit recordings of the statements only for impeachment purposes, where it told the jury that the recording was evidence of a prior statement and that the jury would be further instructed, and the later instructed the jury that evidence of an out-of-court statement inconsistent with witness testimony should not be considered for its substantive value but only as it might affect the witness's credibility).

Just as the other evidence rules must be satisfied if the evidence is admissible under Rule 803(26), the other rules may enable the statement to be introduced as substantive evidence if it does not comply with Rule 803(26). For example, an oral, unrecorded prior statement may be inadmissible substantively under Rule 803(26) but still admissible as an admission of a party opponent under Rule 803(1.2) if, for example, the declarant is also a party or if it is an excited utterance that meets the criteria in Rule 803(2).

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§ 8.32 Rule 804. Hearsay Exceptions; Declarant Unavailable [*et. seq*.]

Rule 804. Hearsay exceptions; declarant unavailable

(a) Definition of unavailability

(b) Hearsay exceptions

§ 8.33 Rule 804(a). Definition of Unavailability

[1] Text of Rule

Rule 804(a) Definition of Unavailability

(a) "Unavailability of a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the grounds 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) Demonstrates 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 the declarant's 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 by process; or

(6) For depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong doing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Advisory Commission Comment:

These grounds for unavailability are familiar to Tennessee practitioners. The fourth and fifth—death, illness, and impossibility of subpoena—are typically the reasons a declarant is unavailable to testify. The first two bases found acceptance by the Supreme Court in *Breeden v. Independent Fire Insurance Co., 530 S.W.2d 769 (1975)*. [Includes 2005 amendment]

1994 Amendment to Advisory Commission Comment:

The third ground for unavailability is new. Memory lapse, if demonstrated to the trial judge under Rule 104(a), is enough to get the contents of recorded recollection read to the jury, and the same condition should be enough to get cross-examining sworn former testimony before the jury. The new provision also applies to declarations against interest and individual declarations of pedigree.

1997 Advisory Commission Comment:

This amendment conforms TENN. R. CIV. P. 32 and *Tenn. R. Evid. 804*. If the former testimony is a deposition, an additional ground of unavailability is a distance of over 100 miles between the deponent and the courthouse.

1998 Advisory Commission Comment:

The amendment to Rule 804(a) is technical.

1999 Advisory Commission Comment:

Rule 804(b)(6) adds a new hearsay exception. It seems only fair to let a party offer any extrajudicial statements of declarants whose unavailability was procured by the opponent.

2003 Advisory Commission Comment:

Paragraph (a)(6) is amended to restrict the 100 mile unavailability ground to depositions in civil, not criminal, trials.

[2] Unavailability Generally

The five hearsay exceptions in Rule 804(b)—former testimony, dying declarations, declarations against interest, declarations of pedigree, and forfeiture by wrongdoing—all require a showing that the declarant is unavailable to testify in court.[611] Rule 804(a) lists the six reasons why a witness is "unavailable" for purposes of permitting hearsay to be admitted under Rule 804(b). Each reason is discussed in the following sections.

It should be obvious that the term "unavailable" is a term of art that describes a witness who cannot testify in more than a *pro forma* way; it does not refer only to a physical inability to be present in court. For example, a witness who asserts a privilege is deemed "unavailable," therefore permitting the Rule 804(b) hearsay exceptions to be used, even though the declarant is physically in the courtroom and has spoken on the witness stand.

Whether a declarant is unavailable is a preliminary question of fact for the court, not the jury, to decide under Rule 104(a). The burden is on the party asserting that a witness is unavailable. Although any one of the six listed reasons is sufficient to render the witness unavailable, the witness is also deemed to be available if the party claiming unavailability procured unavailability in order to prevent the witness from testifying in person, Rule 804(a).

As with other evidence issues, a party challenging whether a witness was unavailable must raise the issue at trial or risk having the appellate court refuse to consider the issue.[611.1]

[3] Privilege

Rule 804(a)(1) provides that a witness is unavailable if the witness is exempted by privilege from testifying about the subject matter of the hearsay statement. Any privilege will render the witness unavailable. For example, privileges may be applicable to lawyers asked to divulge confidential communications,[612] spouses

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[611] Virtually all of the Rule 803 exceptions do not require the declarant's unavailability or availability. The four exceptions in Rule 803 that require availability are prior identification, Rule 803(1.1), recorded recollection, Rule 803(5), children's statements when the abuse victim is available and thirteen years-old or older, Rule 803(25), and prior inconsistent statements, Rule 803(26). Arguably, some of the 804(b) declarations are more trustworthy than many of those admitted under 803, but the common law tradition is carried over to the Tennessee rules.

[611.1] *Dep't of Children's Servs. v. Hood, 338 S.W.3d 917, 923–24 (Tenn. Ct. App. 2009)*.

[612] *See above § 5.03*.

asked to testify about confidential information learned in the marital relation,[613] a criminal defendant asserting self-incrimination protection,[614] and anyone holding one of the many other statutory privileges.[615]

To be unavailable, the witness should assert a privilege and the court should rule that the privilege is properly invoked. The declarant, though probably physically present, is then deemed unavailable and hearsay under Rule 804(b) is permitted. Sometimes it is likely that a privilege will be invoked successfully, but the witness does not appear in court. In such cases, Rule 804(a)(1) would appear unsatisfied because there was no court ruling that a privilege applies. A few federal decisions, however, have read the equivalent federal rule flexibly, finding the witness unavailable if it was clear that a proper claim of privilege was raised, even though there was no formal ruling on the issue.[616]

Obviously the declarant is unavailable if the party against whom the declarant's statement is used has invoked the privilege that prevents the declarant from testifying. But what if the party who wants to use an 804 hearsay exception has invoked a privilege that makes the declarant unavailable? This could occur if, for example, a party invokes a priest/penitent privilege to keep a priest from testifying in person, then wants to introduce the priest's hearsay statement against interest, covered by Rule 804(b)(3), that is admissible only if the declarant is unavailable. Since the last sentence of Rule 804(a) clearly provides that the declarant is not unavailable if the privilege was procured by the proponent of the statement, the proponent should not be able to manipulate the system so as both to make the declarant unavailable and take advantage of the unavailability.[617]

[4] Refusal to Testify

Although a declarant is in the courtroom, seated in the witness box and does not have a privilege not to testify, he or she may nonetheless be "unavailable" for hearsay purposes. Such is the case where the witness simply refuses to talk despite a judicial order to do so and the threat of sanctions for contempt. Rule 804(a)(2) states that a witness is unavailable if he or she "persists in refusing to testify … despite an order of the court to do so." This rule could be used if the witness asserts a non-existent privilege or feigns lack of memory and the court orders the witness to testify.[617.1] When the witness refuses to testify, the testimony cannot be obtained as a practical matter, and hearsay covered by the Rule 804(b) exceptions is admissible.[617.2]

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[613] *See above* *§ 5.17*.

[614] *Breeden v. Independent Fire Ins. Co., 530 S.W.2d 769 (Tenn. 1975)* (arsonist claiming rights under the *Fifth Amendment*); *State v. Bilbrey, 912 S.W.2d 187, 188 (Tenn. Crim. App. 1995)* (co-defendant asserted *Fifth Amendment* privilege and refused to testify).

[615] *See* the privileges collected in the Tennessee Advisory Commission Comment to Rule 501. *See above* *§§ 5.02*–5.39.

[616] *See* *United States v. Johnson, 440 F.3d 832 (6th Cir. 2006)* (existence and validity of *Fifth Amendment* privilege was "patent"; no court ruling necessary). *Contra* *United States v. Pelton, 578 F.2d 701 (8th Cir.)*, *cert. denied*, ***439 U.S. 964 (1978)*** (privilege not sufficiently invoked when counsel advised client not to testify; was no court ruling on existence of privilege).

[617] *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE 31 (3d ed. 2006).

[617.1] *See* *State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. 2015)* (when considering the admission of the prior testimony of a witness who claims a lack of memory, a trial judge who suspects that the witness may be feigning or exaggerating his or her inability to recollect the relevant matters should utilize the approach of ordering the witness to testify, and, if the witness still feigns lack of memory, the witness is unavailable under *Tenn. R. Evid. 804(a)(2)*).

[617.2] *See* *State v. Taylor, 2016 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App. 2016)* (trial court properly allowed the TBI agent to read into evidence at trial a witness's out-of-court statement that he kept time while the victim received the six-minute beating because, due to his refusal to testify, the witness was unavailable, and, once the trial court found the witness was unavailable, the statement against interest given to the agent was no longer excludable as hearsay; to the extent the trial court's approach to declaring the witness unavailable could be considered error, any error in failing to technically order the witness to testify was harmless).

This rule also applies if the witness is willing to testify about some subjects but not about "the subject matter of the declarant's statement," Rule 804(a)(2). The declarant is deemed unavailable with regard to testimony about the matters covered in the 804(b) statement, which may be used even though the declarant testified about other matters.

[5] Lack of Memory

Rule 804(a)(3) provides that a declarant is unavailable to testify if he or she demonstrates a lack of memory of the subject matter of the declarant's own statement. The unusual requirement that the witness "demonstrate" a lack of memory means that the witness should be called to the stand and questioned about the subject matter covered by the witness's own hearsay statement.[618] The court could even require efforts to refresh the witness's recollection. The lack of memory could also make the recorded recollections exception, Rule 803(5), applicable since it reaches declarants who have "insufficient recollection" about a matter to testify fully and accurately about it.

As with the previous unavailability rule, the lack of memory is about the *subject matter of the declarant's statement*. This means that the witness may remember and testify about some issues, but be unable to remember others. He or she is deemed unavailable for purposes of admitting Rule 804(b) hearsay statements about matters in the latter category. Routinely, the witness's own testimony will provide the foundation for the lack of memory.

Rule 804(a)(3) does not provide guidance as to the reason for the lack of memory. One possibility may be a physical or psychological inability to recall the relevant topic. Thus, an assault victim may develop amnesia about the event.

Another possibility may be that the witness does not want to testify and feigns lack of memory. If the court does not believe that the witness really does lack memory, the best approach may be for the court to order the witness to testify. If the witness still feigns lack of memory, the witness would be unavailable under Rule 804(a)(2) for persisting to refuse to testify despite a court order to do so.

