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COUNTY OF WAYNE**

THE LAW OF HEARSAY

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**HEARSAY, PART I:
WHAT IT IS, AND WHAT IT ISN'T**

HEARSAY, PART I: WHAT IT IS, AND WHAT IT ISN'T

Preface

Very frequently evidence sought to be admitted in a criminal case by either the prosecution or the defense takes the form of statements or conduct by an individual who is not presently on the stand. In making affirmative use of this sort of evidence, counsel must, then, know what it is he or she wishes to prove with the evidence, and whether the rules of evidence permit use of the out-of-court statement or conduct to make the point. Should there be an objection from the other side, counsel must be prepared to defend its position persuasively. Recent decisions by the United States Supreme Court with regard to the Confrontation Clause and the use of out-of-court statements from an unavailable declarant have changed the law markedly.

Distinguishing hearsay statements from nonhearsay statements, particularly where the statement *seems* to be and would be hearsay but for the *use* to which it is being put, as well as understanding the various hearsay exceptions where the statement used *is* hearsay but nonetheless admissible under the rules of evidence, is not infrequently quite difficult. The focus of this discussion here is the distinction between hearsay and nonhearsay use of out-of-court statements.

*The theory of the hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but **without reference to the truth of the matter asserted**, the hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the hearsay rule.*

VI Wigmore, *Evidence* § 1766, p.250 (Chadbourn Revision)

I. Introduction: the Three Kinds of Out-of-Court Statements

- A. **The “General” Definition of Hearsay.** One must determine whether an out-of-court statement or conduct falls within or without the “general” definition of hearsay. Critical to the inquiry is *the “work” to which the statement or conduct is to be put*; that is, that which it goes to prove.
- B. **Exclusions From the General Definition of Hearsay.** If an out-of-court statement or conduct does fall within the “general” definition of hearsay, it may nonetheless *not* be hearsay, rather than being a hearsay exception, because the rule of evidence simply *defines* the sort of statement or conduct involved as not being hearsay.
- C. **Hearsay Exceptions.** If an out-of-court statement or conduct falls within the “general” definition of hearsay, and is not “defined out” of the rule, it may nonetheless be admissible if it falls within one of the exceptions to the hearsay rule.

II. The “General” Definition of Hearsay

A. The Rule of Evidence: MRE 801(a), (b), and (c).

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.

B. The Rule Analyzed: “Statements” and “Assertions”

- (1) **“Assertions”:** critical to an understanding of the hearsay rule is the understanding that the out-of-court statement or conduct at issue must be an “*assertion*.” If the out-of-court statement or conduct involved is not an assertion then it *cannot* be hearsay. An assertion is *a declaration of fact, capable of being true or false*.

MRE 801(a)

Michigan Court Rules Practice: Evidence, § 801.2, p.7-8

United States v Lewis, 902 F2d 1176 (CA 5, 1990)

- (2) **The Intention of the Declarant/Actor:** the out-of-court declaration or conduct is not a statement because not an assertion unless “*intended* by the person (making the statement/engaging in the conduct) as an assertion.”NOTE: there is a split of authority on the requirement of intentionality for written/oral assertions). Thus, it is quite possible, particularly in the case of conduct, that words or conduct occurring out-of-court are admissible as circumstantial proof of a fact because those words or that conduct are *expressive* of a fact but were plainly not *intended* as an assertion of fact at all. In such a case, the underlying rationale of the rule excluding hearsay—that the “credit of the assertor,” as put by Wigmore, is the necessary basis to credit an assertion of fact, and must be subject to cross-examination—is not involved.

Michigan Court Rules Practice: Evidence, § 801.2, p.8

People v Davis, 139 Mich App 811 (1984)

People v Watts, 145 Mich App 760 (198t)

People v Stewart, 397 Mich 1 (1976)

See 2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.3

5 Weinstein, *Evidence* (2nd ed), § 801.02(2)(c), p.801-10

Advisory Committee Note to MRE 801(a)

- (3) **Burden of Persuasion:** where a verbal declaration or nonverbal conduct is claimed to be assertive and therefore within the hearsay rule, the burden of proof regarding the point is on the party making the objection to the evidence, and any ambiguity regarding whether an assertion was intended is to be resolved *against* a finding that an assertion was intended and thereby *in favor* of the admission of the evidence.

People v Davis, 139 Mich App 811 (1984) (citing Advisory Committee Note)

People v Watts, 145 Mich App 760 (1985)

People v Gwinn, 111 Mich App 223 (1981)

Michigan Court Rules Practice: Evidence, § 801.2, p.9

See 2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.3, p.203

4 Weinstein, *Evidence* (1st ed), § 801(a)(02), p.801-67

Advisory Committee Note to MRE 801(a)

C. Verbal and Nonverbal Assertions

- (1) **Assertive Verbal Expressions:** verbal conduct is ordinarily intended as a positive factual assertion, and because so intended, meets the definition of a “statement” so as to be hearsay if offered for its truth (and if falling within none of the defined “exclusions” from the hearsay rule, to be discussed subsequently). Where positive assertions of fact are without the hearsay rule it is because they are not offered for the truth. Further, some verbal conduct simply has no factual content, and is by *definition* relevant only if offered for something other than the truth of its “content” (e.g. “hello,” “good luck”).

Michigan Court Rules Practice: Evidence, § 801.2, p.8
See 4 Weinstein, *Evidence* (1st ed), § 801(c)(01), p.801-69
VI Wigmore, *Evidence* (Chadbourn rev), § 1766

- (2) Nonassertive Verbal Expressions and Implied Verbal Assertions:** some verbal conduct is not intended as a positive assertion of fact but contains an implied assertion or assertions. Federal case law holds that implied assertions do not fall within the definition of statements. For example, if an individual were overheard to say “Joe has cocaine” this would be an assertion of fact falling within the rule, but if that person were overheard asking “does Joe still have any stuff?” this would be admissible to prove Joe possessed cocaine (subject to circumstances giving meaning to “stuff”). Exclamations and questions commonly fall into this category.

People v Jones, 228 Mich App 191 (1998)(rejecting doctrine of implied assertions)

United States v Long, 905 F2d 1573 (CA DC, 1990)(unintended implicit messages are not within the hearsay rule)

Advisory Committee Note to FRE 801(a)(even “verbal conduct which is assertive” but which is “offered as a basis for inferring something other than the matter asserted” is also excluded from the definition of hearsay “by the language of subdivision (c)” because not offered for the “truth of the matter asserted”)

But see *People v Lucas*, 188 Mich App 554 (1991)(but statements over telephone described as assertions not quoted in opinion)

Question by individual to returned pager, "Is this Kenny?" not hearsay. "...it might be possible to imply that the declarant believed [defendant] was in possession of the pager and therefore he was the person responding by telephone to the declarant's message. The mere fact, however, that the declarant conveyed a message with her question does not make the question hearsay. ...Rather, the important question is whether an assertion was intended.”

United States v Jackson, 88 F3d 845, 847 -848 (CA 10, 1996)

- (3) Assertive Conduct:** MRE 801(a) itself provides that nonverbal conduct is a statement within the meaning of the rule but only if “*intended by the person as an assertion.*” Plainly, conduct, such as pointing to a person to identify them in a lineup, may be the equivalent of words, and intended as an assertion.

Michigan Court Rules Practice: Evidence, § 801.2, p.9
2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.2, p.202
2 McCormick, *Evidence* (4th ed), § 250, p.107
United States v Abou-Saada, 785 F2d 1 (CA 1, 1986)

(4) Nonassertive Conduct and Implied Assertions: as with verbal conduct, implied assertions by conduct are not covered by the hearsay rule as not within the definition of “statement.” The Advisory Committee Note states that nonverbal conduct “may be offered as evidence that the person acted as he did because of his *belief* in the existence of the condition sought to be proved, *from which belief the existence of the condition may be inferred*. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept.” Nonetheless, this nonverbal conduct is not included within the definition of “statement” because though “evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the act, ...the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.” A common example is that observation of a person stepping outside and opening an umbrella is admissible over a hearsay objection to prove that it was raining at the time.

People v Davis, 139 Mich App 811 (1984) (child breaking into tears when asked about defendant’s conduct with her—the ultimate charge was sexual assault—held not an assertion, citing Advisory Committee Note)

Advisory Committee Note to FRE 801(a)

People v Gwinn, 111 Mich App 223 (1981)

See *People v McReavy*, 436 Mich 197 (1990)(demeanor of accused during interrogation)

See *People v Schollaert*, 194 Mich App 158 (1992)(demeanor of accused when arrested)

2 McCormick, *Evidence* (4th ed), § 250, p.106-117

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.3, p.202-207

United States v Butler, 763 F2d 11 (CA 1, 1985)

D. Statements/Assertions Not Offered For The Truth of The Matter Asserted

(1) Verbal Acts: a statement is a verbal act when the utterance is itself an “operative fact that gives rise to legal consequences.” For example, where the crime is threatening a federal judge, the threats themselves are not offered to prove the truth of the matter asserted, but have independent legal significance giving rise to legal consequences.

Michigan Court Rules Practice: Evidence, § 801.2, p.11-12

2 McCormick, *Evidence* (4th ed), § 249, p.101

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.5, p.208-214

VI Wigmore, *Evidence* (Chadbourn rev), § 1770

United States v Jones, 663 F2d 567 (CA 5, 1986)

- (2) Verbal Part Of An Act:** a statement is a verbal part of an act when it “accompanies conduct to which it is desired to attach some legal effect.” As stated by McCormick, “the bare physical act of handing over money to another person is susceptible of many interpretations. The possibilities include loan, payment of a debt, bribe, bet, gift, (and robbery)....Explanatory words which accompany and give character to the transaction are not hearsay.”

Michigan Court Rules Practice: Evidence, § 801.2, p.11-12

State v Mesk, 123 Mich App 111 (1983)

2 McCormick, *Evidence* (4th ed), § 249, p.102

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.5, p.214

VI Wigmore, *Evidence* (Chadbourn rev), § 1772

United States v Gaines, 726 F Supp 1457 (ED Pa, 1989), aff’d 902 F2d 1562 (CA 3, 1989)

- (3) State Of Mind Of The Listener:** very common in criminal cases is the use of statements not for the truth of the matter asserted, but as bearing on the conduct of an individual who heard or became aware of the statement, so as to explain it. For example, that an officer proceeded to a location because of a radio run is admissible, as is information going to probable cause. In essence, where going to knowledge, belief, good faith, reasonableness, diligence, motive, and so on, statements are admissible as they go to the state of mind of the listener without regard to their truth.

People v Eggleston, 148 Mich App 494 (1986)

People v Lewis, 168 Mich App 255 (1988)

People v Eady, 409 Mich 356 (1980)(demonstrating that fact of receipt of dispatch by police may be admissible but contents may be excluded as unduly prejudicial and unnecessary to show why officers went to the scene)

Michigan Court Rules Practice: Evidence, § 801.2, p.13-14

2 McCormick, *Evidence* (4th ed), § 249, p.103-106

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.5, p.215-224

VI Wigmore, *Evidence* (Chadbourn rev), § 1789

United States v Blandina, 895 F2d 392 (CA 7, 1989)

United States v Harris, 942 F2d 1125 (CA 7, 1991)

United States v Shepherd, 739 F2d 510 (CA 10, 1984)(instructions are not offered for truth)

United States v Vizcarra-Porras, 889 F2d 1435 (CA 5, 1989)(informant’s statements admissible to show reasonableness of officer where entrapment raised)

United States v Green, 887 F2d 25 (CA 1, 1989)

- (4) **Impeachment:** where the out-of-court statement is offered to impeach credibility it is not offered for the truth of the matter asserted by definition (unless also falling within a hearsay exclusion or exception).

MRE 607

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.5, p.225

III. Exclusions from the General Definition of Hearsay

A. The Rule of Evidence: MRE 801(d)

Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) **Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) **Admission by Party Opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of 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 the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a conspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

B. Exclusions From The General Definition Of Hearsay: Prior Inconsistent Statements

- (1) **Alteration Of The Common Law Rule:** the common law rule did not permit substantive use of inconsistent statements of any sort, and thus the federal rule is a modification of the common law, and is limited to inconsistent statements given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. This limitation is *not* constitutionally required, and some jurisdictions allow all inconsistent statements of a testifying witness as substantive evidence.

