Hearsay Rules Under the Federal Rules of Evidence
Leveraging the Rules and Exceptions to Admit Evidence or Make Sustainable Objections

TUESDAY, SEPTEMBER 10, 2013
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Chadwick A. McTighe, Member, Stites & Harbison, Louisville, KY
Dawn C. Van Tassell, Partner, Maslon Edelman Borman & Brand, Minneapolis, MN
Thad K. Jenks, Partner, Harrison Bettis Staff McFarland, Houston, TX

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Tips for Optimal Quality

Sound Quality
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial 1-866-871-8924 and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your company name and (2) the number of attendees at your location
- Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you'd like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.
If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.
Hearsay Rules Under the Federal Rules of Evidence

Thad K. Jenks, Partner
Harrison Bettis Staff McFarland (Houston, TX)

Chadwick A. McTighe, Member
Stites & Harbison (Louisville, KY)

Dawn C. Van Tassel, Partner
Maslon Edelman Borman & Brand, LLP (Minneapolis, MN)

September 10, 2013
Overview of Topics

- Effect on Hearsay Rules and Recent “Re-Styling” of the FRE
- What Qualifies as a Hearsay Statement?
- Common Exceptions to the Hearsay Rule
- The Residual (“Catch-all”) Exception
- Pre-trial Practice and Considerations, Best Practices
- Questions and Answers
Big Picture

The Hearsay Problem

Need for objectively accurate evidence vs. Humans
Big Picture

Solution for In-Court Testimony

- Oath
- Penalty of perjury
- Jury looks the witness in the eye
- Cross-examination
Big Picture

Solution for In-Court Testimony

Why allow?

- Some guarantees of trustworthiness
- Ability to assess trustworthiness
Big Picture

Problem with Out-of-Court Statements

- Faulty perception
- Faulty memory
- Faulty communication
- False communication
Big Picture

Problem with Out-of-Court Statements

Why not allow?

- Fewer guarantees of trustworthiness
- Harder to assess trustworthiness
2011 “Re-Styling” of FRE

- Not meant to reflect substantive changes, but to provide consistency and clarification
- Rule primarily affected:
  - Rule 801 ("statements" substituted for "admissions")
  - Other hearsay rules primarily clarified, better enumeration, and terms used more consistently
- Courts of nearly every circuit have held that the stylistic changes are not meant to alter outcomes of evidentiary rulings
What is Hearsay?

- FRE 801(c)
- Hearsay is a “statement” that:
  - is made by the declarant at some other time while not testifying at the current hearing or trial; AND
  - is offered by a party to prove the truth of the matter asserted.
What is a “Statement”?

- FRE 801(a)
- Statement can be any of the following:
  - Oral assertion
  - Written assertion
  - Nonverbal conduct if intended as an assertion
Non-Hearsay Statements

- Differs from hearsay exceptions
- Rule 801, sections (c) and (d)
  - Statement not offered to prove the truth of the matter
    - To prove notice
      * Tuli v. Brigham & Women’s Hosp., 656 F.3d 33 (1st Cir. 2011)
    - To provide context
      * Re/Max Int’l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999) (leaning and smiling)
    - “Verbal act” (defamatory statements, contract provisions)
    - To show state of mind
    - Directions, instructions, recommendations
      * United States v. Ned, 637 F.3d 562 (5th Cir. 2011) (“Go to the front door!” held non-hearsay)
    - False statements
Non-Hearsay Statements (cont’d)

- Implied assertions
- Automatically generated information (fax headers, computer time stamps)
- Statements relied upon
  Royall v. National Ass’n of Letter Carriers, 548 F.3d 137 (D.C. Cir. 2008)
- Consumer confusion
  Lyons P’ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001)
  - Prior statement of the testifying witness
    - If it is inconsistent with how the witness is now testifying and under oath OR
    - If it is consistent with current testimony, but being used to rebut a charge of recent fabrication OR
    - It identifies a person earlier perceived by declarant
  - Opposing party’s statement (“party admission”)
Hearsay Rule

- FRE 802
- General rule is that hearsay is inadmissible unless an exception exists
- Exception can come from the FRE, from a federal statute or from any other rule prescribed by the Supreme Court
Hearsay Exceptions

Two broad categories

1. Declarant availability irrelevant
2. Declarant not available
Hearsay Exceptions

Availability irrelevant

1. Unreflective Statements
2. Reliable Documents
3. Reputation Evidence
Hearsay Exceptions

Unreflective Statements

- Present Sense Impression
- Excited Utterance
- Then-Existing Mental, Emotional, or Physical Condition
- Statements Made for Medical Diagnosis or Treatment
Hearsay Exceptions

