

Faculty Publications

---

1990

## Hearsay: Part III

Paul C. Giannelli

Follow this and additional works at: [https://scholarlycommons.law.case.edu/faculty\\_publications](https://scholarlycommons.law.case.edu/faculty_publications)



Part of the [Evidence Commons](#), and the [Litigation Commons](#)

---

### Repository Citation

Giannelli, Paul C., "Hearsay: Part III" (1990). *Faculty Publications*. 292.  
[https://scholarlycommons.law.case.edu/faculty\\_publications/292](https://scholarlycommons.law.case.edu/faculty_publications/292)

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# PUBLIC DEFENDER REPORTER

Vol. 13, No. 3

Summer 1990

## HEARSAY: PART III

Paul C. Giannelli

*Albert J. Weatherhead III & Richard W. Weatherhead  
Professor of Law, Case Western Reserve University*

SEP 27 1990

This is the third of a series of articles on the hearsay rule. The first article discussed the definition of hearsay. The second article examined a number of hearsay exceptions recognized in Ohio Rule 803 — those exceptions that do not require the declarant to be unavailable. This article considers additional hearsay exceptions recognized by Rule 803 as well as the unavailability requirements for the exceptions in Rule 804.

### BUSINESS RECORDS

Rule 803(6) recognizes a hearsay exception for records of regularly conducted business activities. According to the Staff Note, the rule is "in substantial conformity with R.C. 2317.40, the Uniform Business Records as Evidence Act. . ."

Rule 803(6) requires: (1) a record of an act, event, or condition; (2) made at or near the time; (3) by, or from information transmitted by, a person with knowledge; (4) which was kept in the course of a regularly conducted business activity; (5) if it was the regular practice of that business activity to make the record; (6) as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10); (7) unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Records of regularly conducted business activities include memoranda, reports, records, or "data compilation[s], in any form." "The expression 'data compilation' is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage." Advisory Committee's Note, Fed. R. Evid. 803. In contrast, RC 2317.40 refers only to "records." See *State v. Knox*, 18 Ohio App.3d 36, 480 N.E.2d 120 (Cuyahoga 1984) (computer printouts admitted).

The reliability of business records "is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Advisory Committee's Note, Fed. R. Evid.

803. See also 5 Wigmore, Evidence § 1522 (Chadbourn rev. 1974). The Supreme Court recognized this rationale in *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947): "The exception to the hearsay rule of evidence in such cases is based on the assumption that the records, made in the regular course of business by those who have a competent knowledge of the facts recorded and a self-interest to be served through the accuracy of the entries made and kept with knowledge that they will be relied upon in a systematic conduct of such business, are accurate and trustworthy." *Id.* at 425-26.

### Regularly conducted activity; regularly kept record

The rule requires that the record be "kept in the course of a regularly conducted business activity." The rule defines a business as an "institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." This definition is coextensive with RC 2317.40 except for the addition of the term "association." The term business was defined broadly in the rule to include "the records of institutions and associations like schools, churches and hospitals. . ." H.R. Rep. No. 1597, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 7098, 7104 (Conference Report). Personal records are not admissible under this exception. The rule also requires that the record be the product of "the regular practice of that business activity." See RC 2317.40 (record made "in the regular course of business"); *Kalna v. Fialko*, 102 Ohio App. 442, 446, 125 N.E.2d 565, 567 (1955) ("piece of paper was not a part of any system of the plaintiff in recording events of his business.").

### Acts, events, and conditions

The rule requires that the record concern "acts," "events," or "conditions." In contrast, Federal Rule 803(6) extends the list of appropriate material to include "opinions or diagnoses." The omission of this phrase from the Ohio rule does not necessarily mean that opinions and diagnoses are inadmissible. RC 2317.40, which also defines records in terms of "act, condition, and event," has been interpreted by the Ohio courts to admit medical diagnoses. See *Weis v. Weis*, 147 Ohio St. 416,

Public Defender Hyman Friedman  
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113

Telephone (216) 443-7223

*The views expressed herein are those of the author and do not necessarily reflect those of the Public Defender.*  
Copyright © 1990 Paul Giannelli

72 N.E.2d 245, 250 (1947) (hospital or physician's office record may include "diagnosis by one qualified to make it . . ."); *Dillow v. Young*, 3 Ohio App.2d 110, 113, 209 N.E.2d 623, 626 (1965), reversed on other grounds, 6 Ohio St.2d 221, 217 N.E.2d 868 (1966) (record of medical diagnosis made by a qualified doctor may be admitted).

