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HEARSAY: PART IV
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This is the fourth in a series of articles on the hearsay rule. It examines the hearsay exceptions in Ohio Rule of Evidence 804, exceptions which require the unavailability of the declarant to be established as a condition for admissibility. Rule 805, which governs double hearsay, and Rule 806, which regulates the impeachment of hearsay declarants, are also discussed.

FORMER TESTIMONY

Rule 804(B)(1) recognizes a hearsay exception for former testimony. The rule provides for admissibility (1) of the testimony of a witness at another hearing or deposition; (2) if the party against whom the testimony is offered, or a predecessor in interest in a civil case, had an opportunity and similar motive to develop the testimony of the witness by direct, cross, or redirect examination; and (3) the witness is unavailable under Rule 804(A). The former testimony of a party is admissible against that party as admission of a party-opponent. See Rule 801 (D)(2)(a). Rule 804(B)(1) supersedes RC 2945.49 (criminal cases) and 2317.06 (civil cases).

In contrast to other hearsay exceptions, the former testimony exception is not based on any circumstance of trustworthiness that is considered an adequate substitute for cross-examination. The Advisory Committee's Note to Federal Rule 804 comments:

Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803 supra. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Type of testimony

The rule provides for the admissibility of testimony given "at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding." Depositions are governed by Crim. R. 15 and Juv. R. 25. See generally 2 Schroeder-Katz, Ohio Criminal Law, Crim. R. 15. See also RC 2945.50 and 2945.51 (depositions in criminal cases).

As originally adopted, Rule 804(B)(1) excluded preliminary hearing testimony from the former testimony exception. See 62 Ohio St.2d xlvi (1980). The exclusion of preliminary hearing testimony was based upon the Ohio Supreme Court's decision in State v. Roberts, 55 Ohio St.2d 191, 378 N.E.2d 492 (1978). The Court in Roberts held that admitting preliminary hearing testimony in a criminal trial violated the accused's Sixth Amendment right of confrontation. See also State v. Smith, 58 Ohio St.2d 344, 390 N.E.2d 778 (1979), vacated, 448 U.S. 902 (1980). Just days before the Rules of Evidence became effective, the Roberts decision was reversed by the U.S. Supreme Court. See Ohio v. Roberts, 448 U.S. 56 (1980).

In response, the rule was amended by deleting the clause which exempted preliminary hearing testimony. See 53 Ohio Bar 1218 (1980). The deletion of this clause means that preliminary hearing testimony is admissible under the former testimony exception. It should be noted, however, that admitting preliminary hearing testimony in a criminal trial still raises confrontation issues. Although the U.S. Supreme Court ruled that admitting the preliminary hearing testimony in Ohio v. Roberts was not error; the Court did not hold that the admission of preliminary hearing testimony will always be beyond constitutional attack. Hence the inclusion of preliminary hearing testimony within the former testimony exception changes the evidentiary, but not the constitutional, analysis.

In addition to deposition and preliminary hearing

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Similar motive to examine

The rule provides that former testimony is admissible only "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar notice to develop the testimony by direct, cross, or redirect examination." The Advisory Committee's Note to Federal Rule 804 contains the following commentary:

Under the exception, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and this is inherent in the situation. (2) If the party against whom now offered is the one by whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one’s own witnesses. Cf. McCormick, § 246, pp. 526-527; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one’s own witness as the equivalent of cross-examining an opponent’s witness. Falknor, Former Testimony and the Uniform Rules: A Comment 38 N.Y.U.L. Rev. 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity.

McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. Id.

The rule does not require "identity of parties." See McCormick, Evidence § 256 (3d ed. 1984). As long as a party against whom the former testimony is offered (or predecessor in interest) had an opportunity to examine the witness at the former hearing, the rule is satisfied. This represents a change in Ohio law. RC 2317.06 permitted the admission of former testimony evidence only in "a further trial of the case." See Lord v. Boschert, 47 Ohio App. 54, 189 N.E. 263 (1934) (requiring identity of parties).

As proposed by the U.S. Supreme Court, Federal Rule 804(b)(1) also would have permitted admission of former testimony if the witness had been examined at a prior hearing by a person "with motive and interest similar to those of the party against whom [the testimony] is now offered." 56 F.R.D. 321 (1973). This formulation of the rule was rejected by Congress. The House Judiciary Committee explained its amendment to the Court's rule as follows:

Rule 804(b)(1) submitted by the Court allowed prior testimony of an unavailable witness to be admissible only against the party against whom it is offered or a person "with motive and interest similar to his" had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar notice to examine the witness. The Committee amended the rule to reflect these policy determinations. H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), reprinted in [1974] U.S. Code Cong. & Ad. News 7075, 7088.

The following example illustrates how the rule operates. Assume that defendant injures A and B in an accident. In the first trial A sues defendant, and witness X testifies. X dies prior to the second trial, in which B sues defendant. X's testimony at the first trial is admissible if the second trial against defendant because he had an opportunity to develop the testimony of X on direct, cross, or redirect examination. X's testimony, however, not admissible against B, even though A and B had a similar motive and interest, because B had no opportunity to examine X.