Reliable Documents

- Recorded Recollection
- Business Records
- Public Records
- Religious Records
- Certificates of Marriage or Baptism
- Ancient Documents
- Commercial Publications
- Learned Treatises
Hearsay Exceptions

Reputation Evidence

- Statements Against Interest
- Judgment of Previous Conviction
- Reputation Concerning:
  - Personal or Family History
  - Boundaries
  - General History
  - Character
Present Sense Impression

Current Fed. R. Evid. 803(1):

*Present Sense Impression.* A statement *describing* or explaining an *event or condition*, made *while or immediately after* the declarant perceived it.

Former Fed. R. Evid. 803(1):

*Present sense impression.* A statement describing or explaining an *event or condition* made while the declarant was perceiving the event or condition, or immediately thereafter.
Present Sense Impression

Requirements:

- Speaker perceives the event (perception)
- Statement describes what was perceived (description)
- Perception and statement are contemporaneous (immediacy)

Note:

- A startling event is not required
Present Sense Impression

Why admissible?

- Eliminates the faulty memory problem
- Little or no time to calculate a false statement
- The person hearing the statement usually witnesses the event and can therefore check its accuracy
Present Sense Impression

Examples – Perception – Admitted

➢ Includes descriptions of sounds heard

*U.S. v. Ruiz*, 249 F.3d 645, 646–647, 56 Fed. R. Evid. Serv. 1341 (7th Cir. 2001)
Present Sense Impression

Examples – Perception – Not Admitted

- 911 call not allowed because caller relayed descriptions by other people
  
  *Bemis v. Edwards*, 45 F.3d 1369, 1373, 41 Fed. R. Evid. Serv. 383 (9th Cir. 1995)

- Viewing a line up – “that’s not him” – because of link to past event
  

- Evaluation of customer’s thoughts by employee
  
  *Vitek Systems, Inc. v. Abbott Laboratories*, 675 F.2d 190, 194, 10 Fed. R. Evid. Serv. 1195 (8th Cir. 1982)
Present Sense Impression

Examples – Immediacy – Admitted

➢ “shortly after”


➢ “no more than a few seconds” after


➢ “virtually on the heels of the event”


➢ “extremely short” interval


➢ “between several minutes and 23 minutes”

Present Sense Impression

Examples – Immediacy – Not Admitted

- **10-15 minutes**
  

- **At least 15 minutes, possibly 45 minutes later**
  

- **50 minutes; questioned by DEA in meantime**
  

- **Drove five miles away within a few minutes**
  
  *U.S. v. Cain*, 587 F.2d 678, 681–682, 4 Fed. R. Evid. Serv. 299 (5th Cir. 1979)
Excited Utterance

Current Fed. R. Evid. 803(2):

*Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Former Fed. R. Evid. 803(2):

*Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
Excited Utterance

Requirements:

- Startling or exciting event
- Made while under stress of the event (excited reaction)
- Connection between statement and event

Note:

- Immediacy not required
Excited Utterance

Why admissible?
- Eliminates the faulty memory problem
- Little or no time to calculate a false statement

But:
- The excitement likely increases risk of misperception
Excited Utterance

Factors – Exciting Event

- Speaker must be excited; the reasonable person standard is irrelevant
- Nature of the event
- Appearance or demeanor of the speaker
- Nature and content of the statement
- Degree of surprise or suddenness
- Physical or psychological distance from event
- Spontaneous or in response to questions
- Time lapse
Excited Utterance

Exciting Events – Admitted

- Threatened by convicted murdered with semi-automatic handgun
  
  *U.S. v. Arnold*, 486 F.3d 177, 184, 73 Fed. R. Evid. Serv. 583 (6th Cir. 2007)

- Statement describing offer of bribe
  
  *U.S. v. Bailey*, 834 F.2d 218, 228, 24 Fed. R. Evid. Serv. 90 (1st Cir. 1987)

- “I’ve found the evidence I’ve been waiting for for a long time” in a trash can
  

- “Never looked at traffic” and backed into truck
  
Excited Utterance

Factors – Connection to Event

- Need not describe the act or event itself
- May describe:
  - Conditions that caused event
  - Identity of perpetrator
  - Dress or appearance of actors
- Can be used to prove agency or authority of speaker if also a participant in event
- Can be used to show fault or lack of due care
Then-Existing Condition or State-of-Mind

