

17. WRITTEN RECORDS EXCEPTIONS, FRE 803 (5) et seq.

A. OVERVIEW

1. There are lots of exceptions for written documents found in Rule 803. We will focus on the two most important ones:

- a) Records of a Regularly Conducted Activity, 803(6), which most people call by its nickname, Business Records.
- b) Public records, 803(8), also sometimes called official records

2. These exceptions are tricky because there is a tendency to confuse the name of the rule with whether it fits into an exception. A document is not a “business record” because it is the record of a business, nor is it a “public record” because it comes from a government office. The only question is whether the foundation has been laid, and they are detailed. A document is only a piece of paper until someone lays a foundation. If you're suing the welfare dept, and trying to get their records into evidence, they could be business records, official records, statements of the opposing party, past recollection recorded, or not hearsay at all because not offered for their truth, depending on the circumstances and what kind of foundation you can lay.

3. These records frequently have hearsay within hearsay problems . Business records may describe both the personal knowledge of employees and also things told to employees by outsiders. The former is covered by the business record exception, the latter is not. It needs its own reason why it is not hearsay.

4. You must distinguish business records from documents with independent legal significance, from admissions of the party-opponent. Assume a dispute with your landlord over the return of your security deposit. The lease itself is not hearsay at all -- it has independent legal significance. The analysis of a report prepared by the landlord's maintenance staff depends on who is offering it. If you offer it against the landlord, because it reports "no damage," then it is admissible as an admission under 801(d)(2), and is not hearsay at all. If the landlord offers it against you, because it documents extensive damage, he can get it in only if he establishes the foundation for a business record.

5. You must distinguish business & public records from other business and official documents. These exceptions are needed only if the document contains an assertion, i.e., a factual description of an event. An employee handbook setting out the procedures for filing a grievance is not hearsay at all because it doesn't describe an event.

6. Computer records are treated just like any other kind of business or public record.

B. Rule 803(6): Records of a Regularly Conducted Activity

Rule 803(6) creates a hearsay exception for the regularly kept records of businesses and other business-like entities, such as institutions, non-profit associations, and government units, both organizations and individuals. The foundation may be laid either by live testimony or an affidavit from a person familiar with the business's record-keeping practices:

- 1) The record must appear to be an ordinary routine record of the business with no obvious signs of alteration, but the original is not required.
- 2) The record must have been made in the routine course of business, concern its regular activities, and have been created for the entity's own internal purposes. Records prepared for outside agencies or litigation do not qualify.
- 3) The record must have been made at or near the time of the event or transaction. For computer records, what matters is when the entry was made, not when the record was printed out.
- 4) The facts recorded were within the personal knowledge of employees, agents, or others authorized to engage in the activity, although the entrant need not be the same employee as the one who had personal knowledge. A record may be based upon information passed along a chain of employees, as long as each person in chain is acting in regular course of business.
- 5) Statements by non-employees may not be included unless they satisfy a separate hearsay exception. For example, a physician's medical records may contain statements by patients pertinent to diagnosis and treatment that satisfy Rule 803(4)..

The employee or agent who made the entry into the records must have had personal knowledge of the event or have received the information from another employee with personal knowledge. Information may be transmitted from one employee to another. As long as the information in the record appears to come from someone who worked for the business, personal knowledge is presumed. This part of the foundation is usually laid by testimony as to business custom under Rule 406.

Other rules of evidence apply to the content of a business record. Rule 803(6) explicitly states that a business record may contain opinions, in which case the rules of law and expert opinions apply and they must meet the foundation requirements for opinions testimony -- notably, establishing within the record itself an adequate factual basis for it.

C. PUBLIC RECORDS

Rule 803(8) creates a hearsay exception for most public records and reports. Properly certified official records from public offices are generally admissible if they are routine, factual, based on personal knowledge of public officials, and appear reasonably reliable. Investigative reports, reports with recommendations, and one-time reports prepared for a narrow purpose are generally admissible except against a defendant in a criminal case. No witness is required if the document is certified. This is called self-authentication under Rule 902, which means that we determine whether the foundation has been established by looking at the document itself. The

foundation is:

- 1) The document comes from a public office. This is shown either by a certification signed by an official or the live testimony of an employee of the agency in whose custody the record was found, that it is true and complete.
- 2) The document was prepared by public officials, though the precise identity of the official does not have to be known. Absolute certainty is not required.
- 3) The record must appear regular and unaltered on its face, although the original is not required.
- 4) The record concerns data collected by, activities recorded by, things observed by, personnel employed by a local, state or federal government office or agency in the performance of official duties. All this can be inferred from the record itself and relevant statutory provisions, or testified to by an official in the agency. The activity does not need to be a regular one, just an authorized one.
- 5) The source of information and other circumstances indicate trustworthiness. The records of public offices are presumed to be trustworthy and the person challenging admissibility bears the burden of proving otherwise. Indications of untrustworthiness include preparation a long time after the event and preparation for purposes of litigation.
- 6) The record must report facts within the personal knowledge of the public officials who prepare it. Public officials who qualify as experts may also report their opinions and diagnoses. However, statements by private citizens may not be included in official records unless they separately satisfy hearsay exceptions. *See D.W.S. v. L.D.S.*, 654 N.E.2d 1170 (Ind. Ct. App. 1995) (report from welfare department based on interviews of people who were under no duty to report did not qualify; person making report must be public employee with personal knowledge).

D. FOUR OTHER OCCASIONALLY USEFUL EXCEPTIONS

1. Rule 803(9): Records of Vital Statistics. Public records of births, deaths and marriages are admissible if properly certified. This exception is well known to family law practitioners.
2. Rule 803(5): Recorded Recollection. A record created by a witness when the matter was fresh in the witnesses' mind, about something the witness originally had personal knowledge about but has now forgotten, is admissible if the witness testifies to lack of current memory but that the record was accurate when made. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party. For example, police officers may be involved in many similar cases, so they create careful notes about each case at the time which can be used if the case takes so long to get to trial that they have forgotten the details.
3. Rule 803(17): Market Reports and Similar Commercial Publications: Market quotations, commercial lists, directories, and other published compilations of information generally used and relied upon by the public or by persons in particular occupations are admissible. This exception

covers items such as telephone directories, stock market reports, used car price guides, and weekly television schedules. The list or directory must come from an unbiased source and have been intended as a reference work for general distribution. For example, a list of weekly television programs published in a local newspaper qualifies under this exception; a list of which television programs promote good family values prepared by a coalition of ministers would not. See *e.g.*, *U.S. v. Goudy*, 792 F.2d 664 (7th Cir. 1986) (a table in Polk's Bank Directory indicating that the banks with the routing prefix "16" are in Los Angeles was admissible). It should make no difference whether the list was published online or in print form. But NOT Wikipedia.

4. Rule 803(18): Statements in Learned Treatises, Periodicals, or Pamphlets. Passages in reliable learned publications that contradict an expert's testimony are admissible for impeachment purposes. The treatise or journal article must first be established as a reliable authority by judicial notice, expert testimony, or stipulation, and then called to the attention of the expert witness whose testimony they undermine. The contradictory passages may be read into evidence but the treatise is not admissible as an exhibit.

E. THE REST OF THE EXCEPTIONS YOU'LL PROBABLY NEVER HEAR ABOUT AGAIN

1. Statements of personal and family history are admissible under four separate exceptions to the hearsay rule. Evidence Rule 803(11) admits written statements contained in regularly kept records of religious organizations. Rule 803(12) admits written marriage, baptismal and similar certificates issued by people authorized to preside at such ceremonies. Rule 803(13) admits information from a wide variety of permanent family records and heirlooms. Oral statements of family history are admissible if the declarant is unavailable under Rule 804(b)(4).

2. Records affecting property interests are admissible under three separate hearsay exceptions: Evidence Rule 803(14) admits records of documents affecting a property interest that were properly recorded. Rule 803(15) admits the documents themselves, whether or not they were recorded, as long as they are consistent with the way the property has been treated since the document. Rule 803(16) admits ancient documents over 20 years old (30 years in Indiana). Such documents may concern either real or personal property.

3. Evidence of a person's reputation is usually not considered hearsay although it consists of out-of-court factual assertions about a person offered in court for their truth. Just to be safe, the Rules of Evidence create three exceptions for reputation testimony. Rule 803(19) excepts reputation within a family concerning a matter of family history. Rule 803(20) covers reputation in a community concerning matters of property or history. Rule 803(21) removes reputation as to character from the hearsay rule.

4. Judgments are not usually considered hearsay at all. The words contained in them have independent legal significance and are not hearsay. The FRE created two exceptions to the

hearsay rule for judgments anyway, just to be on the safe side. Rule 803(22) excepts judgments of conviction for felonies. Rule 803(23) excepts judgments concerning personal or family matters, property boundaries, or general history. Placing these rules in the hearsay section is potentially misleading, however, because the primary consideration governing whether they are admissible is relevance.