Michigan Court Rules Practice: Evidence, § 801.7, p.15

California v Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (1979)

2 McCormick, *Evidence* (4th ed), § 251, p.117-121

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.11, p.253-257

VI Wigmore, *Evidence* (Chadbourn rev), § 1789

- (2) **Declarant Must Testify And Be “Subject To Cross-Examination:** “a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.” Because a defendant is guaranteed under the Confrontation Clause only “an opportunity for effective cross-examination, not cross-examination that is effective,” so long as the declarant testifies and is subject to cross-examination it matters not whether the declarant remembers making the prior statement but fails to remember its content, fails to remember making the prior statement, or denies making the prior statement completely.

United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988)

- (3) **The Statement Must Be Inconsistent With The Declarant’s Testimony:** generally speaking, the test for inconsistency which is applied with regard to impeachment with prior inconsistent statements should be used to determine whether the prior statement is inconsistent. It may be questioned whether a prior statement of the event is inconsistent with present testimony of lack of recollection of the underlying event (e.g. a witness gives a statement that “I saw a green Ford pull away from the bank” and testifies at trial “its been so long I don’t remember anything that happened that day”). Because of the tendency of “unwilling or untruthful witnesses to seek refuge in forgetfulness,” use of the prior statement will ordinarily be permitted (and in cases where the prior statement was itself not only under oath, but subject to cross-examination, the prior recorded testimony exception would suffice to admit the prior testimony).

See 2 McCormick, *Evidence* (4th ed), § 251, p.120-121

See also 1 McCormick, *Evidence* (4th ed), § 34 (regarding requirement of inconsistency in prior statements used for impeachment)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.11, p.253-257

United States v Jones, 808 F2d 561 (CA 7, 1986)

United States v Bonnett, 877 F2d 1450 (CA 10, 1989)

United States v Gravely, 840 F2d 1156 (CA 4, 1988)

United States v Williams, 737 F2d 594 (CA 7, 1984)

C. Exclusions From The General Definition Of Hearsay: Prior Consistent Statements

- (1) **Substantive Evidence:** because excluded from the hearsay rule, prior consistent statements are not only corroborative but substantive evidence, so long as the foundation for admissibility is met.

Michigan Court Rules Practice: Evidence, § 801.8, p.16-18
2 McCormick, *Evidence* (4th ed), § 251, p.121-122

- (2) **Motive To Fabricate:** it is now clear that when the prior consistent statement is offered “to rebut an express or implied charge” of “recent fabrication, improper influence or motive,” the prior statement must itself have been made *before* the motive or influence came into existence or before the time of the alleged fabrication.

Tome v United States, 513 US 150, 130 L Ed 2d 574, 115 S Ct 696 (1995)

People v Rodriquez, 216 Mich App 329 (1996)

People v Brownridge, 225 Mich App 291 (1997)(rev'd on other grounds, 459 Mich 456 (1999))

See also 4 Wigmore, *Evidence* (Chadbourn rev) §1128, p.268

United States v Acker, 52 F3d 509 (CA 4, 1995)

See *United States v Reliford*, 58 F3d 247 (CA 6, 1995)

- (3) **Not Limited To Rebutting The Specific Inconsistency:** prior consistent statement use is not limited to statements directly relating to inconsistencies brought out on cross-examination. So long as there is a suggestion of recent fabrication a prior statement before the charge of recent fabrication is permitted where it is generally consistent with the testimony at trial.

United States v Casoni, 950 F2d 893 (CA 3, 1991)

- (4) **Manner Of Proof:** the prior statement is provable either by the declarant himself, or by any other person with personal knowledge of it. If the latter method is employed, then because the rule requires that the declarant be subject to cross-examination *concerning the prior statement* the witness/declarant must be subject to recall for cross-examination.

See generally 2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.12, p.269-270

D. Exclusions From The General Definition Of Hearsay: Statements of Identification

- (1) Foundational Requirements:** it is required that the declarant testify at the trial or hearing and be subject to cross-examination. As indicated previously, “subject” to cross-examination does not mean successful cross-examination. That the witness claims a lack of memory regarding the underlying event or the statement of identification does not preclude admission of the prior statement; indeed, if the witness fails to identify in court and *denies* making the prior statement, the statement is still admissible. The legislative history, as well as the plain language of the text of the rule, supports this interpretation. Note: there is no requirement of “immediacy” with regard to the identification.

People v Malone, 445 Mich 369 (1994)

People v Whitfield, 214 Mich App 348 (1995)

United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988)

2 McCormick, *Evidence* (4th ed), § 251, p.124

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.13, p.273-287

- (2) Method Of Proof:** given that the prior statement of identification is admissible even if repudiated or denied, it is clear that the declarant is not the only permissible method of proof; any witness to the prior statement may testify to it, whether the declarant affirms the prior statement, denies or, or fails to remember it. Thus, it is quite common for police officers to testify to an identification made at a lineup, for example.

People v Malone, 445 Mich 369 (1994)

United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (1988)

2 McCormick, *Evidence* (4th ed), § 251, p.124

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.13, p.273-287

United States v Lewis, 565 F2d 1248 (CA 2, 1977)

United States v Jarrad, 754 F2d 1451 (CA 9, 1985)

United States v O’Malley, 796 F2d 891 (CA 7, 1986)

E. Exclusions From The General Definition Of Hearsay: Admissions--The Statements Of The Accused

- (1) Party-Opponent:** only the *opposing* party may admit a statement by a party. In a criminal case, then, the prosecution may admit a statement of the defendant, but the defendant in a criminal case may not put into evidence his or her own self-serving statements nor those of the victim, as the victim is not a party opponent .

People v Perryman, 89 Mich App 516 (1979)(cannot put in own statements)

People v Vanderford, 77 Mich App 370 (1977)(cannot put in own statements)

People v Carson, 87 Mich App 163 (1978)(defendant cannot put in victim's statements)

2 McCormick, *Evidence* (4th ed), § 254, p.139-143

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.15, p.293-296

- (2) Need Not Be Against Interest When Made:** the requirement for admissibility is relevance; an admission need not be against interest when made. Declarations against penal interest are a hearsay exception, with particular foundational requirements.

See *Shields v Reddo*, 432 Mich 761 (1989)

People v Moncure, 94 Mich App 252 (1979)

People v Brown, 120 Mich App 765 (1982)

Michigan Court Rules Practice: Evidence, § 801.10, p.18-20

2 McCormick, *Evidence* (4th ed), § 254, p.143 (noting that the phrase "admission against interest" still "continues to appear with embarrassing frequency")

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.15, p.294-295

United States v Turner, 995 F2d 1357 (CA 6, 1993)

- (3) Testimonial Qualifications:** the ordinary rules of testimonial qualification of a witness do not apply to party admissions; neither mental competency nor firsthand knowledge are required (the overall theory of the exception is: "you said it, you explain it"). The rule also allows admissions which are in the form of opinion.

2 McCormick, *Evidence* (4th ed), § 255, p.144-146; § 256, p.146-147

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.16, p.296-297; § 801.24, p.326-331

- (4) False Exculpatory Statements:** false exculpatory statements are admissible and are circumstantial evidence of guilt.

People v Dandron, 70 Mich App 439 (1976)

People v Cutchall, 200 Mich App 396 (1993)

People v Wackerle, 156 Mich App 717 (1986)(prosecutor must be allowed to prove falsity of statements)

People v Wolford, 189 Mich App 478 (1991)(instruction that false exculpatory statement may be considered evidence of guilt is proper)

- (5) Admissions By Conduct:** conduct of the accused such as flight to avoid arrest, using an alias, changing appearance, resisting arrest, attempts to suborn perjury or destroy evidence or otherwise obstruct justice, are often admitted under the admissions exclusion as “admissions by conduct.” Though this will serve quite well to admit the evidence, these acts are not intended as assertions, and technically are not hearsay for that reason.

People v Hooper, 50 Mich App 186 (1973)

People v Taylor, 66 Mich App 456 (1975)

People v Dixon, 84 Mich App 675 (1978)

People v Clark, 124 Mich App 410 (1983)

People v Cutchall, 200 Mich App 396 (1993)

People v Coleman, 210 Mich App 1 (1995)

See *People v McReavy*, 436 Mich 197 (1990)(demeanor of accused during interrogation)

See *People v Schollaert*, 194 Mich App 158 (1992)(demeanor of accused when arrested)

2 McCormick, *Evidence* (4th ed), § 263, p.181-184, see fn.3

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.3 p.206-207

- (6) Admissions By Conduct/Refusal To Act:** refusing to obey lawful commands of the police or of a court may be considered an admission by conduct (or, correctly viewed, as nonassertive conduct), such as where a defendant refuses to obey a search warrant for blood, or refuses to stand in a lineup. Where there is no right to refuse, evidence of refusal is admissible if relevant.

People v Abernathy, 153 Mich App 567 (1986)

People v Benson, 180 Mich App 433 (1989)

People v Williams, 181 Mich App 551 (1989)

F. Exclusions From The General Definition Of Hearsay: Admissions—Statements By Representatives Or Authorized Agents

- (1) Proof Of Agency Or Authorization:** this is a question for the court to decide under MRE 104(a), regarding which the rules of evidence do not apply.

United States v Flores, 679 F2d 173 (CA 9, 1982)

2 McCormick, *Evidence* (4th ed), § 259, p.160

- (2) **Attorneys And Pleadings:** McCormick states that an attorney in a lawsuit “has *prima facie* authority to make relevant judicial admissions by pleadings, by oral or written stipulations, or by formal opening statement, which unless allowed to be withdrawn are conclusive in the case.

See *People v Von Everett*, 156 Mich App 615 (1986)(regarding alibi notice as admission by agent)

2 McCormick, *Evidence* (4th ed), § 259, p.163-164

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.23, p.324-326

United States v McKeon, 738 F2d 26 (CA 2, 1984)

See “Evidentiary Admissions Of Defense Counsel In Federal Criminal Cases,” 24 Am Cr L Rev 93 (1986)

G. Exclusions From The General Definition Of Hearsay: Admissions—Adoptive Admissions

- (1) **Words Or Conduct:** an easier case for adoption or belief in truth of the assertion of another is made where the individual alleging adopting the assertion has responded in some manner either through conduct or words. The question of adoption is treated by commentators as one of conditional relevance under MRE 104(b) rather than one of a preliminary question of admissibility under MRE 104(b), which leaves the question of adoption for the jury rather than the judge so long as the judge determines that the jury *could* find by a preponderance of the evidence that the statement was adopted.

People v Dietrich, 87 Mich App 116 (1978)

People v Godboldo, 158 Mich App 603 (1987)

People v Bushard, 444 Mich 384 (1993)

2 McCormick, *Evidence* (4th ed), § 261, p.175

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.20, p.302-305

- (2) **Silence:** demonstration of adoption by silence is difficult in any case, and more difficult in criminal cases. While ordinarily some participation in the conversation in a manner indicating assent is required, there are cases which find adoption through silence in criminal cases, so long as Fifth Amendment or due process concerns are not violated (that is, the silence is not after Miranda warnings).

People v Dietrich, 87 Mich App 116 (1978)

People v Godboldo, 158 Mich App 603 (1987)

2 McCormick, *Evidence* (4th ed), § 262, p.176-178

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.21, p.307-312

United States v Ojala, 544 F2d 940 (CA 8, 1976)

United States v Schaff, 948 F2d 501 (CA 9, 1991)

H. Exclusions From The General Definition Of Hearsay: Admissions—Statements of Coconspirator

- (1) **The “In The Course Of And In Furtherance” Requirement:** “statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirator abreast of an ongoing conspiracy’s activities are admissible.” Thus, statements made prior to the conspiracy and after its termination are not admissible against other than the declarant (where the admissions exclusion would apply). Upon proper proof, statements related to disposition of the fruits of the underlying offense or concealment of it are admissible if these activities are demonstrated to be part of the overall agreement which forms the conspiracy.