Current Fed. R. Evid. 803(3):

*Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant’s *then-existing state of mind* (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but *not including a statement of memory or belief* to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.
Then-Existing Condition or State-of-Mind

Former Fed. R. Evid. 803(3):

*Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
Then-Existing Condition or State-of-Mind

Requirements

- Description of state-of-mind or other feeling or condition
- Then-existing
  - Not existing in the past

Exceptions

- From Rule: Statements of memory or belief not admissible to prove the fact remembered or believed
- Statements showing external cause of condition
Then-Existing Condition or State-of-Mind

Why admissible?

- Eliminates the faulty memory problem
- Reduces risk of misperception
- More reliable than testifying about the feeling or condition later in court
Then-Existing Condition or State-of-Mind

But:

- Few things are easier to lie about than one’s feelings
- Can be admissible even after self-serving motive to lie is generated

Despite rule, argue for exclusion if statement lacks indicia of reliability
Then-Existing Condition or State-of-Mind

“I was scared yesterday and I am scared today because the defendant threatened me”
Then-Existing Condition or State-of-Mind

- “I was scared yesterday”
  - Not admissible: not then-existing condition

- “I am scared”
  - Admissible: then-existing condition

- “because the defendant threatened me”
  - Not admissible: External cause of condition

Adapted from *U.S. v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005)
Then-Existing Condition or State-of-Mind

Examples – Admitted

➢ “Only came here to get some cigarettes real cheap”
  

➢ Disparaging racist remarks made by defendant in racial discrimination lawsuit
  

➢ Letter stating bank “won’t approve a loan until you get the foreclosure issue resolved” to show bank’s intentions
  
  *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 964 (7th Cir. 2011)

➢ “Hyles was picking him up in Memphis to bring him to Caruthersville”
  
  *U.S. v. Hyles*, 521 F.3d 946, 959 (8th Cir. 2008)
Statements for Medical Diagnosis

Current Fed. R. Evid. 803(4):

Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
Statements for Medical Diagnosis

Former Fed. R. Evid. 803(4):

*Statements for purposes of medical diagnosis or treatment.*

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
Statements for Medical Diagnosis

Why admissible:

- Reduced risk of misperception
- Reduced risk of faulty memory
- Strong incentive to be truthful and precise
  - Really? Treatment vs. Diagnosis
- No better source than the patient
- Past statement to physician is more likely to be accurate than in-court memory of statement
- Because physicians find statements reliable for treatment and diagnosis
Statements for Medical Diagnosis

Requirements:

- For purpose of seeking treatment or diagnosis
- Reasonably pertinent to treatment or diagnosis
Statements for Medical Diagnosis

Not requirements:

- Need not describe present sensations
  - May describe past symptoms
- Speaker need not be patient
  - Can be person who accompanies patient
  - Possible it can be doctor to doctor
- Listener need not be doctor
  - Can be nurse, clerical intake person, admin assistants, orderlies
- Need not be for medical purposes
  - Can be psychiatric
  - What about psychologists, social workers
Statements for Medical Diagnosis

These are reasonably pertinent:

- When injury occurred (date)
- Time of onset of symptoms
- General nature (car accident, slip and fall, etc.)
- Objects involved in causing injury (striking windshield, hit by fist, etc.)
- Apparent cause (food, exertion, exposure)
- Nature of symptoms
- Location (maybe)
Statements for Medical Diagnosis

These are not reasonably pertinent:

- Blamecasting statements
- Identification of tortfeasors or assailants
- Other driver “ran a red light”
- Employer did not “provide a harness”
- Employer imposed unreasonable demands
- Statements suggesting injury was accidental or deliberate
- Possible it does not apply to statements by doctor to patient re: diagnosis or treatment
Statements for Medical Diagnosis

What about references to seat belt use?
Statements for Medical Diagnosis

Real life example:

- Family of ten in rollover accident in Mexico
- Claimed a “rapid blow out” tire failure caused the accident

On day of accident, a teenage passenger gave a sworn statement to investigators blaming a fish-tailing 18-wheeler in the next lane
Statements for Medical Diagnosis

From medical records of mother of the teenager (dated five months later):

PMH: Anemia -
SEVERE MVA - Frx pelvis, hips, sternum, left foot
  - Depression
  - Abnormal pap

PSH: 2 units blood transfusion 1/03 Mexico (PMVA) Dec 1983
  ☐ foot surgery 1/03 Mexico MVA

