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hearsay definition found in Federal Rule 801 closely corresponds to that used by Louisiana courts, Federal Rule 801 and the developing jurisprudence construing it may provide a practical model for the codification of Louisiana evidence law.

Susan R. Kelly

HEARSAY EVIDENCE AND THE FEDERAL RULES:

ARTICLE VIII—

II. EXCEPTIONS TO THE HEARSAY RULE:

EXPANDING THE LIMITS OF ADMISSIBILITY

In addition to the exemptions from the hearsay definition provided in Rule 801(d),¹²⁰ the Federal Rules of Evidence, following the traditional scheme,¹²¹ also allow numerous extrajudicial assertions to escape the general ban against hearsay evidence¹²² under certain exceptions, when deemed necessary to the interests of justice and the circumstances generally assure reliability.¹²³ Two rules comprise these exceptions: Rule 803 includes those exceptions that apply whether or not the declarant is available, and Rule 804 contains those which apply only when the declarant is unavailable. Both rules conclude with identical residual exceptions authorizing admission of hearsay evidence not covered by one of the explicit exceptions, provided the evidence has "equivalent guarantees of trustworthiness" and meets other generalized conditions.¹²⁴

Rules 803 and 804 revise and expand the traditional hearsay exceptions, yet, in accordance with the general policy of the redactors,¹²⁵ rarely incorporate applicable constitutional

120. For text of Rule 801(d), see notes 70-71, *supra*.

121. See generally C. McCORMICK, EVIDENCE §§ 254-323 (Cleary ed. 1972); 5 J. WIGMORE, EVIDENCE §§ 1420-1684 (Chadborn rev. 1974).

122. FED. R. EVID. 802: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

123. FED. R. EVID. 803, 804. Space limitations prevent analysis of each of the 29 exceptions set forth under these two rules; thus only the highlights of those that most significantly affect existing law, especially in Louisiana, are discussed in this comment.

124. FED. R. EVID. 803(24), 804(5). For text of these rules, see note 131, *infra*.

125. See, e.g., FED. R. EVID. art. VIII, Adv. Comm. Note; *Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference*,

principles. Additionally, the Rules seldom specify different provisions for civil and criminal cases, and they never establish different requirements for bench and jury trials.

The Advisory Committee's Notes clearly indicate that even though evidence satisfies one of the enumerated hearsay exceptions, it is not automatically admissible.¹²⁶ For example, evidence must be excluded when its admission would conflict with an overriding constitutional principle such as the defendant's right to confront and cross-examine the witnesses against him.¹²⁷ Additionally, under Rule 403,¹²⁸ evidence may be found inadmissible if its probative value is outweighed by the risk of prejudice.¹²⁹ Although evidence may fit into a particular hearsay exception, its reliability in any specific instance may be adversely affected by such factors as self-serving motives, ambiguity, inaccurate perception, or inadequate memory.¹³⁰ Thus, before deciding whether a hearsay statement otherwise admissible under an exception can be introduced into evidence, the court should evaluate these considerations in light of the specific circumstances of each case.

2d Cir., 48 F.R.D. 39, 42 (1969); Cleary, *Plan for the Adoption of Rules of Evidence for United States District Courts*, 25 RECORD OF N.Y.C.B.A. 142, 146 (1970).

126. "The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." FED. R. EVID. 803, Adv. Comm. Note. See also FED. R. EVID. art. VIII, Adv. Comm. Note. See the introductory language in Rules 803 and 804.

127. The parameters of the hearsay rule and the right of confrontation are not coextensive. See, e.g., *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149, 155-56 (1970); Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529, 541 (1974); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1437 (1966). Thus evidence deemed admissible under one of the exceptions may nevertheless violate the constitutional right of an accused to confront the witnesses against him. E.g., *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965). See generally Comment, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970); Comment, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965).

128. For text of Rule 403, see note 28, *supra*.

129. Unreliable evidence is prejudicial and tends to overbalance whatever probative value might be derived from its use.

130. See text beginning at note 41, *supra*.

The Residual Exceptions

Perhaps the most controversial of the enumerated hearsay exceptions are the two identically-worded omnibus provisions, Rules 803(24) and 804(5),¹³¹ which sanction the introduction of hearsay assertions not admissible under an explicit exception when they are made under circumstances affording "equivalent guarantees of trustworthiness." Additionally, these residual exceptions require that a proffered assertion tend to establish a material fact,¹³² that it be more probative on the question at issue than other reasonably obtainable evidence, and that its admission serve the "purposes of the rules" and the "interests of justice."¹³³ Finally, an opponent must be given advance notice of the proponent's intention to introduce the assertion.¹³⁴

The redactors recognized that situations are certain to arise in which reliable hearsay evidence that fails to satisfy the requirements of an express exception is important to the

131. FED. R. EVID. 803(24), 804(5): "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

132. The Federal Rules pertaining to relevancy do not utilize the term "material facts," but instead refer to facts which are of consequence to the determination of the action. Presumably the notions involved are identical. See FED. R. EVID. 401; Comment, *Determining Relevancy: Article IV of the Federal Rules of Evidence*, 36 LA. L. REV. 70, 73 (1975).

133. FED. R. EVID. 803(24), 804(5).

134. The Supreme Court draft of the residual exceptions merely provided for the admissibility of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Fed. R. Evid. 803(24), 804(b)(6) (Sup. Ct. Draft 1972). Both exceptions were deleted by the House Judiciary Committee. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 5-6 (1973). The Senate Judiciary Committee reinstated them, see S. REP. NO. 1277, 93d Cong., 2d Sess. 18-20 (1974), and added all of the present qualifications except the notice requirement, which the Conference Committee inserted. See H.R. REP. NO. 1597, 93d Cong., 2d Sess. 11-12 (1974).

determination of truth.¹³⁵ Thus they included the omnibus exceptions to provide a necessary measure of judicially administered flexibility.¹³⁶ Although the possibility exists that a rule authorizing such a discretionary power may be utilized frequently and perhaps imprudently, legislative history reveals that the intent of Congress was that the residual exceptions be used "very rarely and only in exceptional circumstances."¹³⁷ The Senate Judiciary Committee expressly exhorted that the omnibus exceptions not be construed as a "broad license" to admit evidence not otherwise fitting one of the explicit exceptions, nor be used to judicially revise the hearsay rule via the formulation of new rigid exceptions.¹³⁸ Rather, the provisions were meant to be used only when the circumstances of an individual case indicate that the hearsay evidence is sufficiently reliable and necessary to justify its admissibility.¹³⁹ Inasmuch as the residual exceptions are formulated so inexplicitly, courts will have to be especially circumspect when applying them in criminal cases to avoid possible infringement of the defendant's right of confrontation.¹⁴⁰

Exceptions in Which Unavailability of Declarant Is Not Required

Rule 803 comprises those exceptions to the hearsay rule that are applicable regardless of the availability of the declarant. These exceptions include any assertive statement

135. See FED. R. EVID. 803(24), Adv. Comm. Note; S. REP. NO. 1277, 93d Cong., 2d Sess. 18-20 (1974). See, e.g., *United States v. Brown*, 411 F.2d 1134 (10th Cir. 1969); *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961); *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968); *Salley Grocery Co. v. Hartford Accident & Indem. Co.*, 223 So. 2d 5 (La. App. 2d Cir. 1969).