Moreover, the Staff Note to Rule 803(6) indicates that these prior cases may have survived adoption of the rule:

The Ohio rule departs from the Federal Evidence rule by deleting "opinions and diagnoses" as admissible under this section. It is not clear how far present Ohio law permits such evidence to be admitted. In *Hytha v. Schwendeman* (1974), 40 Ohio App. 2d 478, the Franklin County Court of Appeals set forth seven criteria for a diagnosis to be admissible when contained in a hospital record. The *Hytha* case may retain validity insofar as it may assist in determining the point at which, in medical records, an act, event, or condition admissible under the exception becomes an impermissible opinion or diagnosis under the rule.

The Staff Note apparently refers to the syllabus of *Hytha v. Schwendeman*, which reads:

Before the record of a medical diagnosis made by a physician may be admitted into evidence, pursuant to R. C. 2317.40 (Records, as evidence), the following factors must be present:

- (1) The record must have been a systematic entry kept in the records of the hospital or physician and made in the regular course of business;
- (2) The diagnosis must have been the result of well-known and accepted objective testing and examining practices and procedures which are not of such a technical nature as to require cross-examination;
- (3) The diagnosis must not have rested solely upon the subjective complaints of the patient;
- (4) The diagnosis must have been made by a qualified person;
- (5) The evidence sought to be introduced must be competent and relevant;
- (6) If the use of the record is for the purpose of proving the truth of matter asserted at trial, it must be the product of the party seeking its admission;
- (7) It must be properly authenticated. *Id.*

Element (4) is required whenever a report contains the opinion of an expert. See Rule 702 (qualifications of expert witnesses). Element (5) is required by Rule 401, the basic rule on relevancy. Elements (1) and (7) simply restate conditions which all business records must meet to be admitted under Rule 803(6). Thus, admissibility of a record of medical diagnosis appears to turn on elements (2) and (3), with the significance of (3) diminished by the fact that a physician rarely makes a diagnosis "solely upon the subjective complaint of the patient."

Other cases on this issue include: *Green v. Cleveland*, 150 Ohio St. 441, 83 N.E.2d 63 (1948) (statement concerning cause of accident in hospital record excluded); *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947) (hospital chart records including blood and urine analysis admitted); *Dorsten v. Lawrence*, 20 Ohio App.2d 297, 253 N.E.2d 804 (1969) (statement of lack of fault in hospital record excluded).

## Time requirement

The rule requires that the record have been "made at or near the time" of the act, event, or condition. RC 2317.40 contains an identical provision. The time requirement is one of the conditions that ensures the reliability of business records. McCormick advocated a flexible approach in applying this requirement: "Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory." McCormick, Evidence § 309 (3d ed. 1984). See also 5 Wigmore, Evidence § 1526 (Chadbourn rev. 1974).

## Firsthand knowledge; business duty

The rule provides that the record must have been made by a person with knowledge of the act, event, or condition or from information transmitted by a person with such knowledge. This provision does not require that the "person with knowledge" be produced at trial or identified. The Senate Judiciary Committee wrote:

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7063-64.

The firsthand knowledge requirement presents no problem when the person making the record had personal knowledge of the act, event, or condition. The difficult cases involve records in which the supplier of information does not make the record, but transmits the information to another person who makes the record. If both the supplier and recorder are acting in the regular course of business, the record is admissible; the supplier is under a duty to transmit the information and the recorder is under a duty to make the record. The recorder need not have firsthand knowledge of the event. See McCormick, Evidence § 310 (3d ed. 1984).