Her car was intercepted by a 18 wheeler truck as a result she has chronic back pain
Hearsay Exceptions

Reliable Documents
- Recorded Recollection
- Business Records
Recorded Recollection

Current Fed. R. Evid. 803(5):

*Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and

(C) accurately reflects the witness’s knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
Recorded Recollection

Former Fed. R. Evid. 803(5):

*Recorded recollection.* 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.
Recorded Recollection

Requirements:

- Witness must be author of record
- Lack of present memory to testify fully or accurately
- Correct reflection of prior knowledge
  - Get witness to say she was careful to correctly record what she knew
    - What if she can only say she wouldn’t have written it if not true?
    - What if statement was signed, notarized, or under oath?
- Made or adopted by witness
  - No formality required
- Freshness
  - Not as restrictive as the immediacy requirement
Recorded Recollection

Why admissible:

- Necessity – last best chance to get witness’s knowledge
- Reduces faulty memory problem (must have been made when matter fresh in mind)
- Reduces risk of lack of candor (because the witness once knew it)
- Witness who made record can be cross-examined about it
  - But not fully!
Recorded Recollection

Don’t forget:

- May only be read to jury
- May not go back to jury as an exhibit
  - Unless offered by adverse party
Records of
Regularly Conducted Activity

Current Fed. R. Evid. 803(6):

*Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.
Records of Regularly Conducted Activity

Former Fed. R. Evid. 803(6):

*Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
Records of Regularly Conducted Activity

Requirements:

- Regular conducted activity
- Business or other organization
- Regularly kept record
- Source of information had personal knowledge
- Contemporaneity
- Foundation testimony
Records of Regularly Conducted Activity

Why admissible:

- Necessity
  - Many records are composites from multiple sources
  - Many records are the only possible source of information; volume means few people will have a memory of it

- Judicial economy
  - Few records contain information from one person; reduces number of witnesses needed to prove up a document

- Trustworthiness
  - Businesses need reliable information to operate
  - Regularly made as part of a routine increases accuracy
    - But doesn’t eliminate self interest
Records of Regularly Conducted Activity

Regular business or organization:

- Businesses of any size
- Non-profits
- Illegal enterprises (drug cartels, bookmakers)
- Churches
- Hospitals, doctor offices (medical records)
- Foreign enterprises and records
- Educational institutions
- Labor organizations
- Political parties
- Sole proprietorships
Records of Regularly Conducted Activity

Not regular business or organization:

- Personal diaries, reminder notes, household phone messages
- Mileage, service, or trip records kept by car owner
- Records kept for a hobby
- Records for personal or recreation equipment
Records of Regularly Conducted Activity

Regularly kept record:

- Kept as a matter of regular practice or routine
  - Does not have to be hourly, weekly, monthly etc.
  - Unusual records and litigation records do not fit exception
  - What if company only created that type of record on a single occasion?
- Each person involved in making the record was doing so as part of her routine duties
  - Exception does not apply to persons outside organization
  - But, records made by one organization can become the business records of another
- E-mail probably does not meet exception
Records of Regularly Conducted Activity

Personal knowledge of source:

- Source of the information must have personal knowledge
- No one else in the chain of transmission of information to document must have personal knowledge
Records of Regularly Conducted Activity

Contemporaneity:
- Again, not immediacy
- Record must be made close in time to event recorded
Records of Regularly Conducted Activity

Foundation testimony:

- By the custodian of records or another qualified witness
- By a live witness or affidavit/certification
- Certification
  - Sworn statement (affidavit)
  - Unsworn statement subject to penalties of perjury (declaration)

Warning:

- Per FRE 902(11), adverse party must be: (1) given reasonable notice in writing of intent to offer the record; and (2) be given opportunity to inspect record and certification
Rule 807 - Residual Exception

Current Fed. R. Evid. 807:

Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;
(2) it is offered as evidence of a material fact;
(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.
Residual Exception

Former Fed. R. Evid. 807:

Residual Exception

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

Requirements:

- Circumstantial guarantees of trustworthiness
- Material fact
  - Argue importance, not just materiality
- More probative than other evidence that can be obtained with reasonable effort
  - Don’t just argue the effort that would be required; actually make the effort
  - Show diligence
- Must serve purposes of FRE and interests of justice
- Notice
Residual Exception