136. In the first preliminary draft of Rules 803 and 804, the Advisory Committee took a much broader discretionary approach than that ultimately adopted, by permitting the judge to evaluate any hearsay evidence in light of its trustworthiness and necessity and listing the enumerated rules as illustrations rather than as specific exceptions. Fed. R. Evid. 8-03, 8-04 (Prelim. Draft 1969).

137. S. REP. NO. 1277, 93d Cong., 2d Sess. 20 (1974). See also, H.R. REP. NO. 650, 93d Cong., 1st Sess. 5-6 (1973) (explaining House deletion of the proposed residual provision); 120 CONG. REC. H-12255-59 (daily ed. Dec. 18, 1974) (House debate over whether to adopt Conference Committee's Report).

138. S. REP. NO. 1277, 93d Cong., 2d Sess. 20 (1974).

139. *Id.* at 18-20.

140. See discussion in note 127, *supra*.

made or recorded under circumstances offering some assurance of reliability deemed unlikely to be especially enhanced by the declarant's presence as a witness at trial.¹⁴¹ When the declarant is in fact unavailable, however, use of his extrajudicial statement against a criminal defendant necessarily involves confrontation problems.¹⁴²

Declarations of Then Existing Mental, Emotional, or Physical Condition; Present Sense Impressions; and Excited Utterances

The first three provisions of Rule 803 embrace several previously-acknowledged exceptions authorizing the admission of various assertive spontaneous declarations, all of which at times have been considered admissible as part of the *res gestae*.¹⁴³ However, authorities generally agree that the term *res gestae* has been rendered virtually meaningless by its indiscriminate use as a justification for the admission of out-of-court utterances irrespective of whether offered as nonhearsay, to prove the fact that they were made, or as hearsay, to prove the truth of the assertion.¹⁴⁴ Consequently, in keeping with the trend toward a more precise definition of the hearsay rule,¹⁴⁵ the Federal Rules abandon the term *res gestae*.

Instead, the Rules obviate the confusion surrounding the failure to distinguish between hearsay and nonhearsay use of spontaneous declarations by postulating a bifurcated rationale for their admissibility. As noted above,¹⁴⁶ the effect of Rule 801(c) is to exclude from the definition of hearsay those statements offered nonassertively. Hence, extrajudicial utterances or acts offered only to prove the fact that they were made rather than the truth of the assertion, such as

141. See FED. R. EVID. 803, 804(b), Adv. Comm. Notes.

142. See discussion in note 127, *supra*. If the declarant is available, constitutional problems are mitigated by the fact that under Rule 806, the defendant may call the declarant as his own witness and cross-examine him on the statement. Additionally, Rule 607 allows a party to impeach the credibility of his own witness.

143. See MCCORMICK § 288.

144: See, e.g., 6 J. WIGMORE, EVIDENCE § 1767 (3d ed. 1940); MCCORMICK § 288; J. THAYER, LEGAL ESSAYS 207, 245 (1908); Comment, *Res Gestae: A Synonym for Confusion*, 20 BAYLOR L. REV. 229 (1968); Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661, 663 (1969).

145. See MCCORMICK § 288.

146. See text beginning at note 17, *supra*.

those comprising operative facts or parts of the act done, are nonhearsay. Conversely, if a statement is offered testimonially, to prove the truth of the matter asserted, it is hearsay but may be nonetheless admissible if it fits under one of the recognized exceptions to the hearsay rule. Like many other courts throughout the country,¹⁴⁷ Louisiana courts have at times failed to differentiate use of spontaneous statements for their assertive and nonassertive value.¹⁴⁸ However, recent cases indicate that Louisiana courts are beginning to confine the use of *res gestae* to its narrower definition¹⁴⁹ encompassing spontaneous statements by the participants offered to establish the factual context of an event¹⁵⁰ and to recognize specific exceptions to the hearsay rule when a statement is offered to prove the truth of an assertion.¹⁵¹

Several kinds of spontaneous declarations that have been deemed admissible as exceptions to the hearsay rule¹⁵² are aggregated under Rule 803(3).¹⁵³ Included in this exception are declarations of then existing sensations, emotions, physical conditions, and states of mind.

As indicated above,¹⁵⁴ the Federal Rules treat as

147. See MCCORMICK §§ 288-89.

148. See, e.g., *State v. Reese*, 250 La. 151, 194 So. 2d 729 (1967). For examples of nonhearsay evidence admitted under the *res gestae* exception, see, e.g., *State v. DiVincenti*, 232 La. 13, 93 So. 2d 676 (1957); *State v. Rice*, 159 La. 820, 106 So. 2d 317 (1925). See also Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969).

149. The *res gestae* exception is covered by statute in Louisiana. LA. R.S. 15:447 (1950): "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words of the participants when narrating the events. What forms any part of the *res gestae* is always admissible in evidence." LA. R.S. 15:448 (1950): "To constitute *res gestae* the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

150. See, e.g., *State v. Smith*, 285 So. 2d 240 (La. 1973); *State v. Green*, 282 So. 2d 461 (La. 1973).

151. See, e.g., *State v. Carvin*, 308 So. 2d 757 (La. 1975); *State v. Smith*, 285 So. 2d 240 (La. 1973).

152. See MCCORMICK §§ 291, 294-95.

153. FED. R. EVID. 803(3): "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."

154. See text beginning at note 17, *supra*.

nonhearsay those statements by a declarant that only inferentially indicate his state of mind and are offered not as proof of the matter asserted but as circumstantial evidence tending to prove that he actually possessed that state of mind.¹⁵⁵ However, if the statement is a direct assertion of the declarant's mental state and is offered to prove the truth of the matter asserted—that he actually possessed that state of mind,¹⁵⁶ or that he probably performed the conduct indicated by his statement of intent¹⁵⁷—it is hearsay but may be admissible as an exception under Rule 803(3).¹⁵⁸ Of course, regardless of whether a declaration of one's mental state is nonhearsay or fits within an exception to the hearsay rule, if the risk of prejudice is found to outweigh the probative value of the evidence, it should be excluded under Rule 403.¹⁵⁹

155. A statement such as "I have been happier in New York than any place else," if offered to show the declarant's intent to remain in New York, is an example of the nonassertive use of a statement indicating the declarant's state of mind.

156. If the statement "I plan to live in New York forever" were offered to prove the speaker's intent to remain in New York, it would be hearsay under the Federal Rules.

157. See *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892) (declarant's statement "I expect to go to Crooked Creek" was admissible to show that he probably went). The House Judiciary Committee Report states that declarations of intent would be admissible only to prove the future conduct of the declarant and not that of a third person, thus indicating the preferred solution to a question that the Rules leaves unanswered. H. R. REP. NO. 650, 93d Cong., 1st Sess. 13-14 (1973). See *People v. Alcade*, 24 Cal. 2d 177, 148 P.2d 627 (1944).

158. This rationale accords with the approach taken by Wigmore, 6 WIGMORE § 1715, and UNIFORM RULE OF EVID. 63(12)(a) (1953). Others propose that when a declaration relating to the speaker's intent is used as an inference that the declarant performed the conduct intended, it should be classified as nonhearsay regardless of whether the declaration was a direct assertion of the speaker's intent or one from which his intent must be inferred. See, e.g., Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954).