Michigan Court Rules Practice: Evidence, § 801.15, p.127-31

People v Ayoub, 150 Mich App 150 (1985)

People v Hall, 102 Mich App 483 (1980)

People v Centers, 141 Mich App 346 (1985)(vacated on other grounds, 422 Mich 925)

People v Cadle, 204 Mich App 646 (1994)(statement after conspiracy ended inadmissible)

2 McCormick, *Evidence* (4th ed), § 259, p.165-168

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.25, p.331-350

United States v Arias-Villanueva, 998 F2d 1491 (CA 9, 1993)

- (2) **Foundational Requirements And The Decisionmaker:** proof of the conspiracy, its scope, and whether the statements were in its course and in furtherance of it are required as foundational matters. These matters are for determination by the court under MRE 104(a), which is to determine the matter by a preponderance of the evidence. The rules of evidence do not apply to preliminary questions of admissibility, so in other jurisdictions the statement sought to be admitted may itself be considered on the question of proof of these foundational matters; however, in Michigan the rule itself requires *independent* proof of the conspiracy.

People v Vega, 413 Mich 773 (1982)

People v Gay, 149 Mich App 468 (1986)

People v Rockwell, 188 Mich App 405 (1986)

2 McCormick, *Evidence* (4th ed), § 259, p.165-168

2 Graham, *Handbook of Federal Evidence* (4th ed), § 801.25, p.331-350

United States v Gordon, 844 F2d 1397 (CA 9, 1988)

United States v Sepulveda, 15 F3d 1161 (CA 1, 1993)

IV. The Intersection of Several Hearsay Exceptions

A. The Former Testimony Exception And The Prior Inconsistent Statements Under Oath Exclusion

- (1) **Former Testimony Requirements:** former testimony may be used as a hearsay exception where given at another hearing of the same or a different proceeding, or in a deposition in the course of the same or another proceeding, so long as the party against whom the testimony is now offered (the accused) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Critically, it is also required that the declarant be *unavailable*.

MRE 804(b)(1)

MRE 804(a) (defining unavailability)

- (2) **The “Unavailable” Testifying Declarant:** when a prior inconsistent statement under oath is employed with regard to a witness on the stand, the witness must, as previously indicated, be “subject to cross-examination” concerning the statement, and convenient memory lapses complicate the matter, though the prior inconsistent statement under oath should still be admissible. Where that statement was given in a proceeding where the accused had an opportunity and similar motive to develop the testimony, this argument can be short-circuited by simply employing the former testimony exception, as selective memory will ordinarily be sufficient to demonstrate unavailability.

MRE 804(a)(3)

2 McCormick, *Evidence* (4th ed), § 253, p.132-133

2 Graham, *Handbook of Federal Evidence* (4th ed), § 804.00, p.594

B. The “State of Mind Exception” And Statements Not Offered For The Truth Of The Matter Asserted

- (1) **The State Of Mind Exception:** a hearsay exception (meaning one must be dealing with a hearsay statement, meaning an intended assertion, *offered for its truth*) exists for 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*¹ unless it relates to the execution, revocation, identification, or terms of declarant's will.” The availability of the declarant is immaterial.

¹ See Part Hearsay, Part II for a discussion of this limitation.

MRE 803(3)

2 McCormick, *Evidence* (4th ed), § 273-276, p.226-245

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.398-412

(2) Statements Not Offered For The Truth Of The Matter Asserted: the exception is sometimes employed when what is actually meant is that the statement is not hearsay because it is not offered for the truth of the matter contained in the assertion. As Graham notes, however, “theoretical difficulties abound with respect to most of the arguments advanced for classifying such statements as not hearsay,” but “fortunately...(this) is of no practical importance, since declarations of this nature are admissible in any event pursuant to Rule 803(3).”

2 McCormick, *Evidence* (4th ed), § 273-276, p.226-245

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.398-412

**HEARSAY, PART II:
EXCEPTIONS TO THE HEARSAY RULE WHERE AVAILABILITY
OF THE DECLARANT IS IMMATERIAL**

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Preface

As was observed in Hearsay, Part I: What It Is And What It Is Not, it often happens in the trial of a case that a witness will testify, or begin to testify, as to something said out of court, perhaps by the witness him or herself. The circumstances under which those out of court declarations simply fall *without* the hearsay rule were the topic of Hearsay, Part I. But it is regularly the case that the out of court declaration *does* fall within the hearsay rule, *unless* it is *excepted* from its operation by one of the hearsay exceptions contained in the Michigan Rules of Evidence. There are two categories of hearsay exceptions: those regarding which the availability of the declarant is immaterial, and a much smaller group of exceptions where demonstration of the unavailability of the declarant is required. The topic of discussion here is the first category, where unavailability need not be shown. Implicit in this discussion is that the statement under consideration is *within* the hearsay rule—it is an assertion made out of court, offered for the truth of the assertion it makes.

An Introductory Note on Crawford v Washington and Confrontation

There are hearsay exceptions—discussed here—where the availability of the declarant is immaterial as a matter of the law of evidence. All this was formerly required, then, was that the foundational requirement of these rules be met. But now the Confrontation Clause has been held implicated whenever statements are admitted made by declarants who do not appear and testify. *Crawford v Washington*, 543 U.S. 1095; 125 S. Ct. 961; 160 L. Ed. 2d 909 (2005). And so the notion that the availability of the declarant is “immaterial” with these exceptions has lost some force, for, with some of them, on at least some occasions, if the declarant is not a witness then the out-of-court statement of that declarant is not admissible *even if* the foundation of the rule at issue is met, as to admit it would violate the Confrontation Clause. Approach to these exceptions must be taken bearing developing Confrontation Clause principles in mind.

Cardinal Principle: *the Confrontation Clause is only implicated:*

- *when an out-of-court statement of an unavailable declarant is admitted as substantive evidence, AND*
- *that statement is “testimonial” (not that it is used testimonially at trial, but that it was “testimonial” in nature when **made**).*

No hard and fast rule for determination of when an out-of-court statement is testimonial has been developed. "Testimony" is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Included among testimonial statements are "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior

testimony, or confessions." Statements taken by police officers in the course of interrogations are testimonial under even a narrow standard.

Developments since *Crawford* will be discussed below as appropriate.

I. “Unpremeditated” Statements: Statements Regarding Physical, Mental And Emotional “events”

A. **MRE 803(1)/Present Sense Impression: The Rule.** “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

(1) **Theory.** The theory of “trustworthiness” with this exception is that a contemporaneous statement regarding an event or condition is unlikely to be the product of “deliberate or conscious misrepresentation.”

Advisory Committee Note to FRE 803(1)
2 McCormick, *Evidence* (4th Ed.), § 271, p.211-212

(2) **Participant or Bystander.** The declarant may be either a participant in the event or condition described or explained, or simply a bystander. There is no requirement of participation.

See Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence* § 803.1, p.108
Advisory Committee Note to FRE 803(1)(“*Participation* by the declarant is not required: a non-participant may be moved to describe what he perceives....”)

(3) **Personal Knowledge.** Personal knowledge of that contained in the statement on the part of the *declarant* is required, as implicit in the requirement that the statement explain or describe an event or condition made after the *declarant perceived it*. There is, however, no requirement that the *witness on the stand recounting the statement* have any actual knowledge, and the rule does not require an available declarant.

See *Bemis v Edwards*, 45 F3d 1369 (CA 9, 1995) (personal knowledge required on the part of the declarant; statement inadmissible where there was no showing that 911 caller had personal knowledge of that reported)
See *United States v Blakey*, 607 F2d 779 (CA 7, 1979)
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.1, p.387-388

(4) “Describing Or Explaining An Event Or Condition.”

- (a) Generally.** While a statement which does not describe an event or condition even though evoked or caused by that event or condition may be admissible as an excited utterance, it is not admissible under this exception.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.1, p.111

Advisory Committee Note to FRE 803(1)(as compared to the excited utterance exception, present sense impression has a shorter permissible time lapse and a narrower breadth of subject matter)

- (b) Evaluative statements.** Evaluative statements or opinions do *not* “explain or describe” a condition or event. For example, to say that someone “was confused” is an evaluation of their thought process, and does not fall within the exception.

Vitek Systems v Abbott Laboratories, 675 F.2d 190, 194 (CA 8, 1982)

- (c) Identifications.** Contemporaneous statements of identification may be admissible (this is important because the statements of identification exclusion from hearsay in MRE 801(d)(1)(C), used for lineup and photo showup identifications, requires an available declarant).

United States v. McElroy 587 F.3d 73, 86 (CA 1, 2009)

United States v. Delaplaine, 778 F.2d 570, 574 (CA 10, 1985)

United States v. Earley, 657 F.2d 195, 198 (CA 8, 1981)

Jones v. State, 780 N.E.2d 373, 376-77 (Ind.2002)

- (5) Hearsay Within Hearsay.** While Dean Robinson observes that this exception may be applied to “contemporaneous handwritten notes of meetings and telephone conversations” as nothing in the rule requires “that the ‘statement’ be oral, and nothing requires the ‘event’ described to be something other than a conversation,” such use of the exception could often run afoul of hearsay problems in that if the notes reflect statements which are themselves hearsay, a second hearsay exception would be required to justify admission of this “hearsay within hearsay.”

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.1, p.110-111

- (6) **Timing and the “Immediately Thereafter” Requirement.** Given the theory of reliability of present sense impression—that a contemporaneous statement regarding an event or condition is unlikely to be contrived or misrepresented—some degree of rigor regarding the time element is required. But that the statement must have been made by the declarant “while perceiving” the event or condition (a contemporaneous statement), or “immediately thereafter” does *not* mean *instantly* thereafter; rather, a “slight lapse” of time is permitted.

Advisory Committee Note to FRE 803(1) (“With respect to the time element, (the exception) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable”)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.1, p.386

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.1, p.109-110

Though the first case in Michigan interpreting the exception held that “immediately” means “instantly,” the delay there was as long as 30 minutes, and subsequent cases have not followed the “instantly” interpretation.

Hewitt v Grand Trunk W. R. Co, 123 Mich App 309 (1983) (requiring the statement be made “instantly” after the event or condition was perceived)

Johnson v White, 430 Mich 47 (1988) (allowing statement made as much as four minutes after perception of event)

People v Jensen, 222 Mich App 575 (1997)(next day too long)

See also *Berryman v K Mart*, 193 Mich App 88 (1992)(“immediately thereafter” is not synonymous with “instantly thereafter”)

People v Slaton, 135 Mich App 328 (1984)

People v Cross, 202 Mich App 138 (1993)

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.1, p.109-110

(7) **Timing Examples:**

Officer in pursuit of defendant saw him bend down and appear to place something on the ground in a backyard. On the officer’s arrival in the yard a minute later, and his observation of money and a rock of cocaine on the ground, a six year old girl in the yard said “That man put that there.” When asked if the man was the man fitting the description of the defendant, the girl said “yes.” Held admissible under MRE 803(1), as made “immediately thereafter” the event observed.

People v Cross, 202 Mich App 138 (1993)

Immediately upon the arrival of the officer at the scene, one family member blurted out that the defendant was threatening to kill members of her family; also, the officer observed the defendant at that moment in a heated argument with his sister. Held that the statement concerned an ongoing event, and was admissible as present sense impression.

United States v Jackson, 124 F3d 607 (CA 4, 1997)

Officer's testimony that when informant turned over marijuana and firearms to him the informant stated he had just purchased the items from the defendant found to be within the exception.

United States v Beck, 122 F3d 676 (CA 8, 1997)

Testimony by officers who served as "note-takers" for other surveillance officers as to what those officers were observing admissible as within the exception.

United States v Gil, 58 F3d 1414 (CA 9, 1995)

911 tapes are often admitted under this exception (while the time lapse is shorter than with an excited utterance, the advantage is that it need not be shown that the declarant was under the influence of excitement from the event).