The situation is different if the supplier is not under a duty to transmit the information.

If . . . the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular

course but the informant does not. The leading case, *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. . . . The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity. Advisory Committee's Note, Fed. R. Evid. 803.

### Double Hearsay

If the supplier is not under a duty to transmit the information, the record may nevertheless be admissible, but only if the supplier's statement falls within another hearsay exception. This situation presents a double hearsay problem, and admissibility is governed by Rule 805. For example, if the statement by the supplier is made for the purpose of medical diagnosis or treatment, the statement may qualify under Rule 803(4).

If, however, the supplier is not acting pursuant to a business duty and his statement does not fit into another exception, the statement is inadmissible. See *Mastran v. Urichich*, 37 Ohio St.3d 44, 48, 523 N.E.2d 509 (1988) (patient's statements in hospital record about accident that have "no reference to his medical or surgical treatment" are inadmissible); *Schmitt v. Doehler Die Casting Co.*, 143 Ohio St. 421, 55 N.E.2d 644 (1944); *Hytha v. Schwendeman*, 40 Ohio App.2d 478, 484, 320 N.E.2d 312, 317 (1974) (" 'hearsay on hearsay,' in the absence of other exceptions to the general hearsay rule, is not admissible, even in view of the business records as evidence statute."); *Dillow v. Young*, 3 Ohio App.2d 110, 113, 209 N.E.2d 623, 625 (1965), reversed on other grounds, 6 Ohio St.2d 221, 217 N.E.2d 868 (1966); *Ohio Credit Corp. v. Brigham*, 25 Misc. 241, 266 N.E.2d 867 (Muni. 1970).

### Method of proof

The rule provides that the foundation for the admissibility of business records may be "shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(b)(10). . . ." The reference to Rule 901(B)(1)(10), which governs methods of authentication, does not appear in the federal rule. According to the Staff Note, "[t]his language was added to clearly permit the admission of records which qualify as self-authenticating pursuant to statute such as hospital records under R.C. 2317.422."

RC 2317.40 outlines a similar method of proof; it requires "the custodian or the person who made such record or under whose supervision such record was made [to] testify to its identity and the mode of its preparation. . . ." See *a/s/o State v. Kehn*, 50 Ohio St.2d 11, 361 N.E.2d 1330 (1977), cert. denied, 434 U.S. 858 (1977) (bank deposit slips authenticated by custodian); *Hardesty v. Corrova*, 27 Ohio App.3d 332, 501 N.E.2d 81 (Franklin 1986) (record need not be authenticated by person who made the postings).

### Lack of trustworthiness

A record that satisfies the requirements of Rule 803(6) may nevertheless be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The leading case on this point is *Palmer v. Hoffman*, 318 U.S. 109 (1943), in which the U.S. Supreme Court interpreted the federal business

records statute as excluding an accident report prepared by an employee of the defendant-railroad company. The report was excluded not because it was untrustworthy, but rather because it was not made "in the regular course of business." According to the Court, the primary use of the report was "in litigating, not in railroading." *Id.* at 113-14. *Palmer v. Hoffman* has been criticized (See McCormick, Evidence § 308 (3d ed. 1984), and the federal drafters decided to deal explicitly with the problem of unreliable records by including the "lack of trustworthiness" requirement.

RC 2317.40 contains a similar provision — admission of the record is proper "if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify [the record's] admission." In addition, the courts have recognized that "if it should appear that such records have been made and kept solely for a self-serving purpose of the party offering them in evidence, it would be the duty of a trial court to refuse to admit them." *Weis v. Weis*, 147 Ohio St. 416, 426, 72 N.E.2d 245, 251 (1947). Accordingly, "litigation records" may be excluded. *McCormick v. Mirrored Image, Inc.*, 7 Ohio App.3d 232, 234, 454 N.E.2d 1363 (Hamilton 1982).