159. For text of Rule 403, see note 28, *supra*. For example, Rule 803(3) ostensibly would not preclude admissibility of statements by a homicide victim that indicate the victims's fear of what the defendant might do to him. Any genuine relevance of such statements as proof of the subsequent conduct of the victim usually is outweighed by the risk of prejudice from the probability that a jury will use them as evidence that the defendant probably performed the criminal conduct in question. See, e.g., *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973) (overturning murder conviction where statement by victim to his wife that he believed the defendant was going to kill him was admitted to show the victim's movements during the time in question and that he had probably been forced to leave his house). *But see State v.*

Although Louisiana courts have often blurred the distinction between assertive and nonassertive use of declarations of state of mind,¹⁶⁰ they have achieved essentially the same results as the Federal Rules by using the test of independent relevancy.¹⁶¹

Most of the few Louisiana cases that treat admissibility of a declarant's spontaneous statements regarding his existing pain are workmen's compensation cases, in which the technical rules of evidence are not applicable.¹⁶² In these cases, Louisiana courts generally have said such declarations are admissible as part of the *res gestae*.¹⁶³

Statements of memory or belief offered as proof of past perceived facts are expressly inadmissible under Rule 803(3)¹⁶⁴ except when they pertain to various aspects of the declarant's will. The distinction in the case of wills accords with contemporary case law elsewhere in the country¹⁶⁵ and is admittedly grounded in pragmatism rather than in logic.¹⁶⁶ There appear to be no Louisiana cases which specifically treat the issue of admissibility of a testator's retrospective statements concerning his will.¹⁶⁷

Raymond, 258 La. 1, 15, 245 So. 2d 335, 340 (1971) (murder victim's statement to a third party that the defendant would want to have sexual relations with him that night held admissible as circumstantial evidence indicating the victim's fear or "emotional reaction to the presence of the defendant"). For a critical analysis of the decision, see *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 353 (1972).

160. For a discussion of the treatment of declarations pertaining to state of mind by Louisiana courts, see Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954).

161. The test of independent relevancy used by Louisiana courts can be summarized as follows: "[I]f the content of the statement be such that the truth of the matter stated is more likely to take effect upon the trier's mind than is the fact that it was made, with a resulting high risk of undue prejudice, then the statement is inadmissible." Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611, 624 (1954).

162. LA. R.S. 23:1317 (1950).

163. See, e.g., *Allen v. Milk Haulers, Inc.*, 278 So. 2d 871 (La. App. 1st Cir. 1973); *Nini v. Sanford Bros., Inc.*, 258 So. 2d 647 (La. App. 1st Cir. 1972); *Clifton v. Arnold*, 87 So. 2d 386 (La. App. 1st Cir. 1956); *Zito v. Standard Acc. Ins. Co.*, 76 So. 2d 25 (La. App. 1st Cir. 1944); *Arrington v. Singer Sewing Mach. Co.*, 16 So. 2d 145 (La. App. 2d Cir. 1943).

164. See *Shepard v. United States*, 290 U.S. 96 (1933).

165. See cases collected in MCCORMICK § 296; Annot., 62 A.L.R.2d 855 (1958); Annot., 28 A.L.R.3d 944 (1969).

166. FED. R. EVID. 803(3), Adv. Comm. Note. See also MCCORMICK § 296.

167. It is not clear whether Louisiana courts would allow verbal retro-

Rule 803(1),¹⁶⁸ based on the relatively recently recognized exception sanctioning admission of descriptive or explanatory statements made while a declarant was perceiving an event,¹⁶⁹ expands its scope to include statements made immediately after the observation. Since the principal guarantee of reliability is deemed furnished by the contemporaneity of the event and the statement,¹⁷⁰ it is essential that this extension be literally interpreted with emphasis on immediacy if the intentment of the Rule is to be achieved. Rule 803(2)¹⁷¹ conforms to the conventional exception for statements uttered under the influence of and relating to a startling event.¹⁷² Under this exception, the character of the event itself determines whether the statement was made within a permissible lapse of time to insure its reliability.¹⁷³ Louisiana courts have generally admitted both present sense impressions and excited utterances under the label of *res gestae*.¹⁷⁴ Recently, however, the Louisiana Supreme Court, in line with the scheme adopted by the Federal Rules, has tended to treat such statements as specific separate exceptions to the hearsay rule.¹⁷⁵

spective statements by a testator to be used as evidence. In some cases, the courts have admitted extrinsic evidence of a testator's prospective intentions. *See, e.g.*, *Ivey v. Bailey*, 175 La. 211, 143 So. 52 (1932); *Succession of Cardone*, 271 So. 2d 338 (La. App. 2d Cir. 1972). In other cases, the courts have stated that parol proof of a testator's verbal declaration of intent is inadmissible. *See, e.g.*, *Succession of Rusha*, 158 La. 74, 103 So. 515 (1925); *Succession of Faggard*, 152 So. 2d 627 (La. App. 2d Cir. 1963); *See also* LA. CIV. CODE art. 1712.

168. FED. R. EVID. 803(1): "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

169. *See, e.g.*, *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942); MCCORMICK § 298.

170. *See* MCCORMICK § 298.

171. FED. R. EVID. 803(2): "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."

172. *See* MCCORMICK § 297.

173. Permissible content of the statement differs under Rules 803(1) and 803(2). Declarations admitted as excited utterances need only relate to the startling event, whereas those introduced as present sense impressions are restricted to descriptions or explanations of the event being perceived.

174. For a discussion of Louisiana cases dealing with present sense impressions and excited utterances, *see* Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969).

175. *See, e.g.*, *State v. Carvin*, 308 So. 2d 757 (La. 1975); *State v. Smith*, 285 So. 2d 240 (La. 1973).

Statements for Purposes of Medical Diagnosis or Treatment

Statements of then existing bodily condition made to a physician for the purpose of treatment are recognized as an exception to the hearsay rule in many jurisdictions.¹⁷⁶ Federal Rule 803(4),¹⁷⁷ following the minority view,¹⁷⁸ expressly enlarges the exception to include statements of medical history, of past symptoms, pain, or sensations, and of external source or cause if "reasonably pertinent to diagnosis or treatment."¹⁷⁹ The scattered Louisiana cases dealing with the admissibility of statements made to a treating physician by a patient do not clearly establish any general rules.¹⁸⁰ In one recent Louisiana court of appeal case, however, a patient's statement describing her then existing bodily condition was held to be admissible "within the recognized exception of spontaneous declaration[s]."¹⁸¹

The language of the Federal Rule does not expressly limit its application to statements made to a physician or by a patient. Thus, statements made to or by hospital attendants, ambulance drivers, nurses, members of the family, or even bystanders conceivably might be admissible.¹⁸² The assurance

176. See MCCORMICK § 292.

177. FED. R. EVID. 803(4): "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

178. See MCCORMICK § 292.

179. Statements concerning fault would not qualify. See FED. R. EVID. 803(4), Adv. Comm. Note.

180. See, e.g., *Marler v. Texas Pac. Ry.*, 52 La. Ann. 727, 27 So. 176 (1900) (statement reciting cause of accident was inadmissible); *Becnel v. Ward*, 286 So. 2d 731, 733 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (La. 1974) (statement describing then existing bodily condition admissible "within the recognized exception of spontaneous declaration[s]"); *Auzene v. Gulf Public Service Co.*, 188 So. 512 (La. App. 1st Cir. 1939) (statement shortly after the event concerning cause of the accident admissible as part of the *res gestae*). In workmen's compensation cases, where more relaxed rules of evidence are applicable, LA. R.S. 23:1317 (1950), Louisiana courts generally admit as *res gestae* patients' statements of then existing bodily conditions, see, e.g., *Clifton v. Arnold*, 87 So. 2d 386 (La. App. 1st Cir. 1956); *Arrington v. Singer Sewing Mach. Co.*, 16 So. 2d 145 (La. App. 2d Cir. 1943), as well as statements reciting the cause of the injury, see, e.g., *Nini v. Sanford Bros., Inc.*, 258 So. 2d 647 (La. App. 1st Cir. 1972); *Youngblood v. Colfax Motor Co.*, 125 So. 883 (La. App. 2d Cir. 1930).