The above interpretation of the rule, however, is not beyond challenge. The leading federal case on this issue adopted an expansive view of what constitutes a "predilection in interest" — a "party having like motive to develop the same testimony about the same material facts, is, i.e., the final analysis, a predecessor in interest to the present party." Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1187 (3d Cir.), cert. denied, 439 U.S. 969 (1978). S McCormick, Evidence § 256, at 766 (3d ed. 1984).

It should be noted that the rule requires only that the "opportunity" to develop the testimony by direct, cross or redirect examination have been provided at the form
Method of proof

The rule does not specify acceptable methods of proving former testimony. RC 2945.49 contains the following provisions on the method of proof in criminal case: "If such former testimony is contained within an authenticated transcript of such testimony, it shall be proven by the transcript, otherwise by other testimony." RC 2317.06 contains comparable provisions for civil cases.

A transcript of the former proceeding is the typical and preferable method of proof. See Rule 803(8) (hearsay exception for public records). Former testimony also may be proved by the testimony of a witness who was present at the time the testimony was given. See Wagers v. Dickey, 17 Ohio 439 (1848). In Summons v. State, 5 Ohio St. 325 (1856), the Supreme Court outlined the following requirements:

It is essential to the competency of the witness called to give this kind of evidence, first, that he heard the deceased person testify on the former trial; and second, that he has such accurate recollection of the matter stated, that he will, on his oath, assume or undertake to narrate in substance the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove Id. ( syllabus).

See McCormick, Evidence § 260 (3d. ed. 1984). The testimony of a witness should be used as a method of proof only if a transcript is not available. The court has the authority pursuant to Rule 611(A) to require a transcript be used if one is available.

DYING DECLARATIONS

Rule 804(B) (2) recognizes a hearsay exception for dying declarations. The rule requires that: (1) the statement be made while the declarant believed his death was imminent; (2) the statement concern the "cause or circumstances of what [the declarant] believed to be his impending death"; (3) the declarant be unavailable (see Rule 804(A)); and (4) the statement was based on the firsthand knowledge of the declarant. See Advisory Committee's Note, Fed. R. Evid 804 ("continuation of a requirement of firsthand knowledge is assured by Rule 602").

The rule is identical to Federal Rule 804(b)(2) except for technical differences. The rule changes prior Ohio law in two respects. First, at common law, dying declarations were admissible only in homicide cases. See State v. Harper, 35 Ohio St. 78 (1878); Mitchell v. New York Life Insurance Co., 62 Ohio App. 54, 22 N.E.2d 998 (1939), reversed on other grounds, 136 Ohio St. 551, 27 N.E.2d 243 (1940); McCoy v. Industrial Comm., 58 Ohio L. Abs. 515, 97 N.E.2d 93 (App. 1950). Under the rule, dying declarations are admissible in civil actions as well. Dying declarations, however, remain inadmissible in criminal trials other than homicide cases. Second, in contrast to the common law, admissibility is not conditioned on the declarant's death. Any of the conditions of unavailability specified in Rule 804(A) suffices.

The exception for dying declarations is based on necessity — the unavailability of the declarant — and on a circumstantial guarantee of trustworthiness. Dying declarations "are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789), quoted in State v. Kindle, 47 Ohio St. 358, 365, 24 N.E. 485, 488 (1890).

Imminent expectation of death

The rule provides that the statement must be "made by a declarant while believing that his death was imminent." This requirement follows from the theory underlying the exception; a declarant who does not believe that death is near may not feel compelled to speak truthfully. In Shepard v. United States, 290 U.S. 96 (1933), Justice Cardozo described this requirement:

To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death . . .

. . . There must be a 'settled hopeless expectation' . . . that death is near at hand, and what is said must have been so spoken in the hush of its impending presence . . . What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The [declarant] must have spoken with the consciousness of a swift and certain doom. Id. at 99-100.

See also State v. Kindle, 47 Ohio St. 358, 24 N.E. 485 (1890) (statement of declarant "made in extremis, while conscious of his condition and under a sense of impending dissolution"); Robbins v. State, 8 Ohio St. 131, 163 (1857) (statement "made under a sense of impending death, excluding from the mind of the dying person all hope or expectation of recovery"); State v. Woods, 47 Ohio App.2d 144, 352 N.E.2d 598 (1972).

The declarant's belief of impending death may be established by the declarant's own statements. In addition, it may be established "circumstantially by the apparent fatal quality of the wound, by the statements made to the declarant by the doctor or by others that his condition is hopeless, and by other circumstances." McCormick, Evidence § 282, at 829 (3d ed. 1984). See also State v. Knight, 20 Ohio App.3d 288, 485 N.E.2d 1064 (1984) ("[I]nmediately before he made the statement, police told him that he did not have long to live."); State v. Kotowicz, 55 Ohio App. 497, 9 N.E.2d 1003 (1937); Shinkman v. State, 7 Ohio L. Abs. 518 (App. 1929).