However, "[p]roof of one error in an account record does not render the record inadmissible." *Hardesty v. Corrova*, 27 Ohio App.3d 332, 335, 501 N.E.2d 81 (Franklin 1986).

## PUBLIC RECORDS

Rule 803(8) recognizes a hearsay exception for public records and reports. A number of other rules also deal with public records. Rule 1005, by permitting the use of certified copies, recognizes an exception to the best evidence rule for public records. Authentication of public records is governed by Rule 901(B)(7), (10), and 902. Under Rule 902 many public records are self-authenticating and thus admissible without any need to produce an authenticating witness. If a public record contains a statement which is itself hearsay, admissibility is governed by Rule 805 (multiple hearsay). See *a/s/o Westinghouse Electric Corp v. Dolly Madison Leasing & Furniture Corp*, 42 Ohio St.2d 122, 326 N.E.2d 651 (1975).

Rule 803(8) provides that records kept by a public office or agency setting forth "(a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which there was a duty to report" are admissible. "Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Advisory Committee's Note, Fed. R. Evid. 803. See *a/s/o McCormick*, Evidence § 315 (3d ed. 1984); 5 Wigmore, Evidence § 1632 (Chadbourn rev. 1974).

The exception is subject to two limitations. In criminal cases, records containing matters observed by police officers and other law enforcement personnel are inadmissible if offered by the prosecution. Moreover, if the "sources of information or other circumstances indicate lack of trustworthiness," the record is inadmissible. The latter provision is identical to one found in the business records exception. Evid. R. 803(6).

Federal Rule 803(8) contains an additional subdivision which provides: "(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law" are admissible. See *Beech Aircraft Corp v. Rainey*, 488 U.S. 153 (1988). This provision was not adopted in Ohio. Consequently, evaluative reports are not admissible under Ohio Rule 803(8). *Cincinnati Ins. Co. v. Volkswagen, Inc.*, 41 Ohio App.3d 239, 535 N.E.2d 702 (1987)(NHTSA reports excluded).

### Comparison with Statute

Rule 803(8) is similar to RC 2317.42, which provides: "Official reports made by officers of this state, or certified copies of the same, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein." There are several differences between the rule and statute. The statute uses the term "official reports," whereas the rule uses the phrase "[r]ecords, reports, statements, or data compilations, in any form." The term "data compilation" refers to computer-generated records.

In addition, the statute covers only official reports "made by officers of this state." See *State v. Colvin*, 19 Ohio St.2d 86, 249 N.E.2d 784 (1969); *Mazzeo v. Board of Liquor Control*, 73 Abs. 94, 136 N.E.2d 663 (App. 1955). In contrast, the rule refers to records of "public officers and agencies." This language is intended to encompass the records of federal agencies as well as the records of agencies of other states. See Advisory Committee's Note, Fed. R. Evid. 803 ("The rule makes no distinction between federal and nonfederal offices and agencies."). The statute also permits the use of "certified copies." Although Rule 803(8) does not address this issue, Rule 1005 permits the use of certified copies of public records.

### Records of activities of the office or agency

Rule 803(8)(a) provides for the admission of records setting forth the "activities of the office or agency." The Advisory Committee's Note to Federal Rule 803 contains the following examples: "Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin*, 200 U.S. 71 (1906), General Land Office records; *Ballew v. United States*, 160 U.S. 187 (1895), Pension Office records."

The prior Ohio cases include: *State v. Walker*, 53 Ohio St.2d 192, 374 N.E.2d 132 (1978) (records of proper calibration of breath analysis machine admitted); *State v. Smith*, 55 Ohio App.2d 202, 380 N.E.2d 353 (1977) (record of notice of suspension of driver's license admitted).