181. *Becnel v. Ward*, 286 So. 2d 731, 733 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (La. 1974).

182. The Advisory Committee's Note discusses the admissibility of

of reliability underlying this exception rests upon the belief that patients seeking treatment are primarily interested in giving a physician accurate information to facilitate effective treatment.¹⁸³ The same rationale generally applies when the declarant describes past pain, relates his case history, or identifies the external cause of his condition,¹⁸⁴ and probably also when the statement is made to someone other than a doctor if relevant to treatment. Guarantees of reliability may not be present, however, when the statement is made by someone other than a patient.¹⁸⁵ Moreover, use of a third party's extrajudicial statements as substantive evidence against a criminal defendant involves special problems regarding the right of confrontation.¹⁸⁶

The Advisory Committee's Note makes it clear that Rule 803(4) encompasses statements made to a physician consulted solely for the purpose of enabling him to testify as an expert witness.¹⁸⁷ In Louisiana¹⁸⁸ as well as most American jurisdictions,¹⁸⁹ statements made under these circumstances are generally admissible only as a foundation for the physician's expert testimony, and not as substantive evidence. Although the redactors were probably correct when they observed that juries are unlikely to appreciate the distinction,¹⁹⁰ it seems significant nonetheless. The reliability of statements made to physicians with a view toward litigation may be highly suspect because a plaintiff's motive and purpose might well have been to acquire favorable testimony rather than effective treatment.

Public Records and Reports

Although certain official written statements are recognized as falling under an exception to the hearsay rule, their statements made to others than a physician but does not mention statements made by others than a patient. FED. R. EVID. 803(4), Adv. Comm. Note.

183. Perhaps the Federal Rule should have required that the declarant believe his statement was made for purposes of diagnosis or treatment, similarly to the Rule 804(b)(2) exception for dying declarations, under which the declarant must actually believe that his death is imminent when he makes the statement. See quotation in note 248, *infra*.

184. See MCCORMICK § 292.

185. The dirth of judicial or doctrinal support for admissibility of such statements is probably indicative of their lack of reliability.

186. See discussion in note 127, *supra*.

187. FED. R. EVID. 803(4), Adv. Comm. Note.

188. See, e.g., *State v. Watley*, 301 So. 2d 332 (La. 1974).

189. See MCCORMICK § 293.

190. FED. R. EVID. 803(4), Adv. Comm. Note.

admissibility is most often regulated by specific statutes.¹⁹¹ To the extent that provisions (a) and (b) of Rule 803(8)¹⁹² allow admission of public reports of agency activities and of matters observed pursuant to official duty, except reports by police and law enforcement officers in criminal cases,¹⁹³ the Rule substantially accords with existing law in many jurisdictions.¹⁹⁴ In Louisiana, however, although a number of public records are statutorily admissible despite the hearsay rule,¹⁹⁵ the courts apparently do not recognize a broad exception covering the general category of public records. Moreover, while the Federal Rule ostensibly authorizes the admissibility of police reports in civil cases, Louisiana courts generally hold to the contrary.¹⁹⁶

The more controversial aspect of Rule 803(8) is provision (c), under which "factual findings resulting from an investigation made pursuant . . . to law" are admissible in civil cases and against the government in criminal cases. The ambiguity of the phrase "factual findings" and the question of whether

191. See MCCORMICK § 315.

192. FED. R. EVID. 803(8): "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

193. Rule 803(8)(B) was expressly amended on the House floor to add the requirement that there be a *duty to report* matters observed pursuant to official duty and, more significantly, to exclude such reports in criminal cases when made by police and other law enforcement officers. The House discussion of the amendment excluding police reports reveals that the legislative intent was that such reports should not merely be read into evidence and that the police officer should be required to take the stand and afford the defendant the opportunity to cross-examine him. See 120 CONG. REC. H563-65 (daily ed. Feb. 6, 1974). To the extent that these reports are not admissible on behalf of a criminal defendant, the present restriction seems unjustified.

194. See MCCORMICK §§ 315-20.

195. See, e.g., LA. R.S. 13:3711-12 (1950) (records of state and local agencies); LA. R.S. 13:3714 (1950), as amended by La. Acts 1966, No. 161 § 1 (hospital records); LA. CODE CRIM. P. art. 105 (coroner's report and procès verbal of coroner's inquest).

196. E.g., *Robinson v. St. Paul Fire & Marine Ins. Co.*, 298 So. 2d 282 (La. App. 1st Cir.), cert. denied, 302 So. 2d 23 (1974); *Veal v. Hutchinson*, 284 So. 2d 60 (La. App. 4th Cir.), cert. denied, 286 So. 2d 662 (1973); *Deville v. Aetna Ins. Co.*, 191 So. 2d 324 (La. App. 3d Cir. 1967).

it should be interpreted to include evaluative reports already has inspired dispute.¹⁹⁷ Additionally, the provision does not specify whether the reporting officials's findings may be based upon information supplied by third persons or only upon his own observations.¹⁹⁸ Rule 803(8), however, is buttressed by several specific safeguards which, if properly observed, should prevent the admission of unacceptable evidence.¹⁹⁹ In particular, the Rule provides that public records and reports are not admissible if "the sources of information or other circumstances indicate a lack of trustworthiness," and the Advisory Committee's Note includes suggested guidelines for the determination of reliability.²⁰⁰

Both the Rule 803(8) exception for public records and the Rule 803(6)²⁰¹ exception for business records authorize admission of "data compilations," a term sufficiently broad to include computer printouts.²⁰² Computerized records require special consideration relative to the reliability of the data originally stored and the interpretation placed on the data

197. The Advisory Committee's Note suggests that evaluative reports that are clearly reliable are admissible. FED. R. EVID. 803(8), Adv. Comm. Note. The House Judiciary Committee Report states that "factual findings" should be strictly construed and evaluative reports "shall not be admissible under this Rule." H.R. REP. NO. 650, 93d Cong., 1st Sess. 14 (1973). The Senate Judiciary Committee Report takes issue with the House Committee Report and concludes that they should be admissible. S. REP. NO. 1277, 93d Cong., 2d Sess. 18 (1974). The Conference Committee Report leaves the matter unresolved. See H.R. REP. NO. 1597, 93d Cong., 2d Sess. 11 (1974).