While a lack of memory will make a witness unavailable for purposes of the rules of evidence, it will not for purposes of the *Confrontation Clause*. The witness who testifies that he or she cannot remember an event or statement is still deemed available and the *Confrontation Clause* will not bar introduction of statements made by the witness.[618.1]

[6] Death, Illness or Other Physical/Mental Condition

Rule 804(a)(4) states that a witness is unavailable to testify if unable to do so because of the witness's own "death or then existing physical or mental illness or infirmity." No one questions that a dead declarant is unavailable to testify. But how sick must a declarant be to be unavailable? Resolution of the issue must be left largely to judicial discretion.[618.2] The trial judge could consider granting a continuance or altering the order of proof in order to provide the witness with an opportunity to recover sufficiently well to testify. The trial judge may consider expert testimony or hearsay, such as a doctor's statement, in deciding the question, because Rule

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[618] The equivalent federal rule substitutes the word "testifies" for "demonstrates". FED. *R. EVID. 804(A)(3)*.

[618.1] *State v. Ackerman, 397 S.W.3d 617, 641 (Tenn. Crim. App. 2012)* (*citing United States v. Owens, 484 U.S. 554, 559 (1988)*, *overruled on other grounds, State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)*; *State v. Davis, 466 S.W.3d 49 (Tenn. 2015)*.

[618.2] *See, e.g.*, *Roach v. Dixie Gas Co., 371 S.W.3d 127 (Tenn. Ct. App. 2011)* (witness was unavailable because of age and health issues though proof of disability was weak; witness was in his 70's, said he was in "bad health," and could not hear or see well (though no other details were presented); counsel said it was difficult for the witness to leave his home).

104(a) makes the rules of evidence inapplicable in preliminary determinations of the admissibility of evidence.[619] The court may require corroboration of counsel's representations about a witness's disability.

The language of Rule 804(a)(4) covers mental[619.1] as well as physical illness. If the illness causes the declarant to be unable to "testify" because of mental or physical deficiencies, the health problem may also cause "insufficient recollection" that will permit use of the contents of a memorandum as past recollection recorded under Rule 803(5).[620]

Late-term pregnancy. In a case involving the termination of parental rights, a witness who was in late-stage pregnancy was deemed unavailable under Rule 804(a)(4).[620.1] The appellate court also ruled that, because postponement of the case would not have been in the best interests of the parties (children), the juvenile court did not err by requiring the case to proceed and allowing the witness be deposed.[620.2]

[7] Inability to Subpoena

Rule 804(a)(5) provides that a witness is unavailable if absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process.[621] It should be noted that only the proponent of the evidence has the responsibility for issuing process. The opponent of the proof need not subpoena or otherwise try to produce the witness, even if he or she could do so.

This ground is the one most frequently used and various fact patterns can arise. The declarant may be beyond the Tennessee border, where the sheriff's power to serve process stops.[622] Perhaps the declarant is within the state but cannot be found and served,[623] or the declarant may be a doctor, lawyer, or one of the numerous

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[619] *See above* *§ 1.04[4]*.

[619.1] *See, e.g.*, *In re R.L., ___S.W.3d___, 2018 Tenn. App. LEXIS 704 (Tenn. Ct. App. 2018)* (trial court did not err in finding child witness mentally ill and, therefore, unavailable, where there were numerous instances where the child's responses were deemed inaudible and several other instances where the answers were not responsive to the question asked).

[620] *See above* *§ 8.10[2]*.

[620.1] *In re Bailey W., 2016 Tenn. App. LEXIS 408 (Tenn. Ct. App. 2016)*.

[620.2] *In re Bailey W., 2016 Tenn. App. LEXIS 408 (Tenn. Ct. App. 2016)*.

[621] The equivalent federal rule requires more efforts than does the Tennessee rule to secure the declarant's presence. Federal Rule 804(a)(5) deems the witness unavailable if the proponent of the hearsay statement has been unable to secure the declarant's attendance by process or *other reasonable means*. FED. *R. EVID. 804(A)(5)*. The Tennessee rule omits the requirement of making reasonable efforts if process is unsuccessful.

[622] *Tenn. R. Civ. P. 45.05(1)*; *Tenn. Code Ann. § 8-8-201(5)(A)* (Supp. 2010) (sheriff serves process within county) & § 8-8-202 (2002).

[623] The pre-rules opinion in *Breeden v. Independent Fire Ins. Co., 530 S.W.2d 769, 775 (Tenn. 1975)*, probably stated the absence provision too restrictively: "beyond the jurisdiction of the court and the reach of its processes."

professionals and public officials exempted from attending court by statute.[624] The court has power to order attendance despite the exemption,[625] but without such an order,[626] the declarant is deemed "unavailable."

If the hearsay offered is former testimony in deposition form, the declarant need not be unservable with a trial subpoena. As described in the next section, deponents situated more than one hundred miles from the courthouse on trial day are unavailable.[627]

Although Rule 804(a)(5) is silent on the issue, surely there is a requirement that efforts to issue process must be made in good faith before a declarant is deemed unavailable. Counsel should not be permitted intentionally to manipulate the unavailability rule by waiting so long to issue process that service is unsuccessful.[628] On the other hand, if a party makes good faith—though unsuccessful—efforts to locate a declarant, the failure to issue a subpoena may be overlooked and the declarant deemed to be unavailable.[629]

Constitutional problems sometimes present themselves. The *confrontation clause* often requires the prosecution to make a good faith effort to bring declarants to court face-to-face with the criminal accused, even though they may be beyond the state boundary.[630] Often this task can be accomplished through the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings,[631] which even permits taking a witness into custody.[632]

[8] Distant Deponent

Rule 804(a)(6), applied in Rule 32 of the Tennessee Rules of Civil Procedure, provides that a witness who gave a deposition but is, at the time of trial, more than 100 miles from the courthouse is an "unavailable declarant."[633]

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[624] *Tenn. Code Ann. § 24-9-101* (Supp. 2010) lists: "(1) an officer of the United States; (2) an officer of this state; (3) an officer of any court or municipality within the state; (4) the clerk of any court of record other than that in which the suit is pending; (5) a member of the general assembly while in session, or clerk or officer thereof; (6) a practicing physician, psychologist, senior psychological examiner, chiropractor, dentist, or attorney; (7) a jailer or keeper of a public prison in any county other than that in which the suit is pending; and (8) a custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures … [of *Tenn. Code Ann. § 68-11-401 et seq*. (hospital records as evidence)] for the production of hospital records pursuant to a subpoena duces tecum."

[625] *Tenn. R. Civ. P. 45.05(2)*.

[626] Tennessee does not have the "testimony" and "other reasonable means" language found in FED. *R. EVID. 804(A)(5)*.

[627] *Tenn. R. Evid. 804(a)(6)*; *TENN. R. Civ. P. 32.01(3)*. *See below § 8.33[8]*.

[628] *Cf. United States v. Foster, 128 F.3d 949 (6th Cir. 1997)* (defense counsel made good faith effort to subpoena witness when counsel issued subpoena one day after prosecution informed him of the substance of the grand jury witness's exculpatory testimony).

[629] *See State v. Summers, 159 S.W.3d 586 (Tenn. Crim. App. 2004)* (declarant, knowing about proceedings, intentionally absented himself from the proceeding and took steps to keep his whereabouts unknown; state agents detailed their unsuccessful efforts to locate him; declarant unavailable even if no subpoena issued). *See also*, *State v. Jones, 568 S.W.3d 101, 2019 Tenn. LEXIS 19 (Tenn. 2019)* (trial court did not abuse its discretion by determining that a State's witness was unavailable, where the State made various good-faith efforts to locate the witness and secure his presence at trial, including contacting his relatives, coordinating efforts with law enforcement in Florida, publishing his photograph in a Florida newspaper, filing petitions to secure his presence at trial, and obtaining an arrest warrant from a Florida court).

[630] *Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)*; *Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972)*; *Barber v. Page, 390 U.S. 719 , 88 S.Ct, 1318, 20 L.Ed.2d 255 (1968)*. The seminal case requiring availability is *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. *See above § 8.02[4]*.

[631] *Tenn. Code Ann. §§ 40-17-201- 212* (2006 and Supp. 2010).

[632] *Tenn. Code Ann. § 40-17-205* (2006).

Accordingly, since the declarant is deemed unavailable, the deposition qualifies as former testimony under Rule 804(b)(1) and therefore satisfies the hearsay rule. It should be noted that this ground of unavailability applies only in civil cases; it is inapplicable in criminal cases.[634]

[9] Procuring Unavailability

It must be recalled that the purpose of the unavailability provisions of Rule 804(a) is to define a prerequisite to admission of the five hearsay exceptions of Rule 804(b). Since these hearsay exceptions may only be used if the declarant is unavailable as defined in Rule 804(a), some parties or lawyers may procure the declarant's unavailability in order to be permitted to offer a hearsay statement, such as a deposition or statement against interest, under Rule 804(b). The last sentence of Rule 804(a) attempts to eliminate this inappropriate tactic by providing that the witness is not considered unavailable for this purpose if the unavailability was due to the intentional procurement or wrongdoing of the proponent of the hearsay.

On occasion a party may allege his or her own unavailability, ordinarily caused by assertion of a privilege such as that authorized by the *Fifth Amendment*. Courts have not been receptive to this tactic and view it as procuring the party's own unavailability.[635]

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[633] *See* *Depasquale v. Chamberlain, 282 S.W.3d 47, 57 (Tenn. Ct. App. 2008)* (the deposed witness in a civil case is absent under Rule 804(a)(6) if more than 100 miles from the court house at the time of the trial, though not necessarily at the time of the deposition).

[634] *Tenn. R. Evid. 804(a)(6)*.

[635] *See*, *e.g.*, *United States v. Bollin, 264 F.3d 391, 413 (4th Cir. 2001)* (denying defendant use of own former testimony because he made himself unavailable by invoking *Fifth Amendment*), *overruled on other grounds by* *United States v. Chamberlain, 868 F.3d 290 (4th Cir. 2017)*; *United States v. Peterson, 100 F.3d 7 (2d Cir. 1996)* (denying defendant use of his own state grand jury testimony as prior testimony; though defendant invoked *Fifth Amendment*, he was not unavailable to himself); *United States v. Kimball, 15 F.3d 54 (5th Cir. 1994)*, *cert denied*, ***513 U.S. 999 (1994)***.