### Matters observed pursuant to duty imposed by law

Rule 803(8)(b) provides for the admission of records setting forth "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, unless offered by defendant." The Advisory Committee's

Note to Federal Rule 803 contains the following examples:

Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook*, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States*, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945); Weather Bureau records of rainfall; *United States v. Meyer*, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

The prior Ohio cases include: *Westinghouse Electric Corp v. Dolly Madison Leasing & Furniture Corp*, 42 Ohio St.2d 122, 326 N.E.2d 651 (1975) (fire department report admissible but statements of third persons contained in report inadmissible); *Carson v. Metropolitan Life Insurance Co.*, 156 Ohio St. 104, 100 N.E.2d 197 (1951) (coroner's report admissible but opinion as to suicide inadmissible).

For "a document to be admissible under Ohio Evid. R. 803(8)(b), the observations of the reporter must occur pursuant to a legally imposed duty and the matters observed must be the subject of a duty to report. Moreover, the observations must be either the firsthand observations of the official making the report or of one with a duty to report to a public official." *Cincinnati Ins. Co. v. Volkswagen, Inc.*, 41 Ohio App.3d 239, 242, 535 N.E.2d 702 (1987).

### Police Reports

The exclusion of police reports in criminal cases is based on the concern that admissibility of these reports would impinge upon an accused's right of confrontation. The Supreme Court has commented:

We interpret the exclusionary language of Evid. R. 803(8) as consistent with the law prior to its adoption. The phrase, "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel \*\*\*," prohibits the introduction of reports which recite an officer's observations of criminal activities or observations made as part of an investigation of criminal activities. This phrase does not prohibit introduction of records of a routine, intra-police, or machine maintenance nature, such as intoxilyzer calibration logs. Such routine records are highly likely to be reliable, and are precisely the type contemplated as admissible by the public records exception to the rule against hearsay. *State v. Ward*, 15 Ohio St.3d 355, 358, 474 N.E.2d 300 (1984).

In contrast to the federal rule, Rule 803(8)(b) includes the phrase "unless offered by defendant." According to the Staff Note, "[s]uch exculpatory reports should be available to the defendant since none of the constitutional hazards of confrontation are involved in making such reports admissible on behalf of defendants." See also *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975).

If a record is excluded because it involves a matter observed by police officers or other law enforcement personnel, the question remains whether the record may be admitted under the business records exception (Rule 803(6)). In *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), the court answered the question in the negative. Other courts, however, have reached the opposite result. See 4 *Louisell & Mueller*, *Federal Evidence* 770-776 (1980); 4 *Weinstein & Berger*, *Weinstein's Evidence* ¶ 803(8)[04] (1987); Annot, 37 ALR. Fed. 831 (1978); Annot, 31 ALR. Fed. 457 (1977).

There may be a conflict between the rule and RC 2925.51, which provides for the admission of laboratory reports in controlled substance prosecutions. Such a report would appear to fall within the exclusion of matters observed by law enforcement personnel in criminal cases. See *United States v. Oates*, *supra*; 4 *Louisell & Mueller*, *Federal Evidence* 750-57 (1980). RC 2925(C) requires exclusion of the report if the accused "demands the testimony of the person signing the report." Failure to make a demand could be construed as a waiver of Rule 803(8)(b). See also *State v. Reese*, 56 App2d 278, 382 N.E.2d 1193 (1978) (failure to serve copy of report on accused renders report inadmissible); *Giannelli*, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671 (1988).

## OHIO RULE 804

Rule 804 specifies five hearsay exceptions that require a showing that the declarant is unavailable to testify at trial. Rule 804 must be read in conjunction with Rule 801, which defines hearsay, and Rule 802, which excludes hearsay evidence in the absence of an exception.

Rule 804(A) contains five conditions of unavailability. By adopting a uniform rule of unavailability that applies to all the exceptions recognized in subdivision (B), the rule differs from the common law, under which each exception had developed its own conditions of unavailability. For example, the common law unavailability requirements for former testimony, dying declarations, and declarations against interest were not identical.

It is the unavailability of the declarant's *testimony*, rather than the unavailability of the declarant, that is determinative. Thus, if the declarant is present in court but claims a valid privilege, refuses to testify, or suffers a lack of memory, his testimony is unavailable, and the hearsay statements falling within the enumerated exceptions of subdivision (B) are admissible.