See *People v Slaton*, 135 Mich App 328 (1984)(tape of murder victim's call that someone was trying to "get upstairs")

United States v Hawkins, 59 F3d 723 (CA 8, 1995)(call was within 7 minutes at most, and victim stated "my husband *just* pulled a gun out on me")

United States v Mejia-Valez, 855 F Supp 607 (EDNY, 1994)(a tape of a 911 call within 2-3 minutes of the shooting, and another 16 minutes after the shooting, both held admissible)

See also *Bemis v Edwards*, 45 F3d 1369 (CA 9, 1995)

- (8) Proof Of The Event Or Condition.** Though the general rule in the country is that the statement itself may provide the proof, and the only proof, of the event or condition to which it refers, and see MRE 104(a), the Michigan Supreme Court has held there must be some independent proof of the event or condition, which may be circumstantial.

People v Hendrickson, 459 Mich 229 (1998)

But see 2 McCormick, *Evidence* (4th Ed.), § 271, p.214-215

But see 2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.1, p.387-388

But this decision was based on a similar requirement for excited utterances established in *People v Burton*, 433 Mich 268 (1989)—“[i]n *People v. Burton*, we held that an excited utterance could not establish its own underlying event. Because of our aversion to the ‘bootstrapping’ of hearsay evidence, we concluded that an excited utterance was inadmissible without independent proof, direct or circumstantial, that the underlying event took place. . . . Given the analytical similarity between the present sense impression and excited utterance exceptions, we conclude that their independent evidence requirements are similarly analogous”—and *Burton* has been overruled, which thus may call *Hendrickson* into question.

See *People v Barrett*, 480 Mich 125 (2008), overruling *Burton*.

- B. MRE 803(2)/Excited Utterances: The 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.”

It has been clarified that the excited utterance exception in Michigan contains two criteria:

- ✍ the statement must arise out of an event that is startling enough to produce nervous excitement, and
- ✍ the resulting statement must be made while the declarant was under the excitement caused by the event.
- ✍ There is also a third very important “prong” to the inquiry, in that the statement must also relate to the circumstances of the startling event. Previous case statements that also required is a showing of a lack of time to contrive, fabricate or misrepresent have been repudiated, it being said that this language is “simply a reformulation of the inquiry as to whether the statement was made when the witness was still under the influence of an overwhelming emotional condition,” the question being whether there was a lack of *capacity* to fabricate, not a lack of *time*. See I (C)(6), *infra*.

People v Smith, 456 Mich 543 (1998)

People v Straight, 430 Mich 418, 425 (1988)

See also the analysis of *People v Verburg*, 170 Mich App 490 (1988)

- (1) Theory.** The theory of “trustworthiness” with this exception is that a s shocking or startling event may produce a condition of excitement “which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”

Advisory Committee Note to FRE 803(2)

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,

§ 803.2, p.111
6 Wigmore, *Evidence* (Chadbourn rev), § 1747, p.195-196
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.390

- (2) **Participant or Bystander.** The declarant may be either a participant in the startling event, or simply a bystander. There is no requirement of participation.

Advisory Committee Note to FRE 803(1) ("*Participation* by the declarant is not required: ...one may be startled by an event in which he is not an actor")
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.391

- (3) **Personal Knowledge.** Though the scope of the statement may be broader than that when present sense impression is involved, in part because here the statement need only "relate" to the startling event or condition while with present sense impression the statement must "describe or explain" the event or condition (which need not be startling), see I(C) (4), *infra*, personal knowledge of that contained in the statement on the part of the *declarant* is still required, which may be established by the content and the context of the statement itself. There is, however, no requirement that the *witness on the stand recounting the statement* have any actual knowledge, and the rule does not require an available declarant.

People v Kent, 157 Mich App 780 (1987)
See *Bemis v Edwards*, 45 F3d 1369 (CA 9, 1995) (personal knowledge required on the part of the declarant; statement inadmissible where there was no showing that 911 caller had personal knowledge of that reported)
McLaughlin v Vinzant, 522 F2d 488 (CA 1, 1975)
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.394

(4) **"Relating To A Startling Event Or Condition"**

- (a) **Generally.** The statement in the Advisory Committee Note to FRE 803(1) that as compared to the excited utterance exception, present sense impression has a shorter permissible time lapse and a narrower breadth of subject matter, reveals also the other side of the coin; namely, the excited utterance exception includes a greater breadth of subject matter than present sense impression, because the statement need only "relate" to the startling event rather than "describe or explain it."

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.2.3, p.114
Advisory Committee Note to FRE 803(2)

(b) Evaluative statements and opinions. Evaluative statements and opinions, not permissible under present sense impression, *do*, or at least, can, “relate” to a startling event, and can be admitted. As stated by Professor Graham, “that the statement contains an opinion, provides details of the event or condition, accuses someone of committing a crime, or is self serving” matters not in terms of whether or not it “relates” to the startling event.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.391
Advisory Committee Note to FRE 803(2)
2 McCormick, *Evidence* (4th Ed.), § 272, p.222
McLaughlin v Vinzant, 522 F2d 488 (CA 1, 1975)

(5) Hearsay Within Hearsay. Though unlikely, if the statement contains hearsay statements of others, a second hearsay exception would be required to justify admission of this “hearsay within hearsay.”

cf. Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.1, p.110-111

(6) Timing and the “Under The Stress Of Excitement Caused By The Event or Condition” Requirement. The Advisory Committee Note to FRE 803(2) observes that with respect to the time element “the standard of measure is the duration of the state of excitement...Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.” Other factors include “the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or in response to a question,” none of which are determinative standing alone. The stress of excitement can last for hours, and even days. As stated in *Straight*, “The focus of MRE 803(2), given a startling event, is whether the declarant spoke while still under the stress caused by the startling event. Because the justification for this rule is *lack of capacity to fabricate rather than the lack of time to fabricate*, which is the justification for the present sense impression exception...’the period of acceptable time will frequently be considerably longer’ under 803(2) than is acceptable under 803(1).”

People v Smith, 456 Mich 543 (1998)
People v Straight, 430 Mich 418, 425 (1988)
Advisory Committee Note to FRE 803(2)
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.392
Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.2.2, p.113

(7) Timing Factors

- (a) **Generally.** The inquiry is one of the totality of the circumstances, considering such factors as the character of the transaction or event, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or in response to a question, none of which are determinative standing alone.

People v Smith, 456 Mich 543 (1998)

People v Straight, 430 Mich 418, 425 (1988)

Advisory Committee Note to FRE 803(2)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.392

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.2.2, p.113

- (b) **Passage of Time.** The passage of time is an important factor in the inquiry.

See e.g. *People v Straight*, 430 Mich 418, 425 (1988)(one month, in combination with other factors, too long)

People v Smith, 456 Mich 543 (1998)(statement made 10 hours after the event upheld)

People v Jensen, 222 Mich App 575 (1997)

People v Anderson, 209 Mich App 527 (1995) (statements made by victim of shooting as soon as officers arrived)

People v Ellis, 174 Mich App 139 (1989)(statements made within moments of startling event held admissible)

People v Zysk, 149 Mich App 452 (1986) (statements made three hours after event upheld)

People v Sommerville, 100 Mich App 470 (1980) (24 hours too long under the facts)

United States v Winters, 33 F3d 720 (CA 6, 1994)(two days too long)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.392

- (c) **Passage of Time/Children.** A greater passage of time may be justified under all the circumstances when children are involved, as well as those of limited mental ability, or perhaps where there have been threats.

People v Hackney, 183 Mich App 516 (1990)

People v Houghteling, 183 Mich App 805 (1990)

People v Lee, 177 Mich App 382 (1989) (17 days too long)

People v Foreman, 161 Mich App 14 (1987)

People v Scobey, 153 Mich App 82 (1986) (too long)

People v Garland, 152 Mich 301 (1986)

People v Draper, 150 Mich App 481 (1986)

People v Soles, 143 Mich App 433 (1985)

- (d) **Questions.** That the statement was made in response to questions is a factor, but will not allow disqualify a statement as an excited utterance.

People v Smith, 456 Mich 543 (1998)(statement upheld under circumstances though question asked)

People v Straight, 430 Mich 418, 425 (1988)(statement inadmissible where questions asked, delay was one month)

People v Hungate, 27 Mich App 496 (1970)

Cf. *People v Creith*, 151 Mich App 217 (1986)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.392

- (8) **Proof Of The Startling Event.** Though proof of the startling event may be made circumstantially, Michigan had, in contravention of MRE 104(a), determined that the existence of the startling event cannot be proven *solely* through the excited utterance itself. This was inconsistent with the view in most of the country and with that of commentators, and has now been overruled.

People v Barrett, 480 Mich 125 (2008), overruling *People v Burton*, 433 Mich 268 (1989)

People v Kowalak, 215 Mich App 554 (1996)(proof of the event may be circumstantial, including such facts as the demeanor and appearance of the declarant)

People v Layher, 238 Mich App 573 (1999)(the prosecution put in evidence of a prior assault on the learning disabled child through an excited utterance made to the mother. The independent proof of the event was that the clothed child—she was then 5—was sent to retrieve a clothes basket, and was found hiding behind a door naked and crying, and that the hospital determined she had been molested)

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.2, p.111

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.2, p.394 (general rule is that the event may be proven by the statement)

Advisory Committee Note to FRE 803(2)

- (9) **Confrontation Clause issues.** Many on-scene inquiries and 911 calls will raise Confrontation Clause issues after *Crawford*. The Court has held that “...statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of 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.” The Court also noted that “Although we . . . reject the Indiana Supreme Court's implication that virtually any

“initial inquiries” at the crime scene will not be testimonial. . . , we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that ‘[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’ . . . Such exigencies may *often* mean that ‘initial inquiries’ produce nontestimonial statements.”

Davis v Washington, 547 U.S. 813, 126 S.Ct. 2266, 2268, 165 L Ed 2d 224 (2006)

And in *People v Bryant*, 483 Mich 132 (2009) police officers arrived at a Detroit gas within minutes of receiving a report of a shooting; they did not know when the shooting had occurred, or where it had occurred, or who the shooter was (or where the shooter was). They found the victim lying on the ground, bleeding, visibly in pain, and having trouble talking, and asked him what happened. He reported that defendant shot him not long before, at a residence six blocks away. The majority held that the statements of the victim—who shortly died—were testimonial, made to build or investigate a case, rather than to respond to an emergency. But in *Michigan v Bryant*, the Supreme Court reversed, finding that the statements were primarily to respond to an ongoing emergency, looking to such factors as formality, the seriousness of the offense, the use of a weapon, and noting that the test is objective, and takes account of all the circumstances.

Michigan v Bryant, __US__ (2-28-2011)

- C. MRE 803(3)/Then Existing Mental, Emotional, or Physical Condition: The 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.”

- (1) Theory.** The theory of “trustworthiness” with this exception is that it is essentially a “specialized application of 803(1),” present sense impression, which is presented separately to “enhance its usefulness and accessibility.” “Statements of memory or belief to prove the fact remembered or believed” are excluded from the exception “to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.”

Advisory Committee Note to FRE 803(3)

“The special assurance of reliability for statements of present state of mind rests, as in the case of statements of bodily condition, upon their spontaneity and resulting probable sincerity. This has been assured principally by the requirement that the statements must relate to a condition of mind or emotion *existing at the time of the statement.*” The evidentiary effect of the statement, however, is “broadened by the inference of continuity in time,” as the “then existing mental state, emotion, sensation, or physical condition may be inferred to exist into the future and to have existed in the past,” depending on the circumstances of the case.

2 McCormick, *Evidence*, § 274, p. 229-232

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.401

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.3.2, p.115-116

- (2) **Distinguished From Nonhearsay.** It may on occasion be argued that a statement which meets the requirements of MRE 803(3) is not hearsay at all, falling without the definition because offered for a different inference than the truth of the matter declared. Often, however, “theoretical difficulties abound” with the nonhearsay argument, but “fortunately whether a particular statement disclosing a then existing state of mind, emotion, sensation, or physical condition is not classified as hearsay is of no practical importance, since declarations of this nature are admissible in any event pursuant to Rule 803(3).”