§ 8.34 Rule 804(b). Hearsay Exceptions

Rule 804(b) Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

§ 8.35 Rule 804(b)(1). Former Testimony

[1] Text of Rule

Rule 804(b)(1) Former Testimony

> **Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.**

Advisory Commission Comment:

The rule makes admissible former testimony even though one of the present parties was not at the earlier hearing, but only if the former testimony is offered against the party common to both hearings. In summary, no mutuality of parties is required, such a requirement having been abolished in *State v. Causby, 706 S.W.2d 628 (Tenn. 1986)*.

The rule covers depositions as well as trial and preliminary hearing transcripts. Amended *T.R.C.P. 32.01* contains the same principle of admissibility for depositions.

By specifically requiring "both an opportunity and a similar motive," this proposed rule is designed to avoid the holdings of *Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978)*, and *Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983)*.

[2] Policy Basis and Forms of Former Testimony

[a] In General

Rule 804(b)(1) establishes a hearsay exception for former testimony. In general terms, former testimony is a statement made during a deposition or previous hearing, now offered in court as true. It may be the most reliable hearsay exception, for it is allowed only when the party against whom it is offered had an opportunity—and similar motive—to examine the declarant under oath at the former hearing. Furthermore, there is a substantial need for the exception, since by definition the declarant is now unavailable to testify. Finally, by definition the former testimony was given under oath, traditionally a strong indicia of truthfulness.

[b] Forms

Such testimony can exist in various forms. In the civil arena, the deposition is the usual form. Depositions taken in previous lawsuits can be used presently if both an opportunity and similar motive for examination existed. In a criminal trial, a preliminary hearing transcript may be offered. In both civil and criminal courts, the transcript from a previous trial—of the same or related litigation—may be the vehicle by which former testimony is presented to the jury. However, it should be stressed that former testimony also may be presented by less formal renditions. A witness who personally heard the declarant testify in the prior hearing may testify about what he or she heard, if the other elements of former testimony are satisfied.

The use of a transcript actually involves multiple hearsay. Since both the witness and the transcriptionist are hearsay declarants, two hearsay exceptions are needed if the transcript is to be admitted, Rule 805.

The first exception is former testimony, Rule 804(b)(1); the second is the official records exception, Rule 803(8). The court reporter is under an official duty to compile an accurate transcript.

[3] Elements of Former Testimony: Unavailability

As discussed in this and the following sections, there are three basic elements of former testimony. First, the former testimony exception of Rule 804(b)(1) only applies if the witness is now unavailable, as defined in Rule 804(a).[636] The unavailability requirement creates a rule of preference. If the witness can now testify, the witness's former testimony is inadmissible and, in theory, it is not as reliable as the live, in-court testimony. The latter is preferred since it gives the trier of fact an opportunity to observe the demeanor of the witness, a key process in evaluating the witness's credibility.

[4] Elements of Former Testimony: Prior Hearing or Deposition

[a] In General

The second element of prior testimony under Rule 804(b)(1) is that the testimony must have been given "as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding." This means that the prior testimony must have been given under oath in a formal proceeding.[637]

[b] Depositions

Under Tennessee law, the admissibility of depositions is discussed in several provisions.[638] *Rule 32.01 of the Tennessee Rules of Civil Procedure* details one approach to the use of depositions. In general terms, Rule 32.01 authorizes the admissibility of depositions in a civil trial, motion hearing, or interlocutory proceeding so long as admissible under the Tennessee Rules of Evidence applied as though the deponent were present and testifying. The party against whom the deposition is used must have been present or at least represented at, or reasonably notified of, the taking of the deposition. Rule 32.01 broadly describes the uses for depositions: impeachment or contradiction of the deponent, for "any purpose" of certain representatives of an adverse party or witnesses who are unavailable[639] or in "exceptional circumstances."

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[636] *See above §§ 8.33[2]–[9]*.

[637] *Cf. State v. Bowers, 744 S.W.2d 588 (Tenn. Crim. App. 1987)* (pre-rules decision; admitting preliminary hearing transcript of testimony of absent eyewitness; no *confrontation clause* violation). *State v. Sorrell, 2019 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. Aug. 22, 2019)* (victim was "unavailable" under Rule 804(a) and his testimony at preliminary hearing qualified as admissible "former testimony" under Rule 804(b)(2) at defendant's new trial hearing, since (1) the defendant's motive for cross examining the victim at the preliminary hearing was similar to the motive for cross examining him at trial — *i.e.,* to negate the defendant's culpability for the charged offense; (2) the victim's testimony about the events was virtually the same at both hearings — *i.e.,* the victim provided a physical description of the shooter and testified that he had never met the defendant and did not know who shot him; and (3) the victim's unavailability was clearly established, since the State used multiple avenues to bring the victim to court and he admitted he did not plan to comply).

Dep't of Children's Serv. v. Hood, 338 S.W.3d 917, 923–24 (Tenn. Ct. App. 2009) (testimony in criminal trial admitted as former testimony in later hearing for termination of parental rights).

[638] A number of statutes deal with specific procedural issues involving depositions. *See*, *e.g.*, *Tenn. Code Ann. §§ 16-1-111* (2009) (federal court depositions used in Tennessee courts); 18-1-108 (2009) (clerks taking deposition); 24-8-110 (2000) (lost deposition); 24-9-101 (Supp. 2010) (exemptions from trial but not deposition subpoenas); 24-9-102(b) (2000) (depositions of medical record custodians in General Sessions Court); 24-9-104 (2000) (commissions to take depositions); 41-21-304 (2010) (deposition of convict); 50-6-235 (2008) (physician's deposition); 58-1-605 through 58-1-607 (2002) (armed forces member's deposition).

Rule 32.01 also provides for depositions in one case that is dismissed to be used if an action involving the same subject is brought again. In this case the party against whom it is used must have had an opportunity and similar motive to develop the testimony at the deposition.

Rule 32.01(3) contains an exception limiting the use of depositions by certain experts. Called the "Bearman Rule,"[640] this provision bars the trial use of an expert's deposition taken pursuant to *Civil Procedure Rule 26.02(4)*. This deposition may be used by a party opposing summary judgment.[641]

Like Civil Procedure Rule 32.01, the Tennessee Rules of Evidence also provide a mechanism to admit depositions into evidence by applying the former testimony hearsay exception to them. Rule 804(b)(1) specifically includes depositions within the former testimony hearsay exception if the procedural requirements of the rule are satisfied.

Sometimes the Civil Procedure and Evidence Rules are in conflict. In *Drennon v. General Electric Company*,[642] a Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court held that Rule 804(b)(1) is superseded by *Rule 32.01(3) of the Tennessee Rules of Civil Procedure*. The latter expressly bars the use of an expert's discovery deposition for anything other than impeachment or contradiction of the expert deponent. Therefore, even though Evidence Rule 804(b)(1) would permit the expert's discovery deposition to be used as any other deposition, the *Civil Procedure Rule 32.01(3)*'s severe restrictions on this particular use of a deposition overrides the more generous former testimony exception.

[5] Elements of Former Testimony: Party Against Whom Now Used Had Opportunity and Similar Motive to Interrogate

The third element of former testimony is that the "party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination," Rule 804(b)(1). There was a time in Tennessee legal history when the parties in the former and the present hearing must have been precisely the same. In other words, the offering party as well as the party against whom the former testimony is offered must have been parties at the earlier hearing. Before the Tennessee Rules of Evidence became effective, however, the Tennessee Supreme Court abolished the complete mutuality requirement.[643]

The key to Rule 804(b)(1) is that the "party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." The rule is not satisfied by the presence of a different party with a motive to examine similar to the motive of the party *against whom* it is now used. The party against whom it is being used today must have been invited to the former hearing and given an opportunity to interrogate the witness.[643.1] This view differs slightly from the corresponding federal rule,

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[639] Civil Procedure Rule 32.01(3) defines availability by referencing *Rule 804(a) of the Tennessee Rules of Evidence.*

[640] *See* Donald F. Paine, *The Bearman Rule*, ***39 TENN. B. J. 33 (April 2003)***.

[641] *Dial v. Harrington, 138 S.W.3d 895 (Tenn. Ct. App. 2003)*.

[642] *897 S.W.2d 243 (Tenn. 1994)*.

[643] *State v. Causby, 706 S.W.2d 628 (Tenn. 1986)*, *superseded by statute as stated in BAC Home Loans Servicing v. Goodson, 2016 Tenn. App. LEXIS 482 (Ct. App. July 6, 2016)*.

[643.1] *See, e.g., BAC Home Loans Servicing v. Goodson, 2016 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2016)* (Tennessee Rule 804 contains language that is almost identical to the federal rule, except the Tennessee rule requires the party against whom the unavailable witness's testimony is offered be the same as the party who had the same opportunity and motive to develop the testimony in the previous deposition; the rule makes admissible former testimony even though one of the present parties was not at the earlier hearing, but only if the former testimony is offered against the party common to both hearings).

which permits, in a civil matter, the party against whom it is now used "or a predecessor in interest" to have had an opportunity to interrogate the witness at the previous hearing.[644] The Tennessee rule rejects the idea that a predecessor in interest adequately protected the party's interests at the prior proceeding.

It should be noted that Tennessee Rule 804(b)(1) states the party against whom it is now offered had a chance to interrogate the witness; it does not say that the current *lawyer* for that party must have had the opportunity to interrogate the witness at the prior proceeding. An identity of lawyers is not needed.[645]

Since Rule 804(b)(1) refers to an *opportunity* to develop the testimony by direct, cross, or redirect examination, the witness need not have actually been examined by the party against whom it is being used in order for the rule to be satisfied. If, for example, the party at a deposition or hearing elected for tactical reasons not to cross-examine an adverse witness, the failure to do so would not prevent that witness's testimony from being used as former testimony at a later proceeding. The key to this example is that the party had an opportunity to cross-examine the witness. Counsel who forgoes extensive examination or cross-examination takes a risk that the witness's testimony may be later used if the witness becomes unavailable.[645.1] This poses very difficult choices for the criminal defense lawyer who will often refrain from full cross-examination at a preliminary hearing in order to facilitate full disclosure of the witness's knowledge and to avoid letting the prosecution know the approach the defense will take at the trial.

Since Rule 804(b)(1) requires a similar motive to interrogate at both the instant and the prior proceeding, it is inapplicable if the party against whom the former testimony is now offered did attend the past hearing but had a different motive for examining the declarant-witness. If the issues in the prior hearing were different from the issue on trial, for example, the similar motive part of the double requirement would possibly not be met. To this extent, the common law identity of issues requirement survives. It should be noted that identity of all issues is not necessary. The former testimony exception is satisfied if the issue to which the testimony is addressed is the same in both cases.