The rule also provides that a "declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

The burden of establishing unavailability rests on the party offering the evidence. See *State v. Young*, 5 Ohio St.3d 221, 223, 450 N.E.2d 1143 (1983); *State v. Smith*, 58 Ohio St.2d 344, 390 N.E.2d 778 (1979), vacated on other grounds, 448 U.S. 902 (1980); *New York Central R.R. Co. v. Stevens*, 126 Ohio St. 395, 185 N.E. 542 (1933).

### Claim of privilege

Rule 804(A) (1) provides that a declarant is unavailable

if "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." Rule 501 governs the law of privilege.

A witness who claims the Fifth Amendment privilege against self-incrimination is unavailable under the rule. See *State v. Davis*, 4 Ohio App.3d 199, 447 N.E.2d 139 (1982). Rule 804(A)(1) is applicable only if the court decides that the claim of privilege is valid. See Advisory Committee's Note, Fed. R. Evid 804 ("A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made."). If the court decides the claim is not valid, but the witness persists in refusing to testify, Rule 804(A)(2) applies.

Although the Staff Note cites the assertion of the husband-spouse privilege as an example of unavailability, the Supreme Court has ruled that spousal incompetency under Rule 601(B) does *not* make the spouse unavailable under this rule. *State v. Savage*, 30 Ohio St.3d 1, 506 N.E.2d 196 (1987).

### Refusal to testify

Rule 804(A)(2) provides that a declarant is unavailable if he "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." As the Staff Note indicates, this "provision extends the earlier rules governing unavailability, but the provision conforms to the modern weight of authority." See *State v. Dick*, 27 Ohio St.2d 162, 166, 271 N.E.2d 797, 800 (1971) (indicating refusal to testify may not be a sufficient showing of unavailability); *but see State v. Kilbane*, 5 O.O.3d 383 (C.P. 1977).

If a witness' refusal to testify is based on a claim of privilege, the court should rule on the validity of the claim. If the court rules the claim is not valid, continued refusal to testify may result in contempt. See *State v. Williams*, 38 Ohio St.3d 346, 347, 528 N.E.2d 910 (1988); *State v. Jester*, 32 Ohio St.3d 147, 153, 512 N.E.2d 962 (1987), cert. denied, 484 U.S. 1047 (1988); *State v. Kilbane*, 61 Ohio St.2d 201, 400 N.E.2d 386 (1980); *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548 (1964). Rule 804(A)(2), however, does not require the imposition of contempt as a condition for finding the declarant unavailable.

### Lack of memory

Rule 804(A)(3) provides that a declarant is unavailable if he "testifies to a lack of memory of the subject matter of his statement." See *State v. Young*, 20 Ohio App.3d 269, 485 N.E.2d 814 (Cuyahoga 1984).

The Advisory Committee's Note to Federal Rule 804 comments: "The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination."

The following statement appears in the House Judiciary Report: "Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court

may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States v. Insana*, 423 F.2d 1165, 1169-1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970)."

### Death or illness

Rule 804(A)(4) provides that a declarant is unavailable if he "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

The rule is consistent with prior Ohio law. See RC 2317.06 (former testimony admissible due to declarant's death, insanity, or "any physical or mental infirmity"); RC 2945.49 (former testimony admissible due to declarant's death or incapacitation); Civ R. 32(A)(3) (deposition admissible due to deponent's death, "age, sickness, infirmity"); Crim R. 15(F) (deposition admissible due to deponent's death, "sickness or infirmity"); *C. M. McKelvey Co. v. General Casualty Co.*, 166 Ohio St. 401, 142 N.E.2d 854 (1957) (declaration against interest admissible due to "death," "sickness" or "insanity" of declarant); *State v. Kindle*, 47 Ohio St. 358, 24 N.E. 485 (1980) (dying declaration admissible due to death).