Circumstantial guarantees of trustworthiness

- Everything that bears on credibility of speaker and accuracy of the statement
  - Sworn or unsworn
  - Propensity to tell the truth
  - Motivations for making the statement /Against interest
  - Stake in the truth of the matter
  - Repetition with consistency
  - Corroboration
  - Contextual credibility
Residual Exception

- Plausibility given other evidence
- Likelihood of faulty perception, memory, or communication
- Time lapse between event and statement
- Reliance on the statement by others
- Made as a matter of routine or regular practice
- Availability of speaker to testify

Practice Hint: Also argue necessity, best evidence, judicial economy, etc.
Residual Exception

Notice:

- Reasonable notice of:
  - Intent to offer statement
  - Particulars of statement
  - Name and address of speaker

- Fair opportunity to meet the statement
More Exceptions

- **Routinized reports: Governments and Agencies**
  - Statements/records from a public office (803(8))
  - Records of vital statistics (births, deaths, marriages) (803(9))
  - Property records (803(14)) and statements therein (803(15))

- **Reports of Religious Organizations**
  - Personal or family history records (803(11))
  - Certificates of ceremonies – marriage, baptism (803(12))

- **Family Records (803(13))**

- **Reliable Third-Party Sources**
  - Market reports or commercial publications (803(17))
  - Learned treatises, periodicals or pamphlets (803(18))
More exceptions (cont’d)

- “Ancient” documents (803(16))
- The absence of business or public records (803(7), (10))
  - Diligent search
  - Indicia of reliability
- Reputation (803(19) – (21))
  - Family matters, relating to boundaries or character
Hearsay Exceptions When the Declarant is Unavailable

FRE 804 sets forth 6 exceptions that allow hearsay to be admitted when the declarant is unavailable to testify:

- Former Testimony
- Statement Under Belief of Imminent Death
- Statement Against Interest
- Statement of Personal or Family History
- Residual Exception
- Statement Offered Against Party That Wrongfully Caused Declarant’s Unavailability.
When is a Declarant Unavailable?

- Whether declarant is unavailable is the threshold question that must be answered.

- Declarant is unavailable in 5 situations (FRE 804(a)):
  - Exempt from testifying based on privilege.
  - Refusal to testify despite court order.
  - Lack of memory.
  - Death, infirmity, or physical or mental illness.
  - Absent and unable to procure attendance or testimony by reasonable means.
Unavailability Based on Privilege

- Declarant is unavailable if he is exempt from testifying to the subject matter based on privilege. FRE 804(a)(1).

- Must have court rule on applicability of privilege. Cannot anticipate privilege or rely solely on invocation of privilege without having court determine if it applies. *E.g.*, *U.S. v. Pelton*, 578 F.2d 701, 709-10 (8th Cir. 1978).

- There is authority to the contrary, *e.g.*:
  - *U.S. v. Young Bros., Inc.*, 728 F.2d 682, 690-91 (5th Cir. 1984) (holding that ruling may not be required if it would be a mere “formalism”).
  - *U.S. v. Williams*, 927 F.2d 95, 98–99 (2d Cir. 1991) (noting that it is preferable for court to require witnesses to claim privilege, but affirming decision to rely on representation by counsel that witnesses would invoke Fifth Amendment if called to testify).
Unavailability Based on Refusal To Testify

- Declarant is unavailable if he refuses to testify despite being ordered by the court to do so. FRE 804(a)(2).

- Court must order witness to testify, and witness must refuse, for this provision to apply.
  - *U.S. v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980). A court order requiring the witness to testify, and not merely judicial pressure, is an “essential prerequisite” to unavailability under this provision. A witness who refuses to respond to judicial pressure may change course if faced with contempt, or if he is given the ability to justify his decision to testify by pointing to the court’s order.

- This provision can create difficult circumstances if a witness chooses to testify selectively.
Unavailability Based on Lack of Memory

- Declarant is unavailable if he testifies to a lack of memory on the subject matter. FRE 804(a)(3).
  - Witness must testify to the lack of memory.

- As with unavailability based on refusal to testify, difficulties can arise if witness appears to have selective memory.
  - Requirement that witness testify to lack of memory helps to address this concern. Testimony on the lack of memory allows cross-examination and assessment of credibility.
Unavailability Based on Death, Infirmity, or Illness

- Declarant is unavailable to testify if he is dead or subject to a then-existing infirmity, or physical or mental illness. FRE 804(a)(4).
  - Death is most obvious form of unavailability, but virtually any condition that affects ability to testify can apply.