A good example is *State v. Howell*,[646] in which evidence of an Oklahoma preliminary hearing was admitted in a Tennessee homicide case involving a robbery-murder at a convenience store. During the Oklahoma preliminary hearing (where defendant was represented by local counsel who did not represent the defendant in the Tennessee trial), the defendant's girlfriend testified for the government about the defendant's actions in killing someone in Oklahoma and about the Tennessee convenience store homicide. The Tennessee Supreme Court

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[644] FED. R. EVID. 804(B)(1).

[645] *See*, *e.g.*, State v. Howell, 868 S.W.2d 238 (Tenn. 1993) (transcript of preliminary hearing in Oklahoma admitted in Tennessee trial, even though different lawyers represented accused in the two proceedings; identity of lawyers unnecessary for former testimony hearsay exception).

[645.1] *See, e.g.*, State v. Warner, 2018 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 2018) (trial court properly admitted preliminary hearing testimony of witness, where defendant failed to cross examine witness at the hearing and attempted to bar introduction of the testimony at trial after the witness became unavailable; although the defendant claimed that the "type of cross-examination" conducted at the preliminary hearing was "different" from that conducted at trial, since the "motive" for cross-examination at the preliminary hearing was not to "engender reasonable doubt" but rather, to conduct "fact-finding," the court of appeals noted it has consistently upheld the admission of testimony from a preliminary hearing when the defendant had an opportunity to cross-examine a witness who was subsequently deemed unavailable, but failed to do so; moreover, differences in the "nature of the proceedings, including the burden of proof," is an insufficient basis for barring an unavailable witness's testimony under Rule 804); State v. Shipp, 2017 Tenn. Crim. App. LEXIS 893 (Tenn. Crim. App. 2017) (complete identity of the issues is not necessary in order for a statement to be admissible under Tenn. R. Evid. 804, and as long as the issues at the previous hearing are sufficiently similar, the statement may be admissible; although a party may decide not to engage in rigorous or even any cross-examination, there is no unfairness in requiring the party against whom the testimony is now offered to accept a prior decision to develop or not develop the testimony fully).

[646] 868 S.W.2d 238 (Tenn. 1993). See also State v. Summers, 159 S.W.3d 586 (Tenn. Crim. App. 2004) (same motive at juvenile transfer hearing and subsequent trial).

held that the similar motive requirement was satisfied. Issues in the two cases were sufficiently similar to constitute similar motive for the former testimony exception. Although the Tennessee crime was not directly an issue in the Oklahoma proceeding, it was relevant in the Oklahoma proceeding to prove the killer's identity in the Oklahoma homicide, since the same gun was used in both. Oklahoma counsel interrogated the prosecution witness (the girlfriend) about the Tennessee crime. The Tennessee Supreme Court noted that defendant, on appeal, failed to point out any matter that should have been raised during the cross-examination in the Oklahoma proceeding.

Another illustration is *State Department of Children's Services v. Hood*,[646.1] a case involving the termination of parental rights. The trial court at the termination hearing admitted the transcript of testimony of a minor who testified in a prior criminal case against the same defendant that the defendant in the termination case had sexually abused the minor. The appellate court reasoned that the defendant in the criminal case had the same motive to develop the testimony in the previous criminal trial as he had in the termination proceeding. Therefore the former testimony exception admitted, in the termination case, the testimony from the prior criminal trial.

[6] Former Testimony and Confrontation

Evidence admitted under the former testimony hearsay exception will most likely be considered "testimonial" for purposes of the *confrontation clause*.[647] This means that the former testimony is admissible by the government in a criminal case only if the government made reasonable efforts to secure the unavailable declarant's presence at trial and the statement was previously subject to cross-examination.[647.1] Often both requirements will be satisfied by statements otherwise satisfying the former testimony exception of Rule 804(b)(1).

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[646.1] *See, e.g., Dep't of Children's Servs. v. Hood, 338 S.W.3d 917 (Tenn. Ct. App. 2009)*.

[647] *See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*. *See above § 8.02[4]*.

[647.1] *See, e.g.*, *State v. Warner, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 2018)* (admission of witness's preliminary hearing testimony was proper, as the State made a good faith effort to locate him and defendant had an opportunity and a similar motive to cross-examine him).

§ 8.36 Rule 804(b)(2). Statement Under Belief of Impending Death

[1] Text of Rule

Rule 804(b)(2) Statement under Belief of Impending Death

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

Advisory Commission Comment:

The rule retains Tennessee's common law limitations. The trial must be for homicide of the declarant, and the declaration is limited to circumstances surrounding the declarant's death. Obviously with this restricted exception, the ground for declarant's unavailability invariably will be death.

2009 Advisory Commission Comment

The revised language makes admissible a dying declaration even though the declarant is not the victim of the homicide being prosecuted. The exception would apply, for example, where there were multiple victims but the prosecutions were severed. The revision also admits dying declarations in civil cases where relevant and material.

[2] Dying Declarations

[a] In General

Rule 804(b)(2) provides a very limited hearsay exception for dying declarations. The traditional underlying theory is that a person who knows that he or she is facing imminent death will be truthful, for the eternal consequences of dying "with a lie on one's lips" are too monumental to risk. The awareness of impending death is deemed to be "equivalent to the sanction of an oath."[648] In addition, there is often a substantial need for this testimony since the homicide victim may be the only person, other than the killer, who can relate what happened.

While at one time this hearsay exception in Tennessee only applied to criminal homicide trials, the rule has been expanded to cover both homicide and all civil trials.[649] When the elements of this exception are satisfied, the hearsay statement may be used by either the prosecution or defense. This exception has five elements.

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[648] *State v. Hampton, 24 S.W.3d 823, 828 (Tenn. Crim. App. 2000)*.

[649] TENN. R. EVID. 804(b)(2).

[b] Death of Declarant Not Necessary

In 2009 the Tennessee legislature changed Rule 804(b)(2). Previously the rule required that the dying declaration be made by the victim of a homicide.[650] The new rule dispenses with the requirement that the declarant have been the victim of a homicide. The new provision simply provides that the statement must be made by a declarant who believes that death is imminent and who makes the statement about the cause or circumstances of what the declarant believes to be the declarant's own impending death.

Thus, it covers the situation where the declarant is wrong about impending death and recovers from what was erroneously thought to be a fatal blow. It also now covers the situation in which a dying declaration is made in a multiple homicide case and the declarant is not the victim of the homicide being prosecuted.[651]

It must be recalled, however, that this is a hearsay exception covered by Rule 804 and therefore may be used only if the declarant is unavailable. Ordinarily, the dying declarant would have died.

[c] Criminal Homicide or Civil Proceeding

Historically, a dying declaration in Tennessee was admissible only in a homicide proceeding. In 2009 *Tennessee Rule of Evidence 804(b)(2)* was amended to extend coverage to both homicide and civil actions, similar to the federal rule.[652] Thus, in Tennessee a dying declaration is admissible in a criminal homicide case, but not a robbery or rape or other non-homicide offense. On the other hand, it may be admissible in any civil action, irrespective of whether the case involves a death. For example, if the declarant is seriously wounded, believes death is imminent, and makes a statement about the cause of the supposed death, the hearsay statement would be admissible as a dying declaration in a civil trial for battery if the declarant somehow survived the fatal blow but was unavailable for the civil trial.

[d] Declarant Need Not Be Homicide Victim

Until 2009, the dying declaration hearsay exception in Tennessee only applied in homicide cases and only when the declarant was the victim of the homicide. The amended provision makes the dying declaration applicable in homicide trials irrespective of whether the declarant is the homicide victim.[653] For example, if a criminal accused killed A and B, and victim A made a dying declaration, victim A's statement may be admissible in a homicide trial for the death of victim B, according to *Tennessee Rule of Evidence 804(b)(2)*.

[e] Statement Must Concern Cause or Circumstances of Death

Under Rule 804(b)(2), the subject matter of the extrajudicial statement is confined to the "cause or circumstances" of what the declarant believed to be the cause of his or her impending death. General relevance principles govern how far afield the prosecutor can go. Obviously it includes an identification or description of the killer and a recitation of the events that occurred during the homicide. Since this hearsay exception reaches the "circumstances" of the homicide, it may also reach events or conditions that preceded the homicide but precipitated or caused it.

The lay opinion rule should be relaxed somewhat here, as was the case under prior law.[654] This means it "must not be unduly restricted when reasonably based."[655] However, the evidence admissible as a dying

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[650] *See, e.g.*, *State v. Banks, 271 S.W.3d 90, 115 (Tenn. 2008)* (declarant must be dead in order to satisfy the dying declaration exception; declarant survived attack; changed in 2009 with amendment no longer requiring that declarant be homicide victim; also now applies in civil case where victim survives or in homicide case whether or not declarant is the homicide victim).

[651] *Tenn. R. Evid. 804(b)(2)*, 2009 Advisory Commission Comment.

[652] FED R. EVID. 804(b)(2).

[653] *Tenn. R. Evid. 804(b)(2)*, 2009 Advisory Commission Comment.

declaration is "limited to that to which the victim could have testified if present."[656] In the leading case, *State v. Lewis*,[657] a homicide victim told a police officer at the crime scene that the victim "knew" that the "lady with the vases" who had been in the victim's antiques store was involved in his homicide. The Tennessee Supreme Court acknowledges that this was a statement of opinion but upheld its admission as a dying declaration because it was rationally based on the perception of the declarant-victim.

[f] Belief that Death Imminent

The dying declaration hearsay exception states that the declarant must have spoken or written the statement under a belief that death was imminent, Rule 804(b)(2). The knowledge of imminent death provides the indicia of truth that justifies this hearsay exception. Proof of this belief can come through obvious circumstances, such as the severity of a wound,[658] or the declarant's own statement of belief.[659] Another source of the declarant's information about his or her longevity is from someone else, such as a doctor or family member who communicated with the declarant.[660]

It is often difficult to assess whether the imminent death requirement is satisfied. In *State v. Hampton*,[661] a murder victim was shot and later rushed to a hospital. His condition stabilized to the extent that fifteen hours after the shooting his family was permitted to visit him for forty-five minutes. During that visit he nodded in response to his sister's question, "Did Al shoot you?" The family then left the hospital. His condition soon deteriorated. He died at 9:18 p.m. that evening. Before nodding in response to his sister's

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[654] *Sherman v. State, 125 Tenn. 19, 42, 140 S.W. 209, 215 (1911)* ("He killed me without cause"); *State v. Lewis, 235 S.W.3d 136, 149 (Tenn. 2007)* (opinion rule should be somewhat relaxed for dying declarations).