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.399

- (3) **Then-Existing Physical Condition.** The key to the exception when employed as to physical condition is the requirement that the statement be *contemporaneous* with the physical condition expressed. Description of *currently experienced* physical pain or symptoms fall within the exception, but statements describing *past* pain or symptoms, or *explanations of the cause of the pain or symptoms* are not within the exception. For example, “That glass of water I drank tasted funny; I feel faint” would only be admissible for the statement “I feel faint.” Similarly, if a person were to fall to the ground, and upon getting up be asked what happened and respond “I felt faint,” the statement would not fall within the exception. It is true, however, that a statement of an existing sensation or physical condition may be inferred to exist for some time into the future and to have existed for some time prior to the statement of the declarant, depending on the circumstances. McCormick has stated that the “continuity” question in terms of its length “varies with the particular attitudes or feelings at issue and with the cause,” so that to employ a continuity inference the declaration must reveal a state of mind which, in light of all the circumstances, is “reasonably likely to have been the same condition existing at the material time,” assuming it is important to show the existence of the condition or feeling at some time other than the precise time of the statement.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.3.2, p.115
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.399
See e.g. *Holden v Ford Motor Co*, 185 Mich App 305 (1990), rev'd other grounds
439 Mich 257 (1992)

(4) Then-Existing Mental Or Emotional Condition.

- (a) Then-Existing/Exclusion of Statements of Memory or Belief.** The state of mind expressed must be then existing, and the statement cannot include why the declarant held the particular state of mind. For example, “I’m scared,” but not “I’m scared because X threatened me.”

United States v Sherbondy, 70 F3d 1281 (CA 9, 1995)

United States v Arevalo-Gamboa, 69 Fd 545 (CA 9, 1995)

United States v Tome, 61 F3d 1446 (CA 10, 1995) (“I’m afraid sometimes” held admissible but not “because my husband has threatened to kill me”)

People v Smelley, 285 Mich App 314 (2009) (rev'd in part on other grounds)

People v Moorner, 262 Mich App 64 (2004)

People v King, 215 Mich App 301 (1996) (“afraid” admissible as relevant to certain future conduct of victim)

See *People v Hackney*, 183 Mich App 516 (1990) (statement inadmissible as a statement of memory or belief rather than a then-existing physical condition)

See *People v Furman*, 158 Mich App 302 (1987) (statements by victim regarding number, frequency, length, and nature of *past* visits to male customer were statements of memory not admissible under 803(3))

See also *People v DeRushia*, 109 Mich App 419 (1981)

Important in this regard in Michigan is the *Moorner* case. Defense counsel moved prior to testimony to exclude certain testimony that the victim had made statements indicating he had been threatened by the defendant and was afraid of him. The prosecutor argued the statements were evidence of premeditation and deliberation, because “clearly, based on the comments he [defendant] made to the decedent leading up to his death, *he obviously was premeditating and planning it.*” The prosecutor, then, did not wish to show simply that the victim was “afraid,” but that he was afraid *because*, as a matter of actual fact, he had been threatened by the defendant, and these threats showed premeditation. The threats were shown through MRE 803(3), and argued as proven through the declarant’s statements. This is not consistent with the rule.

In *United States v Joe*, 8 F3d 1488, 1492 (CA 10, 1993) the court held that a homicide victim's statement to a physician not simply that she was "afraid sometimes," but including an assertion of the source of her fear (because she thought her husband might kill her) was "clearly a 'statement of memory or belief' expressly excluded by the Rule 803(3) exception" (the husband was on trial for the declarant's murder).

And see 2 McCormick, § 276, p. 230-231 ("...even if the judgment is made that evidence of fear standing alone should be admitted, statements of fear are rarely stated pristinely....that state of mind usually assumes the form either of a statement that the accused has made threats, from which fear may be inferred, or perhaps more likely a statement of fear because of the defendant's threats....the cases have generally excluded the evidence").

- (b) Statements of Intent.** This is the use to which the exception is more often put, and which causes the most controversy. There are two categories of use of statements of intent: 1) to show the declarant's intent at the time of the statement, and 2) to demonstrate circumstantially that an event occurred subsequent to the statement; put another way, to demonstrate that the stated intent was *actually carried out*.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.3.2, p.116

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.399

- (i) Declarant's Intent.** Assuming relevance, use of this exception to show the intent of the declarant is unremarkable.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.3.2, p.116

- (ii) Carrying Out Of Declarant's Intent.** A statement of intention is admissible to prove *subsequent conduct*; that is, that the declarant actually carried out his or her stated intent. It is also admissible to prove motive; it is frequently used for this purpose in cases involving marital discord resulting in an assault or murder.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.3.2, p.116-117

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.405-406

Advisory Committee Note to FRE 803(3) ("The rule ... allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed")

People v Fisher, 449 Mich 441 (1995) (statements of intent to visit

Germany to be with lover and to divorce defendant upon return admissible under rule as showing marital discord as motive for murder)
People v Riggs, 223 Mich App 662 (1997)(letters from victim to mother regarding marital discord admissible)
United States v Tokars, 95 F3d 1520 (CA 11, 1996)(statements of murder victim regarding intent to divorce defendant admissible and relevant to motive)
People v Howard, 226 Mich App 528 (1998)(admission of victim's appointment book listing the address of defendant's mother's house on the page for the date, and beside the approximate time, that she was killed, admissible under rule)
People v Furman, 158 Mich App 302 (1987)(murder victim's statement to deliver an order to a particular customer admissible under rule)
People v Knight, 122 Mich App 584 (1983)(statement of plan to leave on a trip admissible under rule)
People v Oaks, 94 Mich App 745 (1980)
See also *People v Brownridge*, 225 Mich App 291 (1997)(rev'd on other grounds)

- (iii) **Carrying Out Of Declarant's Intent To Prove Conduct of Parties Other Than Declarant.** This is the most problematic use of the exception. In *Mutual Life Insurance v Hillmon*, a pre-rules case, the United States Supreme Court had held such evidence admissible to prove the conduct of another ("I am going with a man by the name of Hillmon" to show not only that the declarant went someplace, but that he went with Hillmon, meaning Hillmon also went). No Michigan cases exist on the point, and there is a split of authority among modern case law. Federal authority tends to allow this use of the evidence; Dean Robinson argues against it.

Mutual Life Insurance v Hillmon, 145 US 285, 12 S Ct 909, 36 L d 706 (1892)
Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.3.2, p.117-118
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.3, p.406-408

- D. MRE 803(4)/Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment.: The Rule.** "Statements made for purposes of medical treatment or medical diagnosis in connection with 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 necessary to such diagnosis and treatment."

- (1) **Theory.** The theory of “trustworthiness” with this exception is that the declarant will providing accurate information to treating medical personnel so as to receive effective treatment.

Advisory Committee Note to FRE 803(4)
Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.4, p.119
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.4, p.414

- (2) **To Whom Made.** Need not be made to a physician, but may be made to other medical personnel, or even a psychiatric social worker, hospital attendant, ambulance driver, or even members of the family.

Advisory Committee Note to FRE 803(4)
Galli v Reutter, 148 Mich App 313 (1985)
In re Freiburger, 153 Mich App 251 (1986)

- (3) **More Narrow Than Federal Rule.** The federal rule includes statements leading to diagnosis for purposes of obtaining expert testimony for trial; the Michigan rule is limited to “medical diagnosis in connection with treatment,” thereby excluding diagnosis made for the purpose of testimony. But statements of then existing mental, emotional, or physical condition made to an expert examining the declarant for purposes of testimony would be admissible under 803(3).

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.4, p.120

- (4) **“Reasonably Necessary” To Diagnosis and Treatment.** Because the statements must be “reasonable necessary” to diagnoses and treatment, statements as to the cause of injuries or symptoms may be admissible (“general character of the cause or external source thereof”), but statements of **fault** are not. For example, a statement to a doctor “I was hit by a car” would be admissible, but not “which ran through a red light.” A two part test is followed: 1)the declarant’s motive must be consistent with the purpose of the rule, and 2)it must be reasonable for the physician or medical personnel to rely on the information in diagnosis and treatment.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.4, p.120
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.4, p.421
People v Crump, 216 Mich App 210 (1996)
People v Zysk, 149 Mich App 452 (1986)
People v Creith, 151 Mich App 217 (1986)
People v James, 182 Mich App 295 (1990)

People v McElhaney, 215 Mich App 269 (1996)
United States v Iron Shell, 633 F2d 77 (CA 8, 1980)

(5) “Reasonably Necessary” To Diagnosis and Treatment; Confrontation Clause Issues With SANE statements

Example. Suspecting some sexual abuse, the victim's mother took the 4-year-old child to the hospital, where the child was interviewed by a "Sexual Assault Nurse Examiner" (SANE). The nurse recorded statements the victim made:

Bear hurt it. He put his pee pee in my butt. It hurt. He turned the movie off and took my pop away. I touched his pee pee with my hand. He had me squish it. Water came out, yellow water. He said his pee pee is too dangerous. Let's call Bear. I want to tell him no. They babysit us.

Almost no record was made at the motion to suppress on the circumstances surrounding the making of the statement (it must be assumed the child was not going to testify at trial, or there would be no confrontation issue, only a hearsay issue). Defendant was arrested and gave both an oral and written confession. At the motion hearing the prosecution argued that because the statements were made to a nurse for the purpose of obtaining medical treatment, they were non-testimonial, but the trial judge suppressed without the making of any record as to the process of the examination, what prompted the complainant's statements, or how the forensic form was filled out.

The panel, after canvassing the cases of other jurisdictions, said "A majority of state courts considering this issue have determined that a sexual abuse victim's statements to a SANE, or similar examiner, were testimonial in nature and barred by the Confrontation Clause." Courts have held that "because the primary purpose of the SANE examination was 'to prove some past fact for use in a criminal trial rather than to meet an ongoing emergency,' the child victim's statements during the examination were testimonial." The panel agreed, and held that "in order to determine whether a sexual abuse victim's statements to a SANE are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and determine whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." That was not done here, and thus a remand was necessary (and again, if the child is going to testify the confrontation issue disappears, and this is not clear from the opinion).

People v Spangler, 285 Mich App 136 (2009)

But see *People v Garland*, 286 Mich App 1 (2009), where case statements made to a nurse were admitted where a record *was* made, and the panel determined that "The victim's statements to the nurse were reasonably necessary for her treatment and diagnosis. The victim went to the hospital for medical care the morning of the assault. She was directed to LACASA for such medical care. The nurse was the first person to take a history from the victim and examine the victim, which occurred at 6:00 p.m. on the day the assault occurred. The police investigation occurred subsequent to, and separate from, the nurse's taking of the history and examination. The nurse testified that the patient's history is very important because it tells her how to treat the patient and how to proceed with the examination. Then, based on the victim's history, the nurse provided medical treatment to the victim. . . . we have a factual record that sufficiently indicates that under the totality of the circumstances of the complainant's statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency....For the same reasons that the victim's statements to the nurse were reasonably necessary for her treatment and diagnosis, we find that the victim's statements were nontestimonial. Although the nurse does collect evidence during the course of the examination after taking a patient's history and the nurse is required to report the assault and turn over the evidence to law enforcement, the nurse is not involved in the police officer's interview of the victim after the examination and is not personally involved in the officer's investigation of the crime. . . .we hold that, on these facts, the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against defendant."

(6) "Reasonably Necessary" To Diagnosis and Treatment/Children And Identification of the Perpetrator. Michigan allows a statement by a child of the identity of the perpetrator in a case of sexual abuse as reasonably necessary to diagnosis and treatment, so long as the statement is "sufficiently reliable to support the exception's rationale." The Michigan Supreme Court has identified a 10 factor analysis on the question.

- 1)the age and maturity of the declarant;
- 2)the manner in which the statements were elicited (leading questions, for example, undermine trustworthiness);
- 3)the manner in which the statements are phrased ("childlike" use of words and phrases supports trustworthiness)
- 4)use of terminology unexpected of a child of similar age (the "flip side" of 3), which undermines trustworthiness);
- 5)who initiated the examination (if initiated by prosecution examination may not be for diagnosis and treatment);
- 6)timing of the examination in relation to assault (closer in time supports genuineness);

- 7) timing of examination in relation to trial (going to purpose of examination);
- 8) type of examination (statements in course of treatment of a psychological injury may not be as reliable);
- 9) relation of the declarant to the person identified as the perpetrator (viewed as evidence of lack of mistake);
- 10) existence of or lack of motive to fabricate.