- Must consider whether condition is temporary (e.g., pregnancy, surgery, illness) and whether continuance may be preferable to admitting hearsay (especially in criminal cases, due to Confrontation Clause).
  - Courts have wide discretion to consider preference for live testimony, nature of condition, expected duration, docket management, importance of witness, reliability of evidence, fault of party seeking to introduce hearsay, whether cross-examination is especially appropriate due to the nature of the evidence, and other factors.
Unavailability Based on Death, Infirmity, or Illness (cont’d)

- *U.S. v. Faison*, 679 F.2d 292, 297 (3d Cir. 1982) (providing good discussion of judge’s discretion in determining whether to continue trial or admit hearsay and factors relevant to the analysis); *Ecker v. Scott*, 69 F.3d 69, 71-73 (5th Cir. 1995) (same, addressing Confrontation Clause concerns).

- *U.S. v. McGowan*, 590 F.3d 446, 454–55 (7th Cir. 2009) (affirming finding of unavailability based on evidence of severe and chronic medical conditions that were not likely to improve, making additional evidentiary hearing on the issue and a continuance unnecessary).
Mental conditions can be particularly difficult to address.

- In addition to evaluating whether condition may improve, it also may be necessary to determine whether declarant was suffering from the same condition at the time the hearsay statement was made. This could affect the reliability of, and thus the propriety of admitting, the hearsay evidence.
Unavailability Based on Absence

- FRE 804(a)(5): Declarant is unavailable if he is absent from trial/hearing, and proponent of evidence is unable, by process or other reasonable means, to procure:
  - the declarant’s attendance, in the case of an exception under FRE 804(b)(1) or (6); or
  - the declarant’s attendance or testimony, in the case of an exception under FRE 804(b)(2), (3), or (4).

- Note the difference between the two subsections. Declarant’s attendance is what matters for FRE 804(b)(1) and (6). Attendance or testimony, however, applies to FRE 804(b)(2), (3), or (4). For these subsections, it may be necessary to seek to depose or otherwise obtain testimony from the declarant even if the declarant cannot be made to testify at trial.
Unavailability Based on Absence (cont’d)

- This provision can apply in range of circumstances.
  - Witness cannot be identified.
  - Witness cannot be found.
  - Witness can be found, but is unwilling to appear and is beyond subpoena power or other means to compel attendance (but, be sure of this).

- Must make a reasonable, good faith effort to procure witness’s attendance or testimony.
  - Can witness be subpoenaed?
  - Is it appropriate (or necessary) to offer to reimburse witness for travel expense?
  - May need to try to take deposition of declarant, if relying on exception under FRE 804(b)(2), (3), or (4).
Exception To Unavailability

- Under FRE 804(a), a declarant is *not* unavailable if proponent of testimony procured or wrongfully caused the declarant’s unavailability in order to prevent the declarant from attending or testifying.

- Consider wide range of situations in which this could occur (including attempts to make oneself unavailable and avoid cross-examination, *see U.S. v. Peterson*, 100 F.3d 7, 13 (2d Cir. 1996) (holding that defendant could not make himself unavailable, and introduce prior testimony, by invoking Fifth Amendment at later proceeding)).

- Compare with exception under FRE 804(b)(6) (allowing admission of statements against a party that wrongfully caused, or acquiesced in wrongfully causing, declarant’s unavailability, and did so intending that result).
What if Witness Becomes Available?

- It depends. See Burns v. Clusen, 798 F.2d 931, 943 (7th Cir. 1986) (holding that party must prove that unavailability is continuing, even if prior ruling of unavailability exists).

- But see Bickel v. Korean Air Lines Co., LTD, 96 F.3d 151, 154–55 (6th Cir. 1996). The court affirmed a district court’s decision to continue playing videotapes of expert depositions despite the fact that witnesses became available before entirety of videos had been played. Even assuming that the experts could have flown in to testify immediately after testifying in another case, the testimony that the experts would have given live was substantially the same as in the videotaped depositions, and court had the discretion to proceed in a manner that avoided disruption and delay from trying to have the experts appear live.
Hearsay Exceptions When the Declarant is Unavailable

- Former Testimony
- Statement Under Belief of Imminent Death
- Statement Against Interest
- Statement of Personal or Family History
- Residual Exception
- Statement Offered Against Party That Wrongfully Caused Declarant’s Unavailability
Former Testimony

- FRE 804(b)(1): Two conditions for admission of former testimony:
  - Testimony that was given as a witness at a trial, hearing, or lawful deposition, whether in the current proceeding or another one; AND
  - Testimony is being offered against a party (or, in civil cases, a predecessor-in-interest to the party) that had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
    - How broadly should predecessor-in-interest provision be interpreted?
    - Actual cross-examination during prior testimony is not required; merely opportunity to do so.
    - Motive to develop testimony need only be similar, not identical.
What is a predecessor-in-interest?