198. As a general rule, even in those jurisdictions which admit reports containing the official's conclusions or summaries, courts firmly impose the first-hand knowledge requirement to restrict the use of such reports to prove only those things observed by the officer himself. See MCCORMICK § 317. For a discussion of the application of this rule with regard to police reports, see Annot., 69 A.L.R.2d 1148 (1960).

199. In addition to these specific safeguards, Rule 403, which applies to all hearsay exceptions, permits the exclusion of otherwise relevant evidence if the risk of prejudice outweighs its probative value. For text of Rule 403, see note 28, *supra*.

200. Committee guidelines for the determination of admissibility include: (1) the timeliness of the investigation, (2) the special skill or experience of the official, (3) whether a hearing was held and the level at which conducted, (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109 (1943) (nonroutine report of party aligned in interest with proponent excluded). FED. R. EVID. 803(8), Adv. Comm. Note.

201. For text of Rule 803(6), see note 208, *infra*.

202. The Louisiana Supreme Court recently admitted a computer print-out under the business record exception. *State v. Hodgeson*, 305 So. 2d 421 (La. 1974).

retrieved. For these reasons, when computer printouts are submitted for use as substantive evidence, courts should exercise extra caution in determining that the foundation is sufficient to establish their reliability.

Records of a Regularly Conducted Business Activity

As in the case of public records,²⁰³ the admissibility of business records as an exception to the hearsay rule is governed by legislation in most jurisdictions.²⁰⁴ The modern statutes have relaxed many of the restrictions found in the historical hearsay exception for regularly kept records of a regularly conducted business activity,²⁰⁵ influencing its development in the remaining jurisdictions,²⁰⁶ including Louisiana,²⁰⁷ that have not enacted similar legislation.

203. See text at note 191, *supra*.

204. This is largely due to the extensive adoption of the Commonwealth Fund Act, now codified in 28 U.S.C. § 1732(a) (1970), and the Uniform Business Records as Evidence Act, 9A U.L.A. § 506 (1965). See also MODEL CODE OF EVID. rule 514 (1942); UNIFORM RULE OF EVID. 63(13) (1953).

205. The traditional form of this exception may be summarized as "a permanent record made in the ordinary course of business, by a person unavailable for testimony, from personal knowledge of the facts recorded or from information furnished by one having a business duty to observe and report the facts, is admissible as proof of the facts recorded, in the absence of a strong motive to misrepresent, if the record is the first collected and recorded memorial." Comment, *Business Records in Louisiana as an Exception to the Hearsay Rule*, 21 LA. L. REV. 449, 451 (1961). See generally MCCORMICK § 306. The more recent codifications change the historical requirement that the recorder and his informant be unavailable, and instead permit the custodian or other qualified witness to furnish the requisite foundation testimony authenticating the record and explaining the recordation procedure. These statutes also relax the condition that the record be the first collected and require only that the record be one that is permanent. See, e.g., model statutes cited in note 204, *supra*. FED. R. EVID. 803(6) similarly adopts these provisions. For text of Rule 803(6), see note 208, *infra*.

206. See generally MCCORMICK § 306.

207. Louisiana generally follows the traditional version of the exception with the modifications discussed at note 204, *supra*. For a discussion of the application of the business record exception in civil cases in Louisiana, see Comment, *Business Records in Louisiana as an Exception to the Hearsay Rule*, 21 LA. L. REV. 449 (1961). See also LA. CIV. CODE arts. 2248-50; LA. R.S. 13:3714 (1950), as amended by La. Acts 1966, No. 161 § 1; LA. R.S. 13:3733 (Supp. 1952). For examples of Louisiana criminal cases in which the exception has more recently been applied, see *State v. Hodgeson*, 305 So. 2d 421 (La. 1974) (computer printout); *State v. Lewis*, 288 So. 2d 348 (La. 1974); *State v. Graves*, 259 La. 526, 250 So. 2d 727 (1971).

The Federal Rule 803(6)²⁰⁸ exception for business records continues the trend toward liberalization by significantly broadening certain provisions beyond previous formulations. For example, although the Federal Rule retains the customary limitation that only records of a regularly conducted business activity are admissible,²⁰⁹ the definition of "business" is expansive, encompassing institutions, associations, professions, and "calling[s] of every kind, whether or not conducted for profit."²¹⁰ Furthermore, the Rule extends the permissible subjects of record-keeping beyond the previously more limited range of acts, conditions or events,²¹¹ to include "opinions or diagnoses."

In contrast with the Rule 803(8) exception for public records under which reports embracing factual findings are not

208. FED. R. EVID. 803(6): "A memorandum, report, record, or data compilation, in any form, of acts events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

209. The Supreme Court draft of Rule 803(6) made admissible records of any regularly conducted activity without mentioning the term "business." Fed. R. Evid. 803(6) (Sup. Ct. Draft 1972). The House Judiciary Committee added language limiting the activity to businesses, professions, occupations and callings of every kind. See H.R. 5463, 93d Cong. 2d Sess. (1974); H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 14 (1973). The Senate Judiciary Committee attempted to delete the business restriction and return the rule to its original form. See S. REP. NO. 1277, 93d Cong., 2d Sess. 16-17 (1974). The Conference Committee adopted the House version but expanded the definition even further. See H.R. REP. NO. 1597, 93d Cong., 2d Sess. 11 (1974). In view of the broad "business" definition ultimately adopted in Rule 803(6), it is questionable whether the Rule actually differs in effect from the original unrestricted version.

210. FED. R. EVID. 803(6). Compare the business definition in the Federal Rule with that in 28 U.S.C. § 1732(a) (1970) (business, profession, occupation and calling of every kind) and in 9A U.L.A. 506 § 1 (1965) (business, profession, occupation, calling or operation of institutions, whether carried on for profit or not).

211. See, e.g., 28 U.S.C. § 1732(a) (1970) (act, transaction, occurrence or event); 9A U.L.A. 506 § 2 (1965) (act, condition or event); UNIFORM RULE OF EVID. 63(13) (1953) (act, condition or event); MODEL CODE OF EVID. rule 514(1) (1942) (act, event or condition).

admissible against a criminal defendant,²¹² the broader Rule 803(6) exception for business records expresses no such limitation concerning the admissibility of records containing opinions and diagnoses. Yet, while Rule 803(6) includes a special trustworthiness requirement similar to that of Rule 803(8),²¹³ the Advisory Committee's note to Rule 803(6) provides no corresponding guidelines for the determination of reliability.²¹⁴ Ideally, however, the courts will exercise a large measure of discretion to assure that proffered evidence has the requisite degree of reliability and that the criminal defendant's right of confrontation is not infringed.

Although the federal business records exception retains the traditional requirement that the recorder or informant have first-hand knowledge of the event recorded,²¹⁵ the well-established condition included in the Supreme Court's version of the Rules that *all* steps in the preparation of the proffered record be pursuant to the course of business²¹⁶ was omitted by Congress, apparently inadvertently, in the process of amending the language of this exception.²¹⁷ Thus, if literally construed, the possibility exists that a record which either contains information received from someone not acting in the regular course of business or embraces opinions based on such information could be admitted. Consequently, the omitted requirement should be presumed included until the ostensible oversight is corrected.