[655] *State v. Lewis, 235 S.W.3d 136, 150 (Tenn. 2007)*.

[656] *State v. Lewis, 235 S.W.3d 136, 150 (Tenn. 2007)*.

[657] *State v. Lewis, 235 S.W.3d 136, 149 (Tenn. 2007)*.

[658] *E.g.*, *Dickason v. State, 139 Tenn. 601, 202 S.W. 922 (1918)* (shotgun wound in abdomen); *State v. Keels, 753 S.W.2d 140, 143 (Tenn. Crim. App. 1988)* (to determine whether declarant was conscious of impending death, court may look to character of wounds). *See also* *State v. Wiggins, ____ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 601 (Tenn. Crim. App. Aug. 8, 2018)* (victim's statement that "Dedrick did it" was properly admitted as a dying declaration, having been made when the victim was kicking and screaming and moving a lot in pain, had bullet holes all over his body, and was bleeding a lot); *State v. Thompson, 2017 Tenn. Crim. App. LEXIS 179 (Tenn. Crim. App. 2017)* (trial court did not err by admitting a hearsay statement of the victim as a dying declaration exception to the hearsay rule because, even though the victim died five hours after being shot, the officer testified that when he arrived the victim was on his hands and knees, bleeding very heavily from multiple gunshot wounds and drifting in and out of consciousness, and the victim gave him defendant's name when he asked what had happened); *State v. Crockett, 2016 Tenn. Crim. App. LEXIS 150 (Tenn. Crim. App. 2016)* (trial court properly admitted the victim's out-of-court statement under the dying declaration exception to the hearsay rule; although the victim never made an express statement that he knew he was about to die, the circumstances supported a finding that he was aware of his impending death, given that he was bleeding profusely, he told his girlfriend he loved her, and he said, after being told that he had survived a gunshot wound before, "He got me this time").

[659] *Crittendon v. State, 157 Tenn. 403, 414, 8 S.W.2d 371, 374 (1928)* ("I am going to die"); *State v. Keels, 753 S.W.2d 140, 143 (Tenn. Crim. App. 1988)* (to determine whether declarant was conscious of impending death, court may look to language of the deceased); *State v. Hampton, 24 S.W.3d 823, 829 (Tenn. Crim. App. 2000)* (statements made by declarant about his or her state of health are important factors in assessing belief in imminent death).

[660] *State v. Hampton, 24 S.W.3d 823, 829 (Tenn. Crim. App. 2000)* (conversations between declarant and a physician or family member about the declarant's physical condition may be important indicators of whether the declarant believed death was imminent).

[661] *24 S.W.3d 823 (Tenn. Crim. App. 2000)*.

question, the declarant was awake when, in his presence, a physician told the family that the victim had a fifty-fifty chance of surviving, though if he did survive the victim would be paralyzed and not live to see age thirty. Based on these facts, the Court of Criminal Appeals held that the evidence predominated against a finding that the statement was made under belief of *imminent* death. Apparently there was inadequate proof that the declarant knew his death was likely to be soon.

By contrast, where only five hours elapsed between a multiple-gunshot victim's declaration and death, and the severity of the wounds caused the victim to be in a state of semi-consciousness—as testified to by the police officer who arrived at the scene after the shooting and witnessed the wounds—the circumstances provided sufficient evidence to infer that the victim was aware of his impending death when he made the declaration.[661.1]

Proof of this knowledge of "imminent" death may become more difficult if there were a substantial delay between the statement and the declarant's death. It may be difficult to convince a court that the declarant believed death was imminent when the declarant did not die for six months or a year after the statement.

[3] Dying Declarations and Confrontation

Dying declarations may have a unique position in *confrontation clause* analysis. Since *Crawford v. Washington*[662] the *confrontation clause* appears to apply only to "testimonial" communications. While some dying declarations, such as those to police officers, may qualify, many others will not and therefore will not be barred because of the *confrontation clause*. In *Crawford*, however, the Court suggested that dying declarations that are testimonial may be a deviation from the general rule and are possibly admissible even if testimonial.[663] The Tennessee Supreme Court has followed this suggestion and held that the dying declaration is admissible under the *confrontation clause*, even if the dying declaration is deemed to be testimonial.[664]

[4] Relationship to Other Rules

By definition, statements satisfying the dying declaration hearsay exception may be of suspicious accuracy. The homicide victim has been mortally wounded and knows it. At that profound moment he or she may be less than lucid, due to a bullet in the head or an obvious psychological strain. In extraordinary circumstances Rule 403 may be applicable. The probative value of the statement may be slight, while the danger of unfair prejudice may be substantial.[665]

Statements possibly qualifying under this rule may also be admissible through other hearsay exceptions with less rigorous requirements. For example, such a statement might be an excited utterance, Rule 803(2);[666] a

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[661.1] *State v. Thompson, 2017 Tenn. Crim. App. LEXIS 179 (Tenn. Crim. App. 2017)* (trial court did not err by admitting a hearsay statement of the victim as a dying declaration exception to the hearsay rule because, even though the victim died five hours after being shot, the officer testified that when he arrived the victim was on his hands and knees, bleeding very heavily from multiple gunshot wounds and drifting in and out of consciousness, and the victim gave him defendant's name when he asked what had happened).

[662] *541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*. *See above § 8.02[4]*.

[663] *Id. at 56 n.6*.

[664] *State v. Lewis, 235 S.W.3d 136 (Tenn. 2007)*.

[665] *See above §§ 4.03[3]–[6]*.

[666] *See above § 8.07[2]*.

statement of physical condition, Rule 803(3);[667] or a statement for purposes of medical diagnosis and treatment, Rule 803(4).[668]

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[667] *See above § 8.08[7]*.

[668] *See above § 8.09[2]*.

§ 8.37 Rule 804(b)(3). Statement Against Interest

[1] Text of Rule

Rule 804(b)(3) Statement Against Interest

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Advisory Commission Comment:

This rule follows modern Tennessee law by admitting declarations against penal interest as well as those against pecuniary or proprietary interest. *Breeden v. Independent Fire Insurance Co., 530 S.W.2d 769 (Tenn. 1975)*; *Smith v. State, 587 S.W.2d 659 (Tenn. 1979)*. The proposal eliminates the condition espoused by *Smith* that declarations against penal interest offered by the accused in a criminal prosecution must be corroborated.

[2] Declarations Against Interest

[a] In General

Rule 804(b)(3) provides a hearsay exception for a statement against interest. The rule essentially restates Tennessee decisional law. Ordinarily it is used for nonparty declarants; parties' statements are more likely to be admitted under the admissions exception in Rule 803(1.2).[669] It should be noted that a statement against interest may be used anytime it is relevant, and the declarant may or may not be a party. In a criminal case, the statement may be used by either the prosecution or the defense.

If a person spoke or wrote a statement out-of-court that under an objective standard was against certain interests of the declarant,[670] the statement is considered sufficiently trustworthy to surmount the ban on hearsay because it is unlikely a person would lie when saying something against the person's own interests.

A statement against interest is only admissible if the declarant is unavailable, Rule 804(b)(3).[670.1] Unavailability of a witness occurs when the declarant persists in refusing to testify concerning the subject

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[669] *See above § 8.06[2].*

[670] *See below § 8.37[3].*

[670.1] *See, e.g.*, *State v. Taylor, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 613 (Tenn. Crim. App. 2018)* (trial court did not err by refusing to allow defendant to cross-examine detectives concerning out-of-court statements he made to them shortly after his arrest, because the statements were inadmissible hearsay offered to prove the truth of the matter asserted—i.e., that he had

matter of the declarant's statement despite an order of the court to do so or is absent from the hearing, and the proponent of a statement has been unable to procure the defendant's attendance by process.[670.2] Unlike admissions, the declarant must have firsthand knowledge of the facts stated in the declaration against interest.[671]

[b] Confrontation

Statements that satisfy this hearsay exception and are offered by the prosecution in a criminal case must satisfy the *confrontation clause*. If deemed testimonial, such as under police interrogation, they may well be subject to exclusion unless the declarant testifies.[672]

[3] Interests Covered

[a] Pecuniary

This rule lists various interests that the statement can affect. One example is pecuniary. If the declaration hurts the declarant's wallet, as would be the case with the statement, "I owe *X* money," it is against pecuniary interest.

[b] Impact on Civil Matter

Rule 804(b)(3) also covers a statement that renders invalid a civil claim, such as the statement "*X* has paid me." A declaration that gives rise to civil liability also fulfills the hearsay exception, such as a confession of fault following a collision.

[c] Proprietary

A declaration against proprietary interest is competent as well under Rule 804(b)(3). For example, a landowner's declaration that an easement runs across what by law is a simple estate would be a statement against proprietary interest.

[d] Criminal Liability

Finally, the rule admits declarations that expose the declarant to criminal liability. Since the rule requires only that the statement "tended" to expose the declarant to criminal sanctions, a full confession is

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acted in self defense; moreover, the "statement against interest" exception in Rule 804(b)(3) was inapplicable, because defendant was not "unavailable" as required by Rule 804(a)).

[670.2] *Tenn. R. Evid. 804(a)*. *See also* *State v. Wright, 2020 Tenn. Crim. App. LEXIS 434 (Tenn. Crim. App. June 22, 2020)* (Rule 804(a) not satisfied where defendant merely presumed that the witness would have invoked his right against self-incrimination, but failed to offer evidence that the witness was, in fact, unavailable).

[671] *See*, *e.g.*, *United States v. Lang, 589 F.2d 92 (2d Cir. 1978)*.