Original proposed rule did not include predecessor-in-interest limitation, but instead turned on motive and similar interest—a result considered potentially unfair (saddling party with results of manner in which an unrelated party handled a witness). *See Lloyd v. Am. Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir. 1978).

But, some courts nevertheless interpret the term predecessor-in-interest broadly. *See id.* at 1187 (“While we do not endorse an extravagant interpretation of who or what constitutes a ‘predecessor-in-interest,’ we prefer one that is realistically generous over one that is formalistically grudging.”).
Former Testimony (cont’d)

- Similarity of motive generally is a fact-specific inquiry.
- “The proper approach, therefore, in assessing the similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.” *U.S. v. DiNapoli*, 8 F.3d 909, 914-15 (2d Cir. 1993).
Former Testimony (cont’d)

- Key consideration is whether it would be fair to allow testimony to be introduced against the current adversary.
  - If it’s the same party who clearly had a chance to cross-examine witness on the same issue in a deposition or hearing earlier in the same case, it hardly seems unfair to introduce the testimony.
  - If, on the other hand, the testimony was given in a different case, before someone who was only arguably a predecessor-in-interest to the current party, and it is debatable whether the predecessor truly had a similar motive to develop the testimony at the time, it may be unfair to allow the testimony to be introduced against the current party.
  - Consider: does examination (or opportunity to examine) in former proceeding compensate for inability to cross-examine now?
Former Testimony (cont’d)

- Best way to introduce former testimony is transcript or recording. But, other means are possible (e.g., someone in attendance when testimony was given could testify to what was said). 5-804 Weinstein’s Federal Evidence § 804.04[2].
Statement Under Belief of Imminent Death

- In prosecution of homicide or a civil case, a statement that the declarant made, while believing his death to be imminent, about its cause or circumstances. FRE 804(b)(2).
  - Needs to be about cause or circumstances of impending death—not just any deathbed confession.
  - Declarant does not actually need to be dead, just unavailable under FRE 804(a).
  - Key to this exception is determining what circumstances were when statement was made.
Statement Against Interest

- FRE 804(b)(3): Statement that a reasonable person would have made only if he believed it to be true because, when made:
  - It was so contrary to the declarant’s proprietary or pecuniary interest; or
  - Had so great a tendency to invalidate the declarant’s claim against someone else, or to expose the declarant to civil or criminal liability;

AND

- Is supported by corroborating circumstances that clearly indicate its trustworthiness, if offered in a criminal case as one that tends to expose the declarant to criminal liability.
Statement Against Interest (cont’d)

➢ Necessary to evaluate whether statement is really against declarant’s interest.

➢ Consider, for example:
  o Did declarant believe statement to be against his interest?
  o Is there actually a self-serving (or even neutral) motivation behind the statement?

➢ It may be necessary to parse a statement so as to admit only those parts that are genuinely against declarant’s interest. See *Williamson v. U.S.*, 512 U.S. 594, 599 (1994).
Statement of Personal or Family History

FRE 804(b)(4): Statement about:

- Declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though declarant had no way of acquiring personal knowledge of the fact; OR

- Another person concerning any of these facts, as well as death, if declarant was related to the person by blood, adoption, or marriage, or was so intimately associated with the person’s family that the declarant’s information is likely to be accurate.
Residual Exception

- FRE 804(b)(5). Now codified in FRE 807.
Statement Offered vs. One Who Made Declarant Unavailable

- **FRE 804(b)(6): Statement against party:**
  - That wrongfully caused, or acquiesced in wrongfully causing, declarant’s unavailability, and
  - Did so intending that result

- This can involve obvious efforts (murder, physical assault) or more subtle ones (coercion, threats). Need not be criminal in nature.

- Obviously, if party intentionally renders declarant unavailable to keep him from testifying, the exception applies.

- It can be tricky to determine if the party intended for the declarant to be unavailable.
Criminal conspiracies can result in application of this rule. Several courts have held that party acquiesces to causing the witness to be unavailable if unavailability was procured in furtherance of, within the scope of, and was reasonably foreseeable as a natural or necessary consequence of the conspiracy (and covering up or escaping the consequences of a crime can be a natural or necessary part of the conspiracy). *E.g., U.S. v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000).