Since police reports have occasionally been admitted under the rubric of business records,²¹⁸ the question arises

212. For text of Rule 803(8), see note 192, *supra*.

213. Rule 803(6) sanctions the admissibility of business records "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

214. The Advisory Committee suggested guidelines for the determination of admissibility of evidence under the Rule 803(8) exception for public records. See Advisory Committee Note in note 200, *supra*.

215. See MCCORMICK § 310.

216. See *id.* § 308.

217. The Supreme Court draft of this exception read: "A . . . record . . . of acts . . . made at or near the time by, or from information transmitted by . . . a person with knowledge, *all* in the course of a regularly conducted activity, as shown by the testimony of the custodian . . ." 56 F.R.D. 183, 300-301 (1972). In an effort to clarify the requirement that the record itself be one that was regularly kept, the House Judiciary Committee moved the word "all" to the location in which it now appears. See H.R. 5463, 93d Cong. 2d Sess. (1974). For text of Rule 803(6), see note 208, *supra*.

218. See MCCORMICK § 310.

whether they can be given that status under the Federal Rules. The Advisory Committee apparently assumed that police reports are admissible as business records,²¹⁹ and this assumption has been reiterated by at least one commentator.²²⁰ Since the admissibility of such reports in civil cases is seemingly within the scope of Rule 803(8),²²¹ the public records exception, their admissibility in civil cases under the Rule 803(6) exception for business records would result in little practical difference. Significantly, however, Rule 803(8) was amended by Congress expressly to ensure that police records would not be admissible in criminal cases.²²² Legislative history indicates not only that the amendment was aimed specifically at preserving a criminal defendant's right of confrontation,²²³ but also that police reports were not intended to be admissible at all against a criminal defendant under the Federal Rules.²²⁴ In light of the legislative intent and the serious confrontation problems that could result, especially if such reports are based on information from outside sources,²²⁵ they should not be admitted against an accused under Rule 803(6). These considerations would not be at issue, however, when an accused seeks admissibility of police reports on his own behalf.

Learned Treatises

The hearsay exception expressed in Federal Rule 803(18)²²⁶ represents a significant departure from the cus-

219. See FED. R. EVID. 803(6), Adv. Comm. Note.

220. See Evans, *Article Eight of the Federal Rules of Evidence: The Hearsay Rule*, 8 VAL. L. REV. 261, 282 (1974).

221. For text of Rule 803(8), see note 192, *supra*.

222. See note 193, *supra*.

223. See 120 CONG. REC. H563-65 (daily ed. Feb. 6, 1974).

224. See statement of Congressman William L. Hungate, Conferee and Chairman of the House Judiciary Committee's Subcommittee on Criminal Justice, upon presentation of the Conference Report to the House for final consideration of H.R. 5473, 120 CONG. REC. H12254 (daily ed. Dec. 18, 1974) ("As the rules of evidence now stand, police and law enforcement reports are not admissible against defendants in criminal cases"). See also, 120 CONG. REC. H563-65 (daily ed. Feb. 6, 1974) (House discussion of amendments to section 803(8)(B)); 120 CONG. REC. H12255-56 (daily ed. Dec. 18, 1974) (House debate over whether to adopt Conference Committee's Report).

225. See text beginning at note 215, *supra*.

226. FED. R. EVID. 803(18): "To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct

tomary rule that learned treatises and similar publications may be used only on cross-examination of an expert witness for impeachment purposes, provided the witness first recognizes the publication as authoritative or relies upon it in forming his opinion.²²⁷ The Federal Rule permits statements contained in qualified publications to be read into evidence²²⁸ to prove the truth of their content when used in conjunction with expert testimony on direct or cross-examination.²²⁹ Although the publication must be established as reliable authority,²³⁰ it need not be acknowledged as such or relied upon by the opposing expert. Louisiana apparently follows the traditional rule precluding the use of such material as substantive evidence.²³¹

Judgments of Previous Convictions

In most jurisdictions,²³² including Louisiana,²³³ final judgments of conviction are generally inadmissible in sub-

examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits."

227. See MCCORMICK § 321. The traditional rule is not actually a "hearsay" exception, because such statements are usually used to impeach, rather than to prove the truth of their assertions. Under the federal scheme, substantive use can be made of publications—provided they are introduced only during examination of an expert witness. The Federal Rule adopts the view favored by Professors Morgan and Wigmore. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 366 (1962); 6 WIGMORE §§ 1960-92. See also MODEL CODE OF EVID. rule 529 (1942); UNIFORM RULE OF EVID. 63(31) (1953).

228. However, the Rule expressly prohibits receipt of the written text as an exhibit.

229. Rule 803(18) restricts admissibility of these materials upon direct examination to situations where the expert has relied on the publication. During cross-examination, the opposing counsel must first call the material to the attention of the witness.

230. The rule provides that reliability may be established by the testimony or admission of the witness, by other expert testimony, or by judicial notice.

231. See, e.g., *Pellegrin & Jennings v. Allstate Ins. Co.*, 273 So. 2d 534 (La. App. 1st Cir. 1973) (reference to medical article by expert witness on direct exam was inadmissible as hearsay).

232. See MCCORMICK § 318.

233. E.g., *New Orleans Ry. & Light Co. v. United States Fidelity & Guar. Co.*, 145 La. 364, 82 So. 372 (1919); *Hutchins v. Westley*, 235 So. 2d 434 (La. App. 3d Cir. 1970); *Davis v. Bankston*, 192 So. 2d 614 (La. App. 3d Cir. 1966).

sequent cases to prove the existence of the facts upon which the conviction was based. Rule 803(22),²³⁴ adopting the minority view, permits evidence of final judgments of felony grade convictions²³⁵ resulting from either a trial or a plea of guilty²³⁶ to prove any fact essential to sustain the judgment.²³⁷ The language of the provision appears sufficiently broad to encompass admissibility of final judgments against third persons in subsequent cases between different parties in which some or all of the essential facts in issue coincide with those upon which the conviction depended. Rule 803(22) expressly provides, however, that the prosecution may not use third-party convictions in subsequent criminal cases except for im-

But see Osborne v. People's Benevolent Industrial Life Ins. Co., 19 La. App. 667, 139 So. 733 (2d Cir. 1932) (recognizing general rule but approving use of prior conviction as corroborative evidence that at the time of injury, plaintiff was engaged in committing acts in violation of the law).

234. FED. R. EVID. 803(22): "Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

235. The Rule admits judgments as to conviction of a crime punishable by death or imprisonment in excess of one year which, measured by federal standards, includes only those of a felony grade. The Advisory Committee's Note explains that convictions of minor offenses are excluded in light of the possible lack of motivation to defend at such levels. FED. R. EVID. 803(22), Adv. Comm. Note.

236. The Rule expressly excludes pleas of *nolo contendere*. Contrary to final judgments, guilty pleas may be admissible under other traditional exceptions to the hearsay rule such as declarations against interest of a non-party opponent or as admissions of a party opponent. *See, e.g.*, Hutchins v. Westley, 235 So. 2d 434 (La. App. 3d Cir. 1970) (guilty plea admissible under recognized hearsay exception for admissions). *See also* MCCORMICK § 318. Under Federal Rule 801(d)(2), admissions are exempted from the hearsay exclusionary rule, but the result as to admissibility is generally the same. *See* text beginning at note 70, *supra*.