[672] *See* *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. *See also* *Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)* ; *State v. Lewis, 235 S.W.3d 136 (Tenn. 2007)*, *overruling in part* *State v. Maclin, 183 S.W.3d 335 (Tenn. 2006)*; *see generally above § 8.02[4]*. *See also*, *State v. Taylor, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 613 (Tenn. Crim. App. 2018)* (where defendant sought to admit his out-of-court statements to police shortly after his arrest as a "statement against interest," for the purpose of cross-examining the detectives and bolstering his claim of self defense, and the trial court refused to allow the statements to be introduced; on appeal, defendant argued that the trial court violated his right to confrontation by failing to allow the statements to be introduced during cross-examination of the defendants; the appellate court held, however, that the statements were inadmissible hearsay and, even if they had been admissible, any concerns arising from the trial court's exclusion of the statements during cross-examination were alleviated since defendant subsequently testified and the trial court admitted the statements during his testimony).

unnecessary. The statement would qualify as long as it provides evidence that could be used by the prosecution to prove its case against the declarant if a prosecutor were minded to bring charges.[673]

Conversely, a statement that tends to exculpate or minimize criminal liability may not be against the declarant's penal interest. In *State v. Dotson*,[674] for example, police interrogated the defendant about a robbery and the declarant admitted committing the robbery but claimed not to have had a weapon during the crime. The Tennessee Supreme Court held that the declarant's statement that he was not armed was not against the declarant's penal interest since it would exculpate him from liability for aggravated robbery.

Similarly, the statement does not satisfy the penal interest exception if the declarant could not be held accountable for the statement. Thus, in *State v. Kiser*,[675] the declarant made an anonymous phone call that, in theory at least, could subject the declarant to criminal liability for obstruction of justice and other similar crimes. The Tennessee Supreme Court held that the penal exception was inapplicable since the anonymous nature of the "incriminating" call made it unlikely that the declarant was exposed to criminal liability for the communication, which could not necessarily have been conclusively attributed to the declarant.

In *State v. Jenkins*,[675.1] one member of Aryan Nation made incriminating statements about participating in a beating-homicide to a fellow member, without realizing that a third person (the witness) could overhear the conversation. Although the defendant argued that the statement should be excluded, because the declarant "trusted" the person he was talking to and had no expectation that the statement could expose him to criminal liability, the Court of Criminal Appeals disagreed, holding that the statement was admissible because it was against penal interest. The court reasoned that "any reasonable declarant would have realized that admitting to his participation in the beating and killing of another was against his or her penal interest," and moreover, a "reasonable person in his position would not have made the statements unless the person believed it was true." The court held, therefore, that a statement made to a person whom the declarant trusts, with no expectation that the statement will be overheard by someone else, does not fall outside the parameters of Rule 804(b)(3). Rather, the fact that the declarant trusts the person he or she is talking to only enhances the reliability of the statement.[675.2]

Of course a declaration against penal interest also can be used to assist the accused. The declarant may be a third party who confessed to committing the very crime for which the accused is being tried. The accused may use the penal interest exception to introduce this confession to prove the crime was committed by someone else.

[4] Corroboration

Tennessee decisional law had long rejected the common law and had adopted this hearsay exception,[676] but Rule 804(b)(3) expands even modern Tennessee common law. Under Rule 804(b)(3), it is no longer necessary

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[673] *See, e.g.*, State v. Dotson, 254 S.W.3d 378 (Tenn. 2008) (defendant's confession that he committed a robbery is against his penal interest).

[674] State v. Dotson, 254 S.W.3d 378 (Tenn. 2008).

[675] State v. Kiser, 284 S.W.3d 227, 264–65 (Tenn. 2009); Harris v. State, 301 S.W.3d 141, 156 (Tenn. 2010) (Koch, J., dissent) (anonymous third party confessions were not statements against penal interest because they were written with an expectation that the author would remain anonymous), *overruled in part, on other grounds, by* Nunley v. State, 552 S.W.3d 800 (Tenn. 2018); State v. Brock, 327 S.W.3d 645, 692 (Tenn. Crim. App. 2009) (three anonymous letters admitting responsibility for murder; not covered by penal interest exception because caller did not believe he was subjecting himself to criminal liability).

[675.1] State v. Jenkins, 2017 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 2017).

[675.2] State v. Jenkins, 2017 Tenn. Crim. App. LEXIS 293, 66-71 (Tenn. Crim. App. 2017).

to corroborate a statement that subjects the declarant to criminal liability.[677] If the statement is a confession by the defendant, however, some additional corroboration is necessary under Tennessee law to sustain a conviction.[678] The confession alone is insufficient.

[5] Subjective and Objective Standards

Reasonable Person. The cornerstone of the declaration against interest hearsay exception in Rule 804(b)(3) is that a reasonable person similarly situated to the declarant would not have made the statement unless the reasonable person believed it was true. In turn, this statement means that a reasonable declarant would have realized it was against his or her interest. The important time is when the statement was made.

Declarant's Personal Knowledge. Rule 804(b)(3) does not specifically provide that the declarant must have personally known that the statement was against his or her interests when it was made. However, this knowledge is the reason the hearsay statement is viewed as sufficiently reliable to be admitted, and the evidence should not be admitted if it is established that the declarant did not know that the statement was harmful. For example, if the declarant actually believed that he or she was saying something that would be helpful, reliability is questionable and the statement should not be admitted under this hearsay exception.[679]

Mixed Interests. It is not uncommon for a declarant to make a statement that contains some parts that are against the declarant's interest and some parts that are not. In *Williamson v. United States*,[680] the United States Supreme Court held that the federal hearsay rule for a declaration against interest, Federal *Rules of Evidence 804(b)(3)*:

> [D]oes not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.[681]

The *Williamson* Court was careful to note, however, that some confessions implicating the declarant and another person may qualify under this hearsay exception, depending on the context of the statement. The key, according to the Supreme Court, is to look at the particular words of each statement and its factual context to determine whether a reasonable person would have made the statement unless believing it to be true.

The Tennessee Supreme Court has held that the proper approach is for the trial court to examine each assertion to determine whether it is against the declarant's interest. A good illustration is *State v. Dotson*,[682] where the declarant made three statements. The first, admitting to a robbery, was held to be against his penal interest. The second, denying that he carried a weapon during that robbery, was deemed to be not against his penal interest since it provided a defense to a charge of aggravated robbery (which required being armed). The third statement was the most troublesome: it contained a lengthy narrative of the robbery itself, including a statement the declarant was not armed and other details of the crime. In such "mixed message" cases, the

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[676] *Smith v. State, 587 S.W.2d 659 (Tenn. 1979)*; *Breeden v. Independent Fire Ins. Co., 530 S.W.2d 769 (Tenn. 1975)*.

[677] *Cf.* FED. *R. EVID. 804(B)(3)*, which retains the corroboration requirement if the statement is offered to exculpate the accused. Some federal decisions have expanded the corroboration rule to statements either inculpating or exculpating third parties. *See Automobile Automotive Accessories v. Fishman, 175 F.3d 534 (7th Cir. 1999)*.

[678] *See above § 8.06[3]*.

[679] *State v. Brock, 327 S.W.3d 645, 692 (Tenn. Crim. App. 2009)*.

[680] *512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)*.

[681] *Id. at 600–01*.

[682] *State v. Dotson, 254 S.W.3d 378 (Tenn. 2008)*.

Tennessee Court held that the proper approach is to assess the totality of the circumstances in which the statement was made and to ask whether the statement was "predominantly self-serving or disserving."[683] Noting that the narrative of the crime was more self-serving than harmful, the Supreme Court ruled that it did not qualify as a statement against penal interest.

End of Document

[683] *Id. at 393*.

§ 8.38 Rule 804(b)(4). Statement of Personal or Family History

[1] Text of Rule

Rule 804(b)(4) Statement of Personal or Family History

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement made before the controversy arose (A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy; relationship by blood, adoption, or marriage; ancestry; or other similar fact of personal or family history; even though the declarant had no means of acquiring personal knowledge of the matter asserted; or (B) concerning the foregoing matters, and death also, of another person if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Advisory Commission Comment:

When pedigree evidence is an individual's extrajudicial declaration rather than the community consensus, the declarant must be unavailable and must have spoken or written "before the controversy arose." The rule reflects Tennessee common law.

[2] Declarations of Pedigree

[a] In General

Rule 804(b)(4) provides a hearsay exception for statements about the declarant's own or another person's personal or family history. This exception is deemed sufficiently reliable to be admitted because a person is unlikely to lie about the person's own pedigree or that of a person with whom he or she is intimately associated. While other rules of evidence provide several ways to prove pedigree without showing unavailability of the declarant,[684] here unavailability is necessary.

[b] Made Before Controversy Arose

Moreover, in order to provide an indicia of trustworthiness, Rule 804(b)(4) mandates that the declarant must have made the statement before the controversy arose.

[c] Subjects Covered

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[684] *Tenn. R. Evid. 803(13)* (family records); *Tenn. R. Evid. 803(19)* (reputation); *Tenn. R. Evid. 803(23)* (judgment). Birth, marriage, and death can be proved by a record of vital statistics, *Tenn. R. Evid. 803(9)*, and marriage can be proved by a certificate, *Tenn. R. Evid. 803(12)*.

Issues covered by this hearsay exception include ancestry, birth, adoption, marriage, divorce, legitimacy, and relationship by blood, adoption, or marriage. In addition, the declarant may speak of another person's death, Rule 804(b)(4)(B).

While Rule 804(b)(4) outlines the broad categories reached by the exception, it does not indicate how much detail and background about these subjects are covered. In *United States v. Carvalho*,[685] a prosecution for the knowing use of false alien registration cards, the government used a hearsay statement to prove the defendants were trying to avoid the immigration laws. The statement, from the defendant's former spouse, suggested that the defendant had earlier entered a marriage with the declarant for the purpose of avoiding immigration laws. The court held that the statement was not admissible under Federal Rule 804(b)(4) to prove why the earlier marriage was entered. The court found that the hearsay rule narrowly embraces facts about pedigree:

> While undoubtedly it is correct that for some purposes a statement regarding one's reasons for entering a marriage might well be a "statement concerning" one's marriage, it is also clear that evidence as to motive or purpose, highly debatable or controversial matters, is simply not within the scope of Rule 804(b)(4).[686]

[d] Declarant's Own Pedigree

The declarant can speak of his or her own pedigree under this hearsay exception. A person would often have no personal knowledge of the facts covered by this exception, and the rule specifically provides that the personal knowledge requirement of Rule 602 does not apply. Multiple hearsay is sometimes involved and does not necessarily bar admission of the statement about pedigree. For example, when the evidence is a statement about one's own birthday, there is obviously no personal knowledge and the source of the information may be another declarant.[687]

[e] Another Person's Pedigree

Under Rule 804(b)(4), declarants can speak or write of another's pedigree. In order to ensure that the declarant has some basis for the statement, the rule mandates that the declarant must either be related to the person by blood, adoption, or marriage, or be associated sufficiently intimately with the other person's family as to be likely to have accurate data about that person's pedigree. Depending on the circumstances, this could include such people as maids and other household employees, members of the clergy, physicians, mental health professionals, neighbors, and close friends.