Consider possible analogy to non-conspiracy contexts. This provision is designed to address conduct harmful to system of justice itself.
Determining whether party wrongfully caused or acquiesced in causing declarant to be unavailable is based on preponderance of the evidence. *U.S. v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001) (rejecting precedent applying clear and convincing standard based on amendments to FRE).

Note: showing that evidence is admissible under this exception does not waive right of opposing party to object on other grounds (relevance, prejudice, etc.).
Burden of Proof

- Burden is on the proponent of the hearsay to show that witness is unavailable and that exception applies. See, e.g., *U.S. v. Jackson*, 540 F.3d 578, 588 (7th Cir. 2008); *U.S. v. Fuentes-Galindo*, 929 F.2d 1507, 1510 (10th Cir. 1991).
Hearsay in Pretrial Motions and Proceedings

- Although hearsay is most often a concern at trial, this is hardly the only time when litigants—and their counsel—must be cognizant of hearsay.

- Hearsay rules can come into play any time evidence is being introduced, including, for example:
  - Motions for summary judgment
  - Motions for preliminary injunctions
  - Evidentiary hearings
  - Oral arguments (if evidentiary issues are in play)
Hearsay In Motions for Summary Judgment

- 2010 Amendments to Rule 56 highlight potential hearsay concerns:
- A party can oppose an assertion of fact or support the assertion that there is no genuine issue of material fact by pointing out that a fact cannot be presented in an admissible form. Fed. R. Civ. P. 56(c)(1)(B).
- A party can object to an assertion of fact on the grounds that it cannot be presented in a form that is admissible. Fed. R. Civ. P. 56(c)(2).
- Affidavits or declarations must be based on personal knowledge, set forth facts that would be admissible into evidence, and establish that affiant or declarant is competent to testify to the matters set forth. Fed. R. Civ. P. 56(c)(3) (emphasis added).
Hearsay in Motions for Summary Judgment (cont’d)

- Be conscious of whether you are relying on potentially inadmissible hearsay in moving for or opposing motion for summary judgment.

- It should not be fatal if you do not have the evidence in an admissible form. You may be able to explain how the evidence will be introduced in an admissible form.

  - Hearsay exception may be the means of doing so, and you should be ready to argue the point if necessary.
  
  - Or, you may simply need to explain that the evidence will be presented in another form if the case goes to trial.
Hearsay in Motions for Summary Judgment (cont’d)

- Some courts have held that hearsay cannot be considered in evaluating a motion for summary judgment, e.g.:
  - *Macuba v. DeBoer*, 193 F.3d 1316, 1323–24 (11th Cir. 1999) (holding that hearsay generally cannot be considered unless it is admissible for some purpose, such as through a hearsay exception).

- But see: *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.”); *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (hearsay properly considered if proponent could present it in admissible form at trial).
Hearsay in Motions for Preliminary Injunctions

- Hearsay can be a significant concern in seeking preliminary injunctions (and even more so in seeking temporary restraining orders).

  - But, hearsay may be entitled to less weight than admissible evidence. *See id.; see also Marshall Durbin Farms, Inc. v. Nat’l Farmers Org., Inc.*, 446 F.3d 353, 357 (5th Cir. 1971) (noting that courts are reluctant to issue injunctions when supported by assertions of information and belief).
General Pretrial Considerations

- Always be aware of whether evidence you are seeking to introduce may be considered hearsay.
  - If so, can you introduce evidence in another form that would be admissible?
  - If so, and if other form of evidence is unavailable or otherwise not viable, determine whether hearsay exception may apply.

- Never assume that the opposing party or the court will fail to recognize a potential hearsay problem simply because case is not at trial stage.
Best Practices

- Identify potential hearsay pitfalls/attacks well in advance of trial.
- Prepare bench briefs or motions in limine to educate the judge. Don’t assume s/he knows all these rules by heart.
Questions?

Thad K. Jenks, Partner
Harrison Bettis Staff McFarland (Houston, TX)
thad.jenks@harrisonbettis.com

Chadwick McTighe, Member
Stites & Harbison (Louisville, KY)
cmctighe@stites.com

Dawn C. Van Tassel, Partner
Maslon Edelman Borman & Brand, LLP (Minneapolis, MN)
dawn.vantassel@maslon.com