237. Rule 803(22) does not concern situations where former judgments are admitted as conclusive evidence under the doctrines of *res judicata* or collateral estoppel. *See* FED. R. EVID. 803(22), Adv. Comm. Note. Additionally, the Rule should have less effect in subsequent criminal trial than in civil cases, since the admissibility of evidence of prior crimes against an accused is specifically limited to those situations where the evidence has an independent relevance. *See* FED. R. EVID. 404; Comment, *Determining Relevancy: Article IV of the Federal Rules of Evidence*, 36 LA. L. REV. 70, 78-81 (1975). *See also* LA. R.S. 15:444-46 (1950); State v. Prieur, 277 So. 2d 126 (La. 1973).

peachment purposes.²³⁸ The Rule also stipulates that the pendency of an appeal affects merely the weight of the evidence and not its sufficiency.

Exceptions in Which Unavailability of Declarant Is Required

Under certain exceptions to the hearsay rule, unavailability of the declarant is traditionally a prerequisite for admissibility.²³⁹ In accordance with this scheme, Federal Rule 804 defines unavailability and enumerates the specific exceptions in which it is required.²⁴⁰

Definition of Unavailability

Federal Rule 804(a)²⁴¹ provides a broad and relatively uniform definition of unavailability. A declarant is generally deemed "unavailable" if he is dead or physically or mentally

238. The limitation in criminal cases codifies the constitutional principle expressed in *Kirby v. United States*, 174 U.S. 47 (1899) (error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves). The Advisory Committee's Note points out the distinction to be made when the conviction of a third person is actually an element of the crime, e.g., 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon. FED. R. EVID. 803(22), Adv. Comm. Note.

239. See MCCORMICK §§ 255, 280, 282, 322.

240. The five hearsay exceptions which require that the declarant be unavailable are: Rule 804(b)(1), former testimony; Rule 804(b)(2), statement under belief of impending death; Rule 804(b)(3), statement against interest; Rule 804(b)(4), statement of personal or family history; and Rule 804(b)(5), the residual exceptions, discussed in text beginning at note 131, *supra*.

241. FED. R. EVID. 804(a): "'Unavailability as a witness' includes situations in which the declarant—(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of his statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

incapacitated, is beyond the reach of the court's subpoena,²⁴² effectively claims a privilege, testifies to lack of memory,²⁴³ or refuses to testify despite a court order, unless the party seeking to utilize his statement purposely induces his unavailability. The definition is so broad, however, that it necessarily encompasses the possibility of interference with an accused's right of confrontation.²⁴⁴ The Louisiana requirements for unavailability, as those in most jurisdictions,²⁴⁵ have developed in the contexts of specific exceptions and are narrower than the federal standard.²⁴⁶

242. When the proponent of a hearsay statement is unable to secure the attendance of an absent witness by process or otherwise, in order for statements under belief of impending death, against interest, or of personal or family history to be admissible, the proponent must also show that the witness's testimony could not be obtained. FED. R. EVID. 804(a)(5). For text of the Rule, see note 241, *supra*. Also, as noted by the Advisory Committee, differences in the range of process might lead to a less exacting requirement in civil cases than in criminal cases. FED. R. EVID. 804(a), Adv. Comm. Note. See, e.g., *Barber v. Page*, 390 U.S. 719 (1968); *State v. Thomas*, 290 So. 2d 690 (La. 1974); *State v. Sam*, 283 So. 2d 81 (La. 1973).

243. According to the House Judiciary Committee, the Rule represents no change in existing federal law; the judge remains free to disbelieve the declarant's testimony. H.R. REP. NO. 650, 93d Cong., 1st Sess. 15 (1973).

244. See discussion in note 127, *supra*.

245. See MCCORMICK §§ 253, 280, 282.

246. No Louisiana cases can be found in which the courts have admitted a dying declaration or a statement of pedigree other than when the declarant has died. See, e.g., *Succession of Anderson*, 176 La. 66, 145 So. 270 (1933) (to be admissible, declaration must be made by person since deceased). In a recent Louisiana Supreme Court case, a declaration against interest was admitted where the declarant was residing in England at the time of trial. *Campbell v. American Home Assur. Co.*, 260 La. 1047, 258 So. 2d 81 (1972). In another case dealing with a statement against interest, the appellate court seemingly failed to adhere to the unavailability requirement; closer analysis reveals, however, that the court may have simply confused statements against interest made by a nonparty declarant with the traditional exception for admissions of a party opponent, where unavailability is not required. *LeBlanc v. Phoenix Assur. Co.*, 158 So. 2d 256 (La. App. 4th Cir. 1963). Under FED. R. EVID. 801(d)(2), admissions are exempted from the hearsay exclusionary rule. In Louisiana, admissions are treated as exceptions to the hearsay rule. See text at note 52, *supra*. The result as to admissibility is substantially the same. Louisiana courts have been liberal in their application of the unavailability requirement for former testimony in civil cases. See, e.g., *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1928) (permanent departure from state and whereabouts unknown); *State v. Wheat*, 111 La. 860, 35 So. 955 (1903) (serious illness); *State v. New Orleans Waterworks Co.*, 107 La. 1, 31 So. 395 (1901) (loss of memory due to lapse of time). See also *Hincks v. Converse*, 38 La. Ann. 871 (1886); *Truxillo v. Casso*, 55 So. 2d 601 (La. App. 1st Cir. 1951) (testimony may be used by either party if witness is dead, absent, or for other

Statements under Belief of Impending Death

The Federal Rules not only perpetuate the controversial well-known "dying declaration" exception²⁴⁷ but broaden its previously narrow scope. Although Rule 804(b)(2)²⁴⁸ continues the conventional limitation on admissibility of dying declarations in criminal cases to homicide prosecutions,²⁴⁹ it removes the usual restrictions that the statement be that of the homicide victim and that it concern the death at issue in the proceeding. More significantly, however, it extends the exception to all civil cases. Finally, the unavailability requirement is now satisfied not only by death, but by any of the conditions under Rule 804(a),²⁵⁰ provided the declarant believed that his death was imminent when he made the statement. In Louisiana, dying declarations, though inadmissible in civil cases,²⁵¹ are admissible under a special statute in abortion as well as in homicide prosecutions;²⁵² otherwise, the Louisiana courts generally adhere to the traditional rules pertaining to this exception.²⁵³

cause cannot be produced). Cf. LA. CODE CRIM. P. art. 295. In criminal cases, Louisiana courts have narrowed the scope of absence from the jurisdiction in light of the confrontation clause. See, e.g., *State v. Thomas*, 290 So. 2d 690 (La. 1974); *State v. Sam*, 283 So. 2d 81 (La. 1973).

247. See MCCORMICK § 281.

248. FED. R. EVID. 804(b)(2): "In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."

249. The Supreme Court draft proposed to extend the dying declaration exception to all criminal cases. Fed. R. Evid. 803(b)(3) (Sup. Ct. Draft 1972). The House Judiciary Committee added the limitation to homicide cases only, with the comment that "the Committee did not consider dying declarations as among the most reliable forms of hearsay." H.R. REP. No. 650, 93d Cong., 2d Sess. 15 (1974).

It is unclear whether negligent homicide prosecutions are within the scope of the Rule. Traditionally, the exception has applied to intentional homicides only. See 5 WIGMORE § 1432.