As the Staff Note points out, "a court will have to use its discretion in deciding that the mental or physical infirmity prohibits testifying." A continuance may resolve problems associated with a temporary infirmity. See *Mitchell v. State*, 40 Ohio App. 367, 178 N.E. 325 (1931). See also *State v. Lamonge*, 117 Ohio App. 143, 191 N.E.2d 207 (1962), appeal dismissed, 174 Ohio St. 545, 190 N.E.2d 691 (1963), cert. denied, 375 U.S. 942 (1963) (testimony of witness taken at his home). Because the test for insanity is not the same as the test for competency, an "insane" person may be a competent witness.

### Unable to procure attendance

Rule 804(A)(5) provides that a declarant is unavailable if he "is absent from the hearing and the proponent of his statement has been unable to procure this attendance (or in the case of a hearsay exception under subdivision (B)(2), (3), or (4), his attendance or testimony) by process or other reasonable means."

The rule governs situations in which the declarant's present whereabouts are unknown or the declarant is beyond the subpoena power of the court. Unavailability due to an inability to procure the attendance of the declarant has been the subject of a number of statutory and rule provisions. See RC 2317.06 (former testimony admissible if declarant "is beyond the jurisdiction of the court," "cannot be found after diligent search," or "summoned but appears to have been kept away by the adverse party"); RC 2945.49 (former testimony admissible if declarant "cannot for any reason be produced at the trial"); Crim. R. 15(F) (deposition admissible if "attendance of the witness by subpoena" cannot be procured).

The prior Ohio cases include: *G.M. McKelvey Co. v. General Casualty Co.*, 166 Ohio St. 401, 142 N.E.2d 854 (1957) (declaration against interest admissible due to declarant's "absence from the jurisdiction"); *New York Central R.R. Co. v. Stevens*, 126 Ohio St. 395, 185 N.E. 542 (1933) (former testimony inadmissible; witnesses not beyond subpoena process); *Mitchell v. State*, 40 Ohio App. 367, 178 N.E. 325 (1931) (continuance required if witness is temporarily absent from state); *State v. Preston*, 10 O.O.3d 275 (C.P. 1978) (witness not unavailable because on vacation).

The rule appears to go beyond prior law. In the case of dying declarations (Rule 804(B)(2)), statements against interest (Rule 804(B)(3)), and statements of personal or family history (Rule 804(B)(4)), the rule requires that the testimony as well as the attendance of the witness be unavailable. As used in this rule, the phrase "testimony" refers to the deposition of the witness. This provision was added to the federal rule by the House Judiciary Committee:

The Committee amended the Rule to insert after the word 'attendance' the parenthetical expression ' (or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)'. The amendment is designed primarily to require that an attempt be made to depose a witness (as well as seek his attendance) as a precondition to the witness being deemed unavailable. H.R. Rep. No. 650, 93rd Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code & Ad. News 7075, 7088.

The rule conditions applicability of its exceptions on inability to procure the witness' attendance or testimony by process or "other reasonable means," thus placing the burden of attempting to secure the witness' voluntary attendance at trial, or at least the witness' voluntary submission to deposition, on the offering party. Hence, unavailability is not established merely by showing that the witness is beyond the reach of the court's subpoena power, and cases so holding, e.g. *Bauer v. Pullman Co.*, 15 Ohio App.2d 69, 239 N.E.2d 226 (1968), are no longer controlling. In criminal cases, unavailability is governed by constitutional principles. *State v. Kearns*, 9 Ohio St.3d 228, 460 N.E.2d 245 (1984) (prosecutor's representations concerning efforts to find witness were inadequate to establish unavailability).

Provisions governing subpoenas are found in Crim. R. 1; Juv. R. 17; RC 2939.25 to 2939.29 (out-of-state witness in criminal cases); 2945.47 (prisoners); 2151.28(G) and 2151.29 (juvenile proceedings). Moreover, federal courts are authorized to issue subpoenas to United States nationals and residents who are in foreign countries in order to compel their attendance at state trials. See U.S.C. § 1783(s); *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (dissenting opinion). See also RC 2937.18 (detention of material witnesses).