Although the personal knowledge requirement of Rule 602 is expressly made inapplicable for statements about the declarant's own pedigree, Rule 804(b)(4)(1), it is applicable for statements about another person's pedigree.

685 *742 F.2d 146 (4th Cir. 1984)*.

686 *Id. at 151*.

687 There is a double hearsay problem. The parents, for example, who tell their child the child's birth date are also declarants. Probably the family reputation exception bridges this second gap. 5 WIGMORE ON EVIDENCE 393 (Chadbourn rev. 1974).

§ 8.39 Rule 804(b)(5). [Reserved]

§ 8.40 Rule 804(b)(6). Forfeiture by Wrongdoing

[1] Text of Rule

Rule 804(b)(6) Forfeiture by Wrongdoing

The following are not excluded by the hearsay rule if the declarant is unavailable:

A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness.

Advisory Commission Comment:

Rule 804(b)(6) adds a new hearsay exception. It seems only fair to let a party offer any extrajudicial statements of declarants whose unavailability was procured by the opponent.

[2] Overview

[a] In General

A principle in the rules of evidence is that a party should not, in the admission or exclusion of evidence, benefit from his or her own wrongdoing. Accordingly, as noted elsewhere, if a party procures a witness's unavailability, that party may not use the unavailability to support admission of evidence covered by a Rule 804 hearsay exception.[688] Similarly, Rule 804(b)(6) makes it easier for adversary counsel to introduce a hearsay statement by a witness whose unavailability was procured by a party.

If a party engages in wrongdoing intending to procure a witness's unavailability, the party, under Rule 804(b)(6), essentially forfeits a hearsay objection if adversary counsel wants to introduce a statement by the unavailable witness.[689]

[b] Engaged in Wrongdoing

It should be noted that the Tennessee version of Rule 804(b)(6) differs from the federal rule by dealing only with a party who has "engaged" in wrongdoing. The federal rule also embraces a party who has "acquiesced in" wrongdoing.[690] Thus, the Tennessee rule appears to require active rather than passive

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[688] *See above § 8.33[9]*.

[689] The criminal defendant may also forfeit a confrontation objection. *See*, *e.g.*, *United States v. Rouco, 765 F.2d 983 (11th Cir. 1985)*; *State v. Ivy, 188 S.W.3d 132, 147–48 (Tenn. 2006)* (*quoting* *Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)* (forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds); *Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)* ("one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation"); *Giles v. California, 128 S.Ct. 2678 (2008)* (forfeiture of confrontation rights for intentional procurement of unavailability); *see above § 8.02[4]*.

[690] FED. *R. EVID. 804(B)(6)*.

wrongdoing. It also appears not to cover wrongdoing by a party's friends and others acting without any involvement of the party.

[c] Intended to Procure Unavailability

Rule 804(b)(6) applies only to conduct "intended to … procure the unavailability" of a witness. Negligent and other varieties of conduct, though resulting in the witness's unavailability, do not trigger this hearsay exception. Although Rule 804(b)(6) appears to be limited to wrongdoing "intended" to procure the unavailability of a witness, the Tennessee Supreme Court appears to have softened this requirement considerably. As long as the defendant was motivated "in part" by a desire to silence the witness, Rule 804)(b)(6) is satisfied.[691]

[d] Types of Acts

The act of procuring a witness's unavailability need not involve criminal activity. Indeed, Rule 804(b)(6) does not even require that a formal charge or judicial proceeding of any kind be pending against a defendant when the declarant's statement was made.[692] The rule reaches all parties, including the government, and applies in both civil and criminal cases.

Examples of actions qualifying under Rule 804(b)(6) include bribing or threatening a witness to secure the witness's unavailability. Similarly, it covers silencing a witness through the use of violence, or murder.[693] Since the term "unavailable" refers to an inability to testify rather than only physical absence,[694] coercing a witness to refuse to testify or forget important facts may qualify under this hearsay exception.

A good illustration is *State v. Ivy,*[695] where the court found that the defendant killed the victim-declarant in order to prevent her from contacting police about his aggravated assault against the witness-declarant. Rule 804(b)(6) was cited to admit, at the murder trial, the homicide victim's statements about the aggravated assault. It should be noted that the court did not indicate that the declarant was killed to prevent her from testifying at the *homicide* trial where the hearsay statements were introduced under Rule 804(b)(6).

A contrasting situation was presented in *State v. Brooks*,[696] where the defendant killed the victim, but there was no evidence he threatened to harm the victim if she went to the police or that he followed her when she went to file charges against him. Moreover, there was no proof that the defendant even knew that the victim had spoken about him with the police and the victim continued to live with the defendant for two months after the incident. The Tennessee Supreme Court concluded that there was no evidence that the defendant's action in killing the victim was intended, in whole or part, to make the victim unavailable as a witness.

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[691] *State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006)* (*quoting United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)*); *State v. Brooks, 249 S.W.3d 323, 328 (Tenn. 2008)*.

The United States Supreme Court has interpreted the federal forfeiture rule, FED. *R. EVID. 804(B)(6)*, as requiring that the defendant intended to prevent the witness from testifying. *Giles v. California, 128 S.Ct. 2678 (2008)*.

[692] *State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006)*.

[693] *State v. Ivy, 188 S.W.3d 132, 146 (Tenn. 2006)* (*quoting United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001)*).

[694] *See above §§ 8.32[5]* (lack of memory), 8.32[3] (refusal to testify).

[695] *State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006)*.

[696] *State v. Brooks, 249 S.W.3d 323, 328 (Tenn. 2008)*.

[e] Types of Statements

Rule 804(b)(6) is not limited to any particular kind of statement.[697] Thus, it is not limited to a declarant's statements about past events or prior offenses about which the declarant would have testified.[698]

It is also not limited to statements made when a formal charge or judicial proceeding is pending against the defendant.[699] Perhaps it is applied most frequently to admit grand jury testimony by a now-deceased grand jury witness who was killed by the criminal accused or his or her agents to prevent the witness from testifying at trial.

[f] Rule 403 Applicable

Even though a party wrongfully procures a witness's absence and thereby forfeits a hearsay objection to the admission of a statement of the witness, Rule 403 and due process may still bar admission of the absent declarant's statement.[700]

[g] Procedures

The party asserting wrongdoing has the burden of establishing it by a preponderance of the evidence.[701] Because proof needed to establish the wrongdoing may involve alleged misconduct not itself admissible,[702] the court must conduct a hearing outside the presence of the jury in order to determine whether the declarant's statements are admissible.[703] At this hearing the trial court may admit the statements only if it finds by a preponderance of the evidence that the defendant was involved in or responsible for procuring the declarant's unavailability, and that the defendant's actions were intended, at least in part, to procure the declarant's absence.[704]

[697] State v. Brooks, 249 S.W.3d 323, 328 (Tenn. 2008).

[698] State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006) (*quoting* United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001)).

[699] State v. Brooks, 249 S.W.3d 323, 328 (Tenn. 2008).

[700] *See* United States v. Aguiar, 975 F.2d 45, 47–48 (2d Cir. 1992).

[701] FED. R. EVID. 804(B)(6) Advisory Committee Note; *cf.* State v. Brooks, 249 S.W.3d 323, 328 (Tenn. 2008) (trial court must find by preponderance of evidence that the defendant was involved in or responsible for procuring the unavailability of the declarant).

[702] *But see above* §§ 4.01[12] (concealment of evidence), 4.01[13] (threats).

[703] State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006); State v. Brooks, 249 S.W.3d 323, 328 (Tenn. 2008).

[704] State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006).

§ 8.41 Rule 805. Hearsay Within Hearsay

[1] Text of Rule

Rule 805 Hearsay Within Hearsay

Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law.

Advisory Commission Comment:

The rule provides that an out-of-court statement containing several levels of hearsay and multiple declarants is nonetheless admissible if a hearsay exception applies to each declarant's statement. Also, while not covered here, a particular declarant's statement in the chain may be admissible as nonhearsay.

Often hospital records contain a nurse's notation that a patient said something to the nurse.

In that instance a court must deal with two hearsay declarations. The nurse's notation is admissible as a business record to the extent of showing what words were spoken. The patient's statement may then be admissible under the admissions exception or the declarations of physical condition exception.

[2] Multiple Hearsay

[a] In General

Occasionally hearsay layered on hearsay enters the courtroom.[705] For example, Sam could tell Mary something and Mary could repeat it to Clarence. If Clarence is subpoenaed to testify about what Sam said, there is double hearsay (both Sam and Mary are declarants). Rule 805 permits multiple hearsay to be

[705] As the Tennessee Advisory Commission Comment suggests, a likely occurrence is in hospital records. *Tenn. R. Evid. 805* Advisory Commission Comment. *See above § 8.11[12]*.

introduced if there is a hearsay exception or other solution to the hearsay ban for each hearsay statement.[705.1]

Analyzing multiple hearsay (or hearsay within hearsay) involves a two step process. The first problem is to identify the various declarants whose credibility is crucial to relevance.[706] The second step is to find a hearsay exception, if available, or a non-hearsay use[707] for each declarant's hearsay statement. Although this analysis is deceptively simple, it is easily overlooked by the harried trial lawyer.[707.1]

[b] Example

This rule can be illustrated by a tort case involving a collision at a busy intersection. Bystander A witnesses the collision and excitedly tells Bystander B that, only minutes earlier, Bystander A saw the black car run the red light. Bystander B, obviously greatly disturbed by the carnage that B had observed personally and also heard about from Bystander A, then relays the information to an ambulance driver who shortly arrives at the scene. The driver inserts in the hospital records what Bystander B said about Bystander A's statement. At the subsequent trial, the plaintiff wants to introduce the hospital record into evidence to prove what Bystander A (who was never located) said about the accident. There are three declarants in this hypothetical: both bystanders and the ambulance driver (who authored the hospital record). It can be diagrammed as follows:

Bystander A → Bystander B → Ambulance Driver → Hospital Record → Jury

In order to satisfy Rule 805, there must be a hearsay exception or non-hearsay use for each declarant's statement. In the above illustration, it is likely that Bystander *A* made an excited utterance, under Rule 803(2), to Bystander *B*. There must also be a hearsay exception covering Bystander *B* if the business report is to be admitted. Since Bystander *B* had also witnessed a startling event (both the aftermath of the

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[705.1] For examples where hearsay-within-hearsay was not admitted, *see* State v. Morris, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 391 (Tenn. Crim. App. 2018) (trial court did not err in excluding a daycare accident report, because the teacher who prepared the report did not observe the minor victim's tantrum first-hand, and thus, the report lacked trustworthiness and did not meet all business record exception requirements; at best, the accident report contained hearsay within hearsay, no exception was proffered, and any error in excluding the report was harmless, since injuries at the time of the report were irrelevant to the injuries that caused the victim's death months later); Popick v. Vanderbilt Univ., 2017 Tenn. App. LEXIS 171 (Tenn. Ct. App. 2017) (doctor's email statements describing her recollections of a patient's case were in inadmissible, because even if the doctor's email statements were admissible, her statements reference a nurse's statement, requiring the court to conduct a hearsay-within-hearsay analysis; since the nurse's statement did not satisfy the "excited utterance" exception or any other hearsay exception, the doctor's email was properly excluded); State v. Simmons, 2015 Tenn. Crim. App. LEXIS 933 (Tenn. Crim. App. 2015) (admission of hearsay within hearsay was reversible error).