250. For text of FED. R. EVID. 804(a), see note 241, *supra*.

251. E.g., *Marler v. Texas & Pac. Ry.*, 52 La. Ann. 727, 27 So. 176 (1900) (the court expressed its view that dying declarations given with a view toward civil proceedings might be influenced by the declarant's concern for the future welfare of his family, whereas such a motive would not usually be present in a homicide situation); *Willis v. Kern*, 21 La. Ann. 749 (1869).

252. LA. CODE CRIM. P. art. 482(B): "An indictment for manslaughter may also contain a count for abortion and the jury may convict of either offense . . . Dying declarations shall be admissible in proof of either count."

253. For a discussion of the dying declaration exception in Louisiana, see Comment, *Dying Declarations in Louisiana Law*, 22 LA. L. REV. 651 (1962).

The historical premise that underpins the trustworthiness of dying declarations is that consciousness of imminent death usually suspends the motivation to lie.²⁵⁴ Unfortunately, even when limited to homicide cases, this rationale is not only based on a dubious and unprovable assumption—that dying persons rarely lie—but it ignores the presence of dangers such as inaccurate perception, memory, and reportorial ability which could severely impair the reliability of these statements.²⁵⁵ However, the rationale degenerates even further when applied to civil actions in which the subject matter of the declaration may involve pecuniary gain for the declarant's loved ones. Under these circumstances, the reliability of dying declarations is additionally undermined by the motive to lie for self-exoneration or the future welfare of the declarant's family.²⁵⁶ For these reasons, it is submitted that the dying declaration exception would have best remained confined to its customary narrow application in homicide cases, with admissibility conditioned upon the existence of a compelling need for the statement.

Statements against Interest

Rule 804(b)(3)²⁵⁷ retains the familiar hearsay exception authorizing admission of statements against the pecuniary or proprietary interest of a nonparty declarant.²⁵⁸ The Federal Rule resolves questions concerning the meaning of "pecuniary or proprietary interest" by expressly including

254. See MCCORMICK § 282.

255. See, e.g., discussion in note 249, *supra*, cases cited in note 251, *supra*; P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE, 459 n.45 (Supp. 1975). The notion that dying declarations are reliable conflicts with the theory of the dead man rule, under which evidence of statements made by a decedent are excluded as unreliable and untestable. See MCCORMICK § 65.

256. The same argument would apply to negligent homicide prosecutions. See discussion in second paragraph of note 249, *supra*.

257. FED. R. EVID. 804(b)(3): "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 him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

258. See MCCORMICK § 276.

statements that subject the declarant to civil liability or that render invalid his claim against another. Further, in accord with the modern trend,²⁵⁹ the Rule expands the exception to encompass statements that tend to expose a declarant to criminal liability.²⁶⁰ Louisiana follows the more limited traditional view under which only statements against pecuniary or proprietary interest are admissible.²⁶¹

One customary prerequisite to admissibility which Rule 804(b)(3) does not specifically mention is that the declarant must have personal knowledge of the subject of his declaration.²⁶² The Advisory Committee's Note indicates, however, that the redactors did not intend to discard the first-hand knowledge requirement.²⁶³

Extrajudicial statements against penal interest, made by third parties, that tend to exculpate or inculcate a criminal defendant involve special problems. Rule 804(b)(3) limits the admissibility of statements against penal interest to those instances in which "corroborating circumstances clearly indicate the trustworthiness of the statement."²⁶⁴ The effect of the Rule is that an absent third party's uncorroborated statement incriminating himself and exculpating a party litigant is admissible on behalf of the party litigant in a civil case, but is inadmissible on behalf of a criminal defendant even though his life might be at stake.²⁶⁵ On the other hand,

259. See generally *id.* § 278.

260. The Supreme Court draft of the Federal Rules included within the scope of this exception statements tending to make the declarant an object of hatred, ridicule, or social disapproval, 56 F.R.D. 183, 321 (1972), but this provision was deleted by the House Judiciary Committee as affording insufficient guarantees of reliability. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 16 (1973). For text of Supreme Court draft of Rule 804(b)(3), see note 266, *infra*.

261. See, e.g., *Campbell v. American Home Assur. Co.*, 260 La. 1047, 258 So. 2d 81 (1972); *State v. Nash*, 169 La. 947, 960-61, 126 So. 434, 438 (1930); *State v. Jones*, 127 La. 694, 53 So. 959 (1911); *State v. Young*, 107 La. 618, 31 So. 993 (1901). But see *State v. Morrow*, 260 La. 72, 77-78, 255 So. 2d 78, 80 (1971) (dissenting opinion taking the view that declarations against penal interest should also be admissible).

262. See MCCORMICK § 276.

263. See FED. R. EVID. 803, Adv. Comm. Note.

264. The restriction does not apply in civil cases.

265. Under the rationale of *Chambers v. Mississippi*, 410 U.S. 284 (1973), such statements might be allowed on behalf of the defendant even when the declarant is available. In *Chambers*, however, there was additional corroborating evidence. Also, FED. R. EVID. 607 abandons the voucher rule

the Rule expresses no limitation concerning hearsay statements that jointly incriminate both the unavailable declarant and the accused despite the fact that their admissibility would be highly suspect under confrontation principles.²⁶⁶

Conclusion

Rules 803 and 804 expand the admissibility of hearsay evidence significantly beyond the scope of the rules adhered to in most jurisdictions, including Louisiana. The redactors tempered the extensiveness of the Rules, however, by couching the exceptions in terms of exemption from the general prohibition of the hearsay rule, rather than in positive terms of admissibility. Thus the Rules incorporate means whereby

which precludes re-occurrence under the Federal Rules of the situation which resulted in a denial of due process under *Chambers*.

266. See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965). Legislative history of Rule 804(b)(3) indicates there was much controversy concerning the treatment of third-party hearsay statements inculpatory and exculpatory of an accused and a lack of any definite consensus regarding the formulation of the Rule that was ultimately adopted. As originally drafted, this Rule read: "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interests, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. This example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." 46 F.R.D. 161, 378 (1969); 51 F.R.D. 315, 438-39 (1971). In the Supreme Court draft, the Advisory Committee deleted the concluding sentence and replaced it with the following: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated." 56 F.R.D. 321 (1972). The House Judiciary Committee expanded the corroboration requirement to its present wording (see note 257, *supra*) and replaced the sentence excluding inculpatory statements. See H.R. 5463, 93d Cong. 2d Sess. (1974); H.R. REP. NO. 650, 93d Cong., 1st Sess. 16-17 (1973). The Senate Judiciary Committee, however, deleted the latter sentence, explaining that it was doing so in order to avoid the codification of constitutional principles. S. REP. NO. 1277, 93d Cong., 2d Sess. 21-22 (1974). The Committee's argument is specious, however, in light of the fact that other such principles have been codified in the Federal Rules (see, e.g., note 238, *supra*), and since the exclusion would in fact have gone further than constitutionally mandated, the provision was not merely one which incorporated a constitutional principle, but rather, one which reflected a determination to implement the underlying policy of the Constitution and thus ought to have been codified.

the court can exclude evidence fitting into a hearsay exception when it lacks sufficient reliability under the particular circumstances of an individual case. Because most of the exceptions apply so broadly to both civil and criminal cases, the courts will have to exercise even greater discretion when the criminal defendant's right of confrontation is involved.

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