People v Meeboer, 439 Mich 310 (1992)

People v Hyland, 212 Mich App 701 (1995)

See MRE 803(A)

E. MRE 803A²/Child’s Statement About Sexual Act: The Rule. “A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.”

² Though a “subset” of the rules of MRE 803 where the availability of the declarant is immaterial, in fact for this rule it is not the case that the declarant must be *unavailable*, as with the rules under MRE 804, but rather the declarant must be *available* under this rule, which analytically fits for discussion at this point though not one of the rules contained in MRE 803.

- (1) **Theory.** The Note to the rule states that the rule “reinstates the Michigan common law hearsay exception known as the tender years rule.” This is true only in part, as the rule is more narrow than the common law rule. The rule is premised on a theory of reliability under the circumstances, coupled with a theory of necessity.

Note to Rule 803A

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803A, p.201

- (2) **Age Limitation.** Unlike the former common law rule, which had no age limitation, there is a requirement that the declarant be under the age of 10 *when the statement was made*, not at the time of trial.
- (3) **Corroborative Use Only.** The rule states that the hearsay statement is only admissible “to the extent that it corroborates testimony given by the declarant....” It is thus *not* sufficient simply that the declarant take the stand and be available for cross-examination. If the victim-declarant is unable to give a reasonable detailed account of what occurred, then the statement is not corroborative, but a *substitute* for in-court testimony, and not within the rule. Note that use of multiple statements to corroborate is prohibited; only the first may be used.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803A, p.202

Cf. *People v Kreiner*, 415 Mich 372 (1982)

- (4) **Excusable Delay.** Whether a delay is excusable as having been caused “by fear or other equally effective circumstance” depends on the facts of the case. Threats of consequences made to the child if he or she “tells” should be sufficient, even to justify delays of days or even months.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803A, p.202-203

People v Hammons, 210 Mich App 554 (1995)

People v Dunham, 220 Mich App 268 (1996) (delay of 8 or 9 months justified)

- (5) **Spontaneity.** Spontaneity, said the court, requires that the child must bring up the subject of sexual abuse. Any followup questioning or prompts from adults must be nonleading and open-ended, so that it is clear that the statement is the creation of the child.

People v Gursky, 486 Mich 596 (2010)

See also *People v Dunham*, 220 Mich App 268 (1996) (admissible when made in response to open-ended questions asked of all children of divorcing parents by friend of the court mediator)

- (6) **Notice.** No specific time frame is given; the notice must simply be adequate to allow the opposing side to prepare to meet the statement.

See *People v Dunham*, 220 Mich App 268 (1996)

II. “Premeditated” Statements: Recorded Statements, Records, and Reports

A. MRE 803(5)/Recorded Recollection: The 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’ 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.”

- (1) **Theory.** The theory of “trustworthiness” with this exception is that the declarant made the record while the event which precipitated it was still fresh in his or her mind so that the statement is likely to be reliable and accurate.

Advisory Committee Note to FRE 803(5)

- (2) **“Insufficient Recollection.”** Unlike the common law statements of the rule, the rule as adopted does not require an “exhausted” present recollection, but clearly states that the foundation is laid if it is demonstrated that the witness now has “insufficient recollection to enable him to testify fully and accurately.” Nor is it required under the rule that there be a failed attempt to “refresh recollection” by reference to the document in question; however, the most effective method of demonstrating a lack of sufficient memory is to show that the document fails to “jog” the memory of the witness.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.5, p.429

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.5, p.121-122

See *People v Jenkins*, 450 Mich 249 (1995)

- (3) **Prepared or Adopted When Fresh in the Memory, and Accurate.** The witness need not have prepared the document in question, but may have “adopted it” when it was made. For example, a witness statement may be written or typed by a police officer, and then signed by the witness, who adopts it at that time. The witness must testify that the record was accurate when made or adopted; it is possible, in cases where the witness has forgotten completely the precise situation when the record was made for the witness to testify that he or she is “confident from the

circumstances that he would not have written or adopted such description of the facts unless that description truly described his observations at the time.”

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.5, p.427
Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.5, p.121-122
People v Clark, 106 Mich App 610 (1981)
People v Williams, 117 Mich App 505 (1982)
United States v Wimberly, 60 F3d 281 (CA 7, 1995)

- (4) **Personal Knowledge.** The document must consist of otherwise admissible testimony; it is required that it be record of a matter about which the witness “once had knowledge”—that is, at the time of the preparation of the document.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.5, p.425

- (5) **Police Reports.** Given the limitation of MRE 803(8), the Public Records exception, excluding, as to “matters observed pursuant to duty imposed by law as to which matters *there was a duty to report*,” “in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.....” there is some concern as to whether the exception applies to police reports. With regard to notes of witness statements, confessions, and the like, the exception should apply; with regard to PCR’s and the like the exception may not apply. Note: an officer’s notes of a defendant’s confession, which the defendant does *not* sign is not the confession of the defendant, but the notes of the officer, which must be admitted via two hearsay exceptions: 1)past recollection recorded, and 2)admissions. Where the statement is signed, it is the statement of the defendant and admitted as an admission.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.5, p.430
People v Rosborough, 387 Mich 183 (1972)

- (6) **Original Notes.** Where a report is prepared from contemporaneous notes, and the report employed as past recollection recorded, the notes must also be read, if available. The report is not inadmissible where the notes are not available.

People v Rosborough, 387 Mich 183 (1972)
Echols v Rule, 105 Mich App 405 (1981)(record admissible where notes lost)

- (7) **Admission of Document.** A very common error is for the proponent of the evidence to move the admission of the document. The rule clearly states that the document is to be *read* not admitted; it is only admissible upon motion of the *opposing party*.

See 2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.5, p.429

- B. MRE 803(6)/Records of Regularly Conducted Activity: The Rule:** “A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, 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.”

- (1) **Theory.** The theory of “trustworthiness” with this exception is that those who rely on records of a regularly conducted activity will maintain those records in an accurate and trustworthy fashion.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.6, p.123

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.6, p.440

- (2) **Authentication.** The records are admitted through the custodian of the records, or some other qualified witness. This person need have no knowledge whatever of the content of the records.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.6, p.454(person need only understand the record-keeping system)

- (3) **Opinions or Diagnoses.** It is important to note that the rule *has been amended* so that like its federal counterpart it includes opinions or diagnoses. This would now allow not only the underlying factual data, but the conclusions of the medical examiner, in an autopsy report, in effect overruling in part *People v Shipp*, 175 Mich App 332 (1989), decided before the amendment.

See *People v Shipp*, 175 Mich App 332 (1989)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.6, p.470-471

- (4) **Timing/”At Or Near The Time”:** This requirement is viewed with reasonable flexibility, taking into account practical considerations.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.6, p.449-450

- (5) **Records.** The definition of records is very broad. As Dean Robinson has pointed out, this includes bank account records, court and prison records, accounting records, profit receipts, trucking logs, and computer records. PCR’s have been held to be business records.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.6, p.124-125
People v Harajili, 170 Mich App 794 (1988)
People v Miller, 88 Mich App 210 (1979)

- (6) **Regular Activity/Regular Practice to Record.** The rule requires that the record be made of a regular business activity, *and* that it be the regular practice of the business to make the record. Dean Robinson takes the view that “non-routine” records, perhaps of some internal investigation, should not be admitted, even if prepared in the regular course of business, because the records are not themselves “regularly” made.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.6, p.124
See *People v Huyser*, 221 Mich App 293 (1997)(medical expert’s report prepared at request of prosecution in CSC case not admissible under rule)

C. MRE 803(7)/Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6): The Rule: “Evidence that a matter is not included in the memoranda, report, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.”

- (1) **Theory.** This exception is simply the “negative counterpart” to 803(6), relying on the same theory of reliability, and applied in very much the same way.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.7, p.126
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.7, p.475-476

- (2) **Diligent Search.** Michigan has not interpreted this rule. Federal law requires a foundational showing of a “diligent search” for the entry or record.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.7, p.126
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.7, p.476
Cf. MRE 803(10)

- D. MRE 803(8)/Public Records and Reports: The Rule:** “Records, reports, statements, or data compilations, in any form, of public officers 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, and subject to the limitations of MCL 257.624; MSA 9.22324.”

- (1) **Theory.** This theory of “trustworthiness” for this exception is akin to that of the business record exception—a public report is assumed to be accurate and reliable because maintained and relied upon in the course of a regularly conducted activity by public officers who lack a motive to falsify. Further, the public interest is viewed as served by not bringing public officials to court to testify regarding matters recorded accurately, and regarding which the record is more likely reliable than the memory of the official in any event.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.8, p.127
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.8, p.486
Advisory Committee Note to FRE 803(8)

- (2) **Authentication.** See MRE 901 and 902

- (3) **Limitation As Compared to Federal Rule.** Michigan has not adopted subsection (C) of the federal rule, including “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.” Investigative reports are not admissible in Michigan.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.8, p.127-128
Bradbury v Ford Motor, 419 Mich 550 (1984)

- (4) **Evaluative or Investigative Reports.** The decision not to include subsection (C) in Michigan also means that subsection (B) cannot be employed to admit investigative reports; that provision is limited to objective data observed pursuant to a duty imposed by law and reported and recorded pursuant to said duty.

Bradbury v Ford Motor, 419 Mich 550 (1984)

- (5) **Personal Knowledge.** Though unlike MRE 803(6) there is no requirement that the report be made “at or near the time by, or from information transmitted by, a person with knowledge,” this does *not* mean that every report prepared pursuant to a statutory duty is admissible. With regard to “matters observed pursuant to duty imposed by law as to which matters there was a duty to report” there must be not only a duty to *record*, but the information must be supplied by one who has *observed it pursuant to a duty imposed by law*, and *reported* it pursuant to a duty imposed by law. As one commentator has put it, “if the supplier of the information is not under a duty to do so, an essential link is broken....An illustration is the report of a police officer incorporating information from a bystander: the police officer qualifies as acting pursuant to an official duty but the bystander does not.” Subsection (A) is limited to reports and data compilations regarding the general or overall activities of the public agency, and not records and reports based on otherwise inadmissible double hearsay.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.8, p.488-489
Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.8, p.128
See *In re Freiburger*, 153 Mich App 251 (1986)

- (6) **Exclusion of Police Reports Under Subsection (B).** The Congressional legislative history, which added the exclusion on the use of police reports, is based on Confrontation Clause concerns. This does not preclude, in certain circumstances, the use of police reports as business records, or as past recollection recorded, or under subsection (A), where appropriate.

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.8, p.479-485 (legislative history)
Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,
§ 803.8, p.128

The “bottom line” appears to be that “investigative” police reports fall outside of MRE 803(8)(B), whereas police documents “recording routine matters fall within” the rule, it being arguable that any routine police report made in a nonadversarial setting is admissible under the rule.

Solomon v Shuell, 435 Mich 104 (1990) (opinion of Justice Boyle)(PCR’s and

homicide investigation reports prepared with knowledge of possible litigation inadmissible)

People v Tanner, 222 Mich App 626 (1997)(search warrant affidavit not admissible)

People v Bell, 178 Mich App 351 (1989) (fire incident report prepared to give information to arson unit not admissible)

People v Stacey, 193 Mich App 19 (1992)(allowing routine reports made in nonadversarial setting)

People v Jobson, 205 Mich App 708§1994) (allowing activity log sheet officers were required to complete against officer charged with entering without owners permission)

2 McCormick, *Evidence* (4th Ed.), § 296, p.293 (and see fn 27)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.8, p.494

- (7) **Confrontation Clause issues.** Unless there is a stipulation, a lab report from a law enforcement facility is “testimonial” under *Crawford* and may not be admitted in lieu of testimony of the technician. But autopsy reports are admissible, as the medical examiner is not a law-enforcement officer, but has duties prescribed by law. Note: this is still an area of ongoing litigation in the United States Supreme Court and around the country.