[706] Statements by declarants whose truthfulness is not essential are nonhearsay.

[707] *See above* §§ 8.01[6]–[10].

[707.1] *See, e.g.*, State v. Wright, 2020 Tenn. Crim. App. LEXIS 434 (Tenn. Crim. App. June 22, 2020), where the defendant was charged with killing two victims and attempted to introduce a witness's audio statement to show that a third party had committed one of the killings in support of his motion to sever. In the audio statement, the witness stated that another person, Carr, told the witness that "he had shot a guy [victim #1] while trying to rob him". The entire audio statement constituted hearsay. Carr's alleged comment about the shooting was hearsay within hearsay under Rule 805, so it also required an exception. Neither the witness nor Carr testified. The defendant failed to offer an exception for the recording itself, but as to Carr's alleged statement that he had killed victim#1, counsel argued it was admissible under Tenn. R. Evid. 804 as a statement against Carr's penal interest. There was no evidence that Carr was unavailable, however, as required under Rule 804. Although defense counsel said that he had subpoenaed Carr, no proof was offered. Unsurprisingly, the Court of Criminal Appeals affirmed the trial court's exclusion of the entire audio statement.

collision and the excited statement of Bystander *A*), it is likely that Bystander *B* also made an excited utterance to the ambulance driver.[708]

Finding a hearsay exception for the third declarant, the ambulance driver, is the most difficult. If the ambulance driver had a business duty to record the information,[709] it is possible that the statement would be included under the business record exception, Rule 803(6). If so, the final hearsay link would be established and the statement, though involving multiple hearsay, would be admissible under Rule 805.

Since the accuracy of a statement may well be compromised after it is repeated several times, statements involving multiple hearsay may lack significant probative value. When the hearsay chain is long or otherwise creates likely inaccuracies, Rule 403 should be considered as a possible vehicle for exclusion of the evidence. The probative value of the multiple hearsay may be slight, while the danger of unfair prejudice may be great.

[3] Permissible Multiple Hearsay in Other Rules

Rule 805, permitting multiple hearsay to be admitted if each link satisfies a hearsay exception, is not the only avenue for admitting multiple hearsay. Several other rules approve the use of multiple hearsay in special situations. The best example is business records, Rule 803(6), where several people in the business may relay information seriatim to one another and the last recipient of the information includes it in a routine business record.[710] Public records under Rule 803(8) are similar.[711] Employee and agent admissions may also permit multiple hearsay since the personal knowledge rule does not apply.[712]

[708] A good illustration of this principle is *Benson v. Tennessee Valley Electric Cooperative, 868 S.W.2d 630 (Tenn. Ct. App. 1993)*, a products liability case involving an electrical worker for the Tennessee Valley Electrical Cooperative (TVEC) who was injured when the bucket in a bucket truck fell about six inches and then lunged back and forth. The trial court admitted into evidence, as an "admission against interest," an investigative report prepared by a mechanical engineer for the manufacturer of the bucket unit (TECO), also a defendant in the case. The report indicated that the plaintiff apparently hurt his abdomen and possibly incurred a slipped disk. The engineer obtained this information from McClain, who was a TVEC employee, and from TVEC personnel records. The report was admitted to establish the extent of the plaintiff's injuries. The Tennessee Court of Appeals held that the report presented multiple hearsay. Noting that TVEC's personnel records were not introduced into evidence, the Court of Appeals held that the statement from McClain to the engineer was hearsay not covered by any hearsay exception.

[709] *See above § 8.11[5]*.

[710] *See above § 8.11[5]*.

[711] *See above § 8.13*.

[712] *See above § 8.06[2]*.

§ 8.42 Rule 806. Attacking and Supporting Credibility of Declarant

[1] Text of Rule

Rule 806 Attacking and Supporting Credibility of Declarant

> **When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.**

Advisory Commission Comment:

The rule makes clear that hearsay declarants are subject to impeachment to the same extent as trial witnesses. If the method of impeachment is by prior inconsistent statement, such statement is not excluded for failure to provide the declarant an opportunity to explain. See Rule 613(b).

[2] Impeaching and Rehabilitating Declarant

If a hearsay declarant's statement is admitted as substantive evidence, the opposing party should have the same right to impeach the declarant's credibility as exists with a live witness. Rule 806 affords that right. All tools for impeachment are available, including inconsistent statements,[713] bad acts,[714] bad reputation for

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[713] *See*, *e.g.*, *State v. Shipp, 2017 Tenn. Crim. App. LEXIS 893 (Tenn. Crim. App. 2017)* (when a hearsay statement has been admitted into evidence under *Tenn. R. Evid. 806*, the unavailable declarant's credibility may be attacked as if the declarant were testifying at the trial, and evidence of the declarant's inconsistent statement or conduct does not require that the declarant have been given an opportunity to deny or explain the inconsistency; thus, where the State introduced preliminary hearing testimony of an unavailable witness at trial, which stated that the perpetrator had a tattoo, the defendant was allowed to impeach that witness's testimony by introducing evidence of an inconsistent statement, i.e., that the perpetrator had a *facial* tattoo; under *Tenn. R. Evid. 804* and *806*, both the introduction of the witness's preliminary hearing testimony and the introduction of the inconsistent statement was proper); *State v. Bowman, 327 S.W.3d 69, 90 (Tenn. Crim. App. 2009)*. It should be noted that the inconsistent statement used to impeach a hearsay declarant will often have been made *after* the hearsay statement was made. In one case, after testimony by one witness of declarant's out-of-court statement, the adverse party presented proof, through another witness, of a conflicting statement made by the same declarant, thus impeaching the declarant. *State v. Adams, 859 S.W.2d 359 (Tenn. Crim. App. 1992)*. *See also State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994)* (absent hearsay declarant made one statement admitting involvement in crime and a subsequent one denying it; latter admissible to impeach when former admitted in trial); *State v. Zirkle, 910 S.W.2d 874, 891 (Tenn. Crim. App. 1995)* (after defendant introduced non-testifying co-defendant's statement, government entitled to introduce same co-defendant's inconsistent statement under Rule 806; jury instructed on proper use of inconsistent statement). *See above § 6.13[2]* (prior inconsistent statement to impeach).

[714] It is unclear how Rule 608, permitting impeachment through bad acts, is to be applied for a hearsay declarant. Rule 608(b) provides that specific acts probative of truthfulness may be inquired into on cross-examination of the witness. If the hearsay

truthfulness,[715] convictions,[716] contradiction, bias, and impaired capacity.[717] As to inconsistent statements, Rule 806 dispenses with the usual requirement in Rule 613 that the impeached person have an opportunity to deny or explain, although the other requirements of Rule 613 should apply.[718] Once an attack is launched, the party offering the hearsay can rehabilitate.

The party opposing the hearsay has an additional option. The declarant can be subpoenaed, and the calling lawyer on direct examination can ask leading questions about the extrajudicial statement, "as if under cross-examination," Rule 806.

A hearsay declarant's general competence to be a witness under Rule 601 may also be challenged, though the general rule is that such incompetence does not automatically bar the person from serving as a hearsay declarant.[719]

declarant does not testify, how will adverse counsel bring specific acts into evidence since there can be no cross-examination of the declarant? One solution is to bring them in through the cross-examination of some other character witness. Another solution is to relax the rule permitting inquiry about specific acts only on cross-examination. This unusual approach would be fair since the adverse party introduced the hearsay statement that necessitated impeachment of the absent declarant.

[715] *See*, *e.g.*, *United States v. Moody, 903 F.2d 321 (5th Cir. 1990)* (should permit impeachment of co-conspirators, whose hearsay was admitted against the accused, by proving co-conspirators' bad reputation for truthfulness).

[716] *See*, *e.g.*, *United States v. Burton, 937 F.2d 324 (7th Cir. 1991)* (should permit proof of criminal record of absent informant whose voice was heard on tape recordings played for jury).

[717] *See, e.g.*, *United States v. Check, 582 F.2d 668, 684 n. 44 (2d Cir. 1978)* (proof that hearsay declarant was under psychiatric care). *See also* *Alston v. State, 2020 Tenn. Crim. App. LEXIS 461 (Tenn. Crim. App. July 2, 2020)* (counsel may impeach a witness by demonstrating his or her impaired capacity either at the time of the occurrence which is the subject of the testimony or at the time of the testimony).

[718] While Rule 806 dispenses with the need to provide the impeached declarant an opportunity to deny or explain the prior inconsistent statement used to impeach, a different result is likely when the prior inconsistent statement is used as substantive evidence. Tennessee Rule 803(26) permits a prior inconsistent statement to be introduced as substantive evidence as opposed to just for impeachment. When the statement is used substantively and Rule 803(26) applies, the declarant will essentially have a chance to explain or deny the statement. By definition, the prior statement may be used substantively under Rule 803(26) only when the declarant testifies at trial and is subject to cross examination concerning the statement. As a practical matter, this procedure means that the declarant will be able to explain or deny the prior statement during cross-examination or, at the least, on redirect by friendly counsel. It also means that the prior statement may not be used *substantively* under Rule 803(26) if the declarant is unavailable at trial, but the prior statement may still be used to *impeach* the unavailable hearsay declarant consistent with Rule 806.

[719] *See above* *§ 6.01[3]*.