Melendez-Diaz v Massachusetts, __US__, 129 S Ct 2527, 175 L.Ed.2d 314 (2009)

People v Lewis, 287 Mich App 356 (2010)

But see *People v Dendel*, __Mich App__ (8-24-2010) (autopsy report testimonial where included was toxicology report from private lab, and what was sought was specific information to investigate the possibility of criminal activity).

And see *Bulcomming v New Mexico*, __US__ (6-23-2011). The State cannot, in place of the technician who performed the lab tests, employ testimony from a supervisor who neither participated in nor observed the testing of the defendant's blood sample. NOTE: Michigan has never allowed this in any event, so nothing changes here. Note also that certiorari has been granted on yet another case, *Williams v. Illinois*, No. 10-8505, involving consideration by an expert giving an expert opinion of a lab report not itself entered into evidence. The Illinois Supreme Court held that the absent analyst's report was introduced not for the truth of what it asserted but rather "to show the underlying facts and data [the in-court witness] used before rendering an expert opinion in this case."

Also see *People v Fackelman*, 489 Mich 515 (2011): in case involving insanity defense, prosecution questioning of both defense and prosecution experts, who had considered medical report of treating physician when evaluating defendant for criminal responsibility, regarding that report without testimony from the treating physician was a violation of the confrontation clause, and plain error (there was no objection) requiring reversal.

- (8) **Machine-generated Results.** Machine-generated printouts from a breathalyzer test are not testimonial, nor are they hearsay. The reports generated by the officer who writes down the results generated by the machine are past recorded recollection under Michigan Rule of Evidence 803(5).

People v Dinardo, __ Mich App __ (No. 294194, 10-12-2010)

- (9) **Offered By The Defendant.** Though there is nothing in the rule which allows an investigative police report falling within the prohibition of subsection (B) to be offered by the defendant, some cases and commentators hold that, despite the express language of the rule, the prohibition does not apply to the defendant.

2 McCormick, *Evidence* (4th Ed.), § 296, p.292

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.8, p.498

- E. MRE 803(9)/Records of Vital Statistics: The Rule:** “Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public officer pursuant to requirements of law.”

- (1) **Theory.** This theory of “trustworthiness” for this exception is akin to that of the public records exception, and also that the one reporting the birth, death, or marriage is commonly a disinterested professional with no motive to misrepresent, or some other person under circumstances which demonstrate reliability.

- (2) **Application.** While this exception has been employed to allow the statement of cause of death in a death certificate, this is very likely not permissible in a criminal case.

Greek v Bassett, 112 Mich Ap 556 (1982)

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.8, p.498

- F. MRE 803(10)/Absence of Public Record or Entry: The Rule:** “To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.”

- (1) **Theory.** This exception is simply the to 803(7), relying on the same theory of reliability, and applied in very much the same way.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.10, p.129-130

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.10, p.520-524

- (2) **Diligent Search.** The rule requires a diligent search.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.7, p.126
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.10, p. 520-521

III. Miscellaneous Exceptions

The remaining exceptions under MRE 803 have to do with specific kinds of records, and have either almost no utility in criminal cases (there are virtually no reported decisions involving criminal cases with these exceptions), or are wholly uncontroversial in that they are connected to other rules (i.e. testimony regarding reputation as to character, and judgments of conviction). Of importance, however, is the new “catch-all” exception in MRE 803(24), also replicated in MRE 804(b)(6), and discussed below.

IV. The Catch-all Exception: “Equivalent Circumstantial Guarantees of Trustworthiness”

- A. **MRE 803(24)/Other Exceptions: The Rule.** “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 that 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 the statement 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, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.”

- (1) **Theory.** The theory of this rule is to provide flexibility to the law of evidence, while providing a requirement that any otherwise hearsay statement admitted under the rule must be as trustworthy as the recognized exceptions, and that there must be a special need for use of the statement. It is intended that the rule be used only rarely.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.24, p.139-143
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.558

- (2) **Equivalent Guarantee of Trustworthiness.** One must look to the circumstances which surround the making of the statement which would render the declarant under those circumstances particularly worthy of belief. Among factors, none of

them determinative, are whether the statement was under oath; whether there is an assurance that the declarant spoke with personal knowledge of the underlying event; the practical availability of the declarant to testify and be cross-examined at trial regarding the underlying event, and any other factors viewed on a case-by-case basis, considered in the light of the reliability assurances of the other exceptions (e.g. bias or interest or coercion, presence or absence of time to fabricate, suggestiveness, recantations or corroborative statements). At least in a criminal case, circumstances corroborating the *truth* of the statement may not be employed to justify its admissibility.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,

§ 803.24, p.139-143

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.561-572 (see many federal cases cited)

See *People v Welch*, 226 Mich App 451 1997)(holding exclusion of statement offered by defendant proper; relying on federal cases)

(a) Near Misses. The only discernible pattern thus far in the cases is that a category of acceptable statements is what might be termed the “near miss,” where a statement narrowly fails to fit within a recognized exception. These are sometimes (but not always) held admissible if the rest of the circumstances of this rule are met.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,

§ 803.24, p.139-143

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.578-579 (see cases, and supplement)

See e.g. *United States v Earles*, 113 F3d 796 (CA 8, 1997)

(b) Others. There is no other clear pattern as to when statements fit the exception or not, which is not surprising given the case by case nature of the inquiry.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*,

§ 803.24, p.140-141

2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.578-579

- (3) **“More Probative”**: The rule requires that the statement must be more probative than any other evidence which may reasonably be procured by the proponent of the evidence.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.24, p.142
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.573-575

- (4) **Material Facts**. All facts must be “material” in that under MRE 401 they must be “of consequence to the action; what is meant here is something more--that the fact sought to be proven must be “truly important” in the case.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.24, p.142
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.575

- (5) **Notice**. In advance of trial, unless need arises later, notice must be given sufficient to allow the opponent to contest the admissibility of the statement and to meet it at trial.

Robinson, Longhofer, Ankers, *Michigan Court Rules Practice: Evidence*, § 803.24, p.143
2 Graham, *Handbook of Federal Evidence* (4th ed), § 803.24, p.575-578

- (6) **Confrontation Clause issues**. Ordinarily these statements are not made to government officials.

See *People v Bauder*, 269 Mich App 174 (2005)
People v Geno, 261 Mich App 624 (2004)

- B. MRE 804(b)(6)**. This rule is identical to 803(24), except that the declarant is required to be unavailable. It is likely that the rules will be consolidated into one separate rule in the federal system.

**HEARSAY, PART III:
EXCEPTIONS TO THE HEARSAY RULE
WHERE UNAVAILABILITY OF THE DECLARANT IS REQUIRED**

**HEARSAY, PART III:
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OF THE DECLARANT IS REQUIRED**

Preface

Statements made by declarants absent from the trial present the most problematic class of hearsay exceptions, for it is *only* when the declarant does not testify at trial that Confrontation Clause issues arise. The principal justification for admission of out-of-court statements of an unavailable declarant is, apart from reliability, *necessity*. A rather rigorous demonstration of unavailability is therefore required.

I. The Foundational Prerequisite of Unavailability: Definition and Proof

A. MRE 804 and Hearsay Exceptions Requiring Unavailability of the Declarant: The Rule.

(a) Definition of Unavailability. “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 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) *has a lack of memory of the subject matter of the declarant’s statement*; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

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 wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

B. Summary. Unavailability is shown by demonstrating the declarant’s absence due to:

- (1) a valid claim of privilege; or
- (2) a refusal to testify; or
- (3) a lack of memory (including “selective recall”); or
- (4) a physical or mental inability (including, but not limited to, death); or
- (5) an inability by the proponent to produce the witness despite, in a criminal case, the use of “due diligence.”

C. Ruling of Court/Burden of Persuasion. The determination of the unavailability of a witness is not left to the party offering the out-of-court statement but must be made by the court. The proponent of the statement has the burden of demonstrating unavailability. Unavailability cannot be demonstrated if any of the circumstances constituting unavailability are due to the procurement or other wrongdoing of the proponent of the statement.

United States v Eufracio-Torres, 890 F2d 266, 269 (CA 10, 1989)

Kirk v Raymark Industries, 61 F3d 147 (CA 3, 1993)

Ohio v Roberts, 448 US 56, 65, 100 S Ct 2531, 2538-39, 65 L Ed 2d 597 (1980)(overruled on other grounds)

2 McCormick, Evidence (4th ed. 1992), § 253, at 134

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.601

MRE 804(a)

D. Unavailability By Exemption Due to a Valid Claim of Privilege. “...is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement....”

(1) Ruling of the Court Required. A witness is not the judge of his or her own claim of privilege; rather, the rule requires that the witness be exempted on the ground of privilege by a “ruling of the court.”

MRE 804(a)

MRE 104(a)

Advisory Committee Note to FRE 804(a)(1)

- (2) **Determination Must Be Out of the Presence of the Jury.** The determination of whether the witness has a valid claim of privilege must be had out of the presence of the jury.

People v Dyer, 425 Mich 572 (1986)

People v Paasche, 207 Mich App 698 (1994)

People v Gearns, 457 Mich 1 (1998)(overruled on other grounds)

MRE 103(c)

MRE 104(c)

- (3) **Exercise of Fifth Amendment.** This is the most frequent ground of unavailability in criminal cases. NOTE: persistence in an invalid claim of Fifth Amendment privilege constitutes refusal to testify. See below.

See Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence, § 804.1.1, p. 216

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.591, fn 3

People v Moore, 78 Mich App 294 (1977)

People v Castaneda, 81 Mich App 453 (1978)

People v Meredith, 459 Mich 62 (1998)

- (4) **Exercise of Spousal Bar.** The “spousal bar” absolutely prevents the calling of a spouse when the spouse is unwilling to testify (the witness spouse now holds the privilege, not the defendant spouse) and no exception exists. MCL 600.2162. Assertion of the spousal bar is unavailability, so that if, for example, the witness testified at the preliminary examination before the marriage, the assertion of the bar at trial would constitute unavailability so as to allow the prior recorded testimony. *People v Whalen*, 129 Mich App 732 (1983)

E. Unavailability By Refusal of Witness to Testify. “...persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so...”

- (1) **Refusal to Testify.** A refusal of the witness to testify constitutes unavailability.

People v Burgess, 96 Mich App 390 (1980)

Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence, § 804.1.1, p. 217

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.593, fn 5

People v Pickett, 339 Mich 294 (1954)

- (2) **Invalid Claim of Privilege.** Persistence in a claim of privilege that the court has not accepted constitutes a refusal to testify.

United States v Mobley, 421 F2d 345 (CA 5, 1979)

F. Unavailability By Lack of Memory. “...has a lack of memory of the subject matter of the declarant’s statement...”

- (1) **Reason for Lack of Memory Immaterial.** Whether the reason for the lack of memory is physical, psychological, or whether the lack of memory is arguably feigned, lack of memory is unavailability.

People v Hayward, 127 Mich App 50 (1983)

People v Williams, 117 Mich App 505 (1982)

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.594

- (2) **“Selective” Memory Loss.** It is not required that the failure of memory be total; rather, a loss of memory regarding the “subject matter” of the declarant’s out-of-court statement is all that is required, even if the witness testifies to other events.

McDonnell v United States, 472 F2d 1153 (CA 8, 1973)

People v Walton, 76 Mich App 1 (1977)

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.594

G. Unavailability By Mental or Physical Infirmary. “...is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity...”

- (1) **Both Inability to Be Present, and Presence But Inability to Testify, Are Included.** The proponent of the evidence need not show that the witness cannot be present, but that either the witness cannot be present, or, if present, cannot testify, so long as either is the result of death or then existing physical or mental illness or infirmity.

Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence,
§ 804.1.4, p.218-219

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.594-595

People v Lytal, 119 Mich App 562 (1982)

People v Murry, 106 Mich App 257 (1981)(testifying would have been harmful to infirm witness’s health)

A witness is unavailable where travel and/or testimony would be physically harmful to the witness (e.g. witness was experiencing a high-risk pregnancy, lived in another state, and was unable to fly or travel to Michigan to testify).

People v Garland, 286 Mich App 1 (2009)

- (2) **Incompetence As Witness.** One who is incompetent to testify Under MRE 601 is unavailable. Incompetence under MRE 601 is a sufficient but not necessary condition of unavailability under MRE 804(a)(4).

People v Karelse, 143 Mich App 712 (1985)(rev'd on ground that finding of incompetency was factually erroneous, 428 Mich 872 (1987))
People v Edgar, 113 Mich App 528 (1982)

- (3) **Temporary Inability.** In criminal cases, where the testimony of the witness can predictably be obtained within a reasonably short time, Confrontation Clause concerns counsel in favor of a continuance, rather than a finding of unavailability, particularly if the testimony is critical.

Barber v Page, 390 US 719, 88 S Ct 1318, 20 L Ed 2d 255 (1968)

Ecker v Scott, 69 F3d 69 (CA 5, 1995)

Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence,
§ 804.1.4, p.220

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.595-596

H. Unavailability Because of Inability To Procure Attendance. "...is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown..."

- (1) **Due Diligence.** "...the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." Mere service of a subpoena is not adequate.

People v Bean, 457 Mich 677 (1998)

People v Dye, 431 Mich 58 (1988)

Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence,
§ 804.1.5, p.221-222

2 Graham, Handbook of Federal Evidence (4th ed), § 804.00, p.597-600

- (2) **Out-of-State Witnesses.** Though older authority holds that there is no requirement that a witness who is out of the jurisdiction be produced, it is likely the case now that Confrontation Clause principles require use of the Uniform Rendition of Witnesses Act to procure the attendance of a witness whose location is known.

People v Serra, 301 Mich 124 (1942)(no duty)
People v Kim, 124 Mich App 421 (1983)(no duty)
Contra *People v Freedland*, 101 Mich App 501 (1980)
See *Barber v Page*, 390 US 719, 88 S Ct 1318, 20 L Ed 2d 255 (1968)

- (3) **Flight of Witness After Appearance.** In a case the victim appeared at court on the day of trial to testify, and discussed the case was the prosecutor trying it. However, when trial began she had disappeared, and a search for her was unsuccessful. The Court of Appeals held that the 11th hour decision of a witness to leave the courthouse rather than testify is “unavailability.”

People v Adams, 233 Mich App 652 (1999)

II. The Exceptions: Prior Recorded Testimony

- A. **The Rule.** Excluded from operation of the hearsay rule is “Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

MRE 804(b)(1)

Note: where prior recorded testimony is the only testimony on an element, it may be sufficient standing alone; there is no “corroboration” requirement. *People v Chavies*, 234 Mich 274 (1999)

- B. **Firmly Rooted.** It has been held that the prior recorded or former testimony exception is a “firmly rooted” exception, so that satisfaction of the foundational requirements of the rule is also satisfaction of the Confrontation Clause. Though the “firmly rooted” analysis is now largely obsolete, establishment of the prior recorded testimony foundation satisfies the confrontation clause.

People v Meredith, 459 Mich 62 (1998)
United States v. Avants, 367 F.3d 433, 445 (CA 5, 2004) (“The qualities that made Jones' testimony admissible under 804(b)(1) make it meet *Crawford's* Confrontation Clause test: unavailability and prior opportunity for cross-examination”).

- C. **Opportunity.** The opposing party must at the prior hearing have had an opportunity to develop the testimony by direct, cross, or redirect examination; it matters not that the party chose not to take advantage of the opportunity. Unless counsel is curtailed by the judge, a preliminary examination provides the necessary opportunity, even if strategic reasons might counsel against exercise of the opportunity.

People v Goldman, 349 Mich 77 (1957)

2 Graham, Handbook of Federal Evidence (4th ed), § 804.1, p.620-626

- D. **Similar Motive.** The motive to develop the testimony by direct, cross, or redirect examination needs only be similar to that at trial, not identical. Again, ordinarily the motive at a preliminary examination is sufficiently similar.

People v Morris, 139 Mich App 550 (1984)

United states v Lombard, 72 F3d 170 (CA 1, 1995)

2 Graham, Handbook of Federal Evidence (4th ed), § 804.1, p.612-620

III. The Exceptions: Statement under Belief of Impending Death

- A. **The Rule.** Excluded from operation of the hearsay rule is “In a prosecution for homicide...a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”

MRE 804(b)(2)

- B. **Confrontation Clause.** *Crawford* suggests, but does not hold, that the dying declaration is sui generis, and is admissible even where testimonial.

See *People v Taylor*, 275 Mich App 177 (2007)

- C. **Case Law Foundation.** PreMRE cases, which have been followed uncritically in several postMRE cases, posit the following foundational requirements:

- (1) The declarant must have been conscious or in fear of impending death.
- (2) The declarant must have actually died.
- (3) The statements must be sought to be admitted in a criminal prosecution against the individual who killed the declarant.

(4) The statements must relate to the circumstances of the killing.

People v Parney, 98 Mich App 571 (1979)
People v Siler, 171 Mich App 246 (1988)

D. Differences Under MRE. Though the pre-rules foundational requirements are applicable 99.9% of the time, technically they are no longer accurate. Under the language of the rule, if a declarant gave a statement under fear of impending death, which the prosecution sought to admit in a homicide case, concerning the cause of the circumstances which lead to the declarant's fear of impending death, the statement would be admissible even if the declarant did not die and the homicide prosecution was not concerning the death of the declarant, so long as the declarant was shown unavailable. For example, if the declarant and a companion were both shot, and the companion died, and the declarant gave a statement under fear of impending death concerning the identity of the shooter, and the declarant then recovered, but was unavailable for other reasons—such as mental incompetency, or death from some other cause—under the rule the statement would be admissible.

See Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence, § 804.4, p.230-232

Under the language of the rule, the declarant need not die from the wounds inflicted regarding which the statement is made, so long as the statement is offered in a homicide prosecution and the declarant is deceased. The rule states that “[i]n 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, concerning the cause or circumstances of what the declarant believed to be impending death.” While the common-law rule was that the declarant must have died from the injuries, no such requirement is contained in the rule of evidence. So long as the statement was made in fear of imminent death concerning the cause of what the declarant “believed to be impending death,” the statement is admissible in a prosecution for homicide. In one case, while under fear of impending death the victim identified the defendant as the shooter when he was shot the first time. But he recovered, only to be murdered later by defendant. The dying declaration was admissible to identify defendant as the shooter in the first incident, that incident being admitted under MRE 404(b). It is questionable, however, that this use of the rule would be exempt from *Crawford* as would the traditional use of the statement as described in the common law.

People v. Orr, 275 Mich. App. 587 (2007)

- E. Fear of Impending Death.** Most cases are litigated on this question. The belief in the imminence of death may be shown by the statements of the declarant him or herself, or circumstantially, from the nature of the injuries, statements made in the presence of the declarant, or testimony from a physician or medical examiner.

People v Wilborn, 57 Mich App 277 (1975)

People v Parney, 98 Mich App 246 (1979)

People v Siler, 171 Mich App 246 (1988)

See Robinson, Longhofer, Ankers, Michigan Court Rules Practice: Evidence, § 804.4, p.232

2 Graham, Handbook of Federal Evidence (4th ed), § 804.2, p.631

- F. Competency/Children.** There is be no rule that any class of witness is incapable of making a dying declaration. “Whether a child was conscious of his own impending death must be determined on a case-by-case basis.” In one case, after the defendant gave the child a bath, the child was “passing out,” and the defendant put him in the bathtub to revive him. He then lay on the bed with his mother, who asked him to open his eyes-he responded “Mom, I can't, I'm dead” and “don't bother me, I'm already dead.” After his admission to the hospital with bruises on his neck, arms, chest, abdomen, groin, testicles, and legs, a nurse asked how he got them, and he responded, “from ‘Mike’” (the defendant). Shortly thereafter he died. The court rejected defendant's argument that a four-year-old child cannot be aware of impending death, and found the statement admissible here.

People v. Stamper, 480 Mich. 1 (2007)

- G “Failed” Dying Declaration.** A “failed” dying declaration may often meet the foundational requirements for an excited utterance.

People v Schinzel, 86 Mich App 337 (1978)(rev'd in part on other grounds, 406 Mich 888)

IV. The Exceptions: Declarations Against

- A. The Rule.** Excluded from operation of the hearsay rule is “a statement which...so far tended to subject the declarant to..criminal liability..., that a reasonable person in the declarant’s position would not have made the statement unless believing 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.”

MRE 804(b)(3)

- B. Defense Use.** The Michigan Supreme Court has held that the “corroborating circumstances” which must “clearly indicate the trustworthiness of the statement” must be considered in an “inverse proportion” to the defendant’s need for the evidence, so that “the more crucial the statement is to the defendant’s theory of defense, the less corroboration a court may constitutionally require for its admission.”

People v Barrera, 451 Mich 261 (1996)

See also *People v Blankenship*, 108 Mich App 794 (1981)

See also *People v Miller*, 141 Mich App 637 (1985)

See also *People v Sanders*, 163 Mich App 6-6 (1986)

See also *People v Underwood*, 184 Mich App 784 (1990)

See also *Carson v Peters*, 42 F3d 384 (CA 7, 1994)(insistence on compliance with requirements of rule does not violate the constitution)

- C. Prosecution Use.** In Michigan, where the statement of one defendant fits the foundation requirements of the rule and implicates a codefendant it is admissible against the codefendant, even if arguably the “carry-over” portion which incriminates the codefendant is not directly against the declarant’s penal interest. The foundation is rigorous, and it is difficult to meet the foundation with statements made in-custody to a police officer, though not impossible.

- (1) Generally.** In Michigan, where the statement of one defendant fits the foundation requirements of the rule and implicates a codefendant it is admissible against the codefendant, even if arguably the “carry-over” portion which incriminates the codefendant is not directly against the declarant’s penal interest. The foundation is rigorous, and it is difficult to meet the foundation with statements made in-custody to a police officer, though not impossible.

People v Poole, 444 Mich 151 (1993)

Contra *Williamson v United States*, 512 US 594, 114 S Ct 2431, 129 L Ed 2d 476 (1994)(interpreting FRE—not a constitutionally based decision)

NOTE: post-*Crawford*, this prosecution use of a declaration against penal interest is limited to nontestimonial declarations (the ordinary confession to a police officer would be excluded, then). But nontestimonial statements against penal interest remain admissible.

People v Deshazo, 469 Mich 1044 (2004)

People v Shepherd, 263 Mich App 665 (2004)(rev’d on other grounds)

People v Taylor, 482 Mich 368 (2008)

People v Bennett, __ Mich App __ (No. 286960, 11-2-2010)

(2) **Foundation.** The foundation is rigorous. The foundation is rigorous, and it is difficult to meet the foundation with statements made in-custody to a police officer, though not impossible. Better candidates are statements made to third parties while not in police custody. The factors to consider are, in a totality of the circumstances inquiry:

- Was the statement voluntarily given.
- Was it made contemporaneously with the events.
- Was it custodial, or made to family, friends, colleagues, or confederates.
- Was it uttered spontaneously at the initiation of the declarant.
- Did it shift blame or attempt to minimize the role of the declarant
- Did the declarant have a motive to falsify or curry favor.

People v Poole, 444 Mich 151 (1993)

People v Petros, 198 Mich App 401 (1993)

People v Ortiz-Kehoe, 237 Mich App 508 (1999)(codefendant's statement admissible where made spontaneously, while not in custody, to someone other than the police)

People v Rodriguez, 251 Mich App 10 (2002)

People v Washington, 468 Mich 667 (2003)(no "carryover" portion naming defendant; statement relevant)

V. Forfeiture by Wrongdoing

The forfeiture by wrongdoing exception to the right of confrontation does not allow prosecutors to present testimonial hearsay absent a showing that, at the time the defendant engaged in acts which caused the witness' unavailability, the accused was acting with the intent to prevent the witness from testifying

Giles v. California, 554 US 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).