Subject matter requirement

The rule limits the type of statements that are admissible under this exception to those "concerning the cause or circumstances of what [the declarant] believed to be
his impending death." Statements identifying the
assailant who caused the injury are included, as are
statements describing the events leading up to the injury.
See McCormick, Evidence § 283 (3d ed. 1984); 5 Wigmore,
Evidence § 1434, at 282 (Chadbourn rev 1974) ("facts
leading up to or causing or attending the injurious act").

Opinion rule
Some courts have excluded dying declarations as
violative of the opinion rule. See McCormick, Evidence §
285 (3d ed. 1984). In Wroe v. State, 20 Ohio St. 460
(1870), the defendant objected to the admission of the
dying declaration of a victim who stated, "it was done
without any provocation," on the grounds that the state­
ment expressed a "mere matter of opinion." The
Supreme Court held: "Whether there was provocation or
not, is a fact, not stated, it is true, in the most elementary
form of which it is susceptible, but sufficiently so to be
admissible as evidence." Id at 469. The result in Wroe is
correct. As McCormick notes, the opinion rule "is entirely
inappropriate as a restriction upon out-of-court declara­
See also Advisory Committee's Note, Fed. R. Evid 804
("Any problem as to declarations phrased in terms of
opinion is laid at rest by Rule 701.").

STATEMENTS AGAINST INTEREST
Rule 804(B)(3) recognizes a hearsay exception for
statements against interest. Such statements are admis­
sible if (1) they are based on firsthand knowledge, (2) they
are against the declarant's pecuniary, proprietary, penal,
or civil liability interest at the time made, and (3) the
declarant is unavailable, see Rule 804(A). Statements of
parties are admissible as admissions of party-opponents
under Rule 801(D)(2).

The exception for declarations against interest is based
on necessity — the unavailability of the declarant — and a circumstantial guarantee of trustworthiness.
"The circumstantial guaranty of reliability for declarations
against interest is the assumption that persons do not
make statements which are damaging to themselves
unless satisfied for good reason that they are true." Advisory Committee's Note, Fed. R. Evid 804.

Firsthand knowledge
Although it is not explicitly mentioned in the rule, first­
hand knowledge on the part of the declarant is required.
See G. M. McKelvey Co. v. General Casualty Co., 166
Ohio St. 401, 404, 142 N.E.2d 854, 855-56 (1957)
("declarant had peculiar means of knowing the facts
which he stated"); Latham v. Clark, 120 Ohio St. 559, 166
N.E. 685 (1929).

Against interest requirement
The rule provides that the statement must have been
"so far contrary to the declarant's pecuniary or propri­
etary interest, or so far tended to subject him to civil or
criminal liability, or to render invalid a claim by him
against another, that a reasonable man in his position
would not have made the statement unless he believed it
to be true." As proposed by the U.S. Supreme Court, the
federal rule also permitted the admissibility of declara­
tions against social interest, that is, a statement making
the declarant "an object of hatred, ridicule, or disgrace." 56 F.R.D. 321 (1973). This provision was rejected by
Congress and was not incorporated in the Ohio rule.

The Staff Note contains the following comment: "The
exceptions to the hearsay rule subjecting declarant to
civil or criminal liability broaden the traditional law
governing declarations against interest and broaden
Ohio law as well, the Ohio law having been limited to
declarations against pecuniary interest." This comment,
however, does not accurately reflect prior Ohio law. In
G.M. McKelvey Co. v. General Casualty Co., 166 Ohio St.
401, 142 N.E.2d 854 (1957), the Supreme Court held
declarations against "pecuniary or proprietary interest"
admissible. The case involved statements concerning
embezzlement by the declarants. The Court interpreted
"pecuniary interest" expansively to include statements
which would subject the declarants to civil liability: "[I]t
was clearly not to their interest to state such facts, since
such declarations render them civilly liable for the
amounts of their defalcations." Id. at 405. Moreover, in
State v. Williams, 43 Ohio St.2d 88, 330 N.E.2d 891
(1975), the Supreme Court appeared to recognize the
admissibility of declarations against penal interests.

Other Ohio cases on declarations against interest,
which were decided prior to the adoption of the Rules of
Evidence, include: Latham v. Clark, 120 Ohio St. 559, 166
N.E. 685 (1929); Ferrebee v. Boggs, 24 Ohio App.2d 18,
263 N.E.2d 574 (1970); 67 Corp v. Elias, 3 Ohio App.2d
411, 210 N.E.2d 734 (1965); Fox v. McCreary, 103 Ohio
App. 73, 144 N.E.2d 546 (1957); Massachusetts Bonding
& Insurance Co. v. Cleveland, 91 Ohio L. Abs. 569, 187
"Against Interest" in Ohio, 15 Ohio St. L.J. 187 (1954).

Rule 804(B)(3) requires that the statement be against
the declarant's interest "at the time of its making." See
State v. Williams, 38 Ohio St.3d 346, 348 n.6, 528 N.E.2d
910 (1988) ("[T]he statement does not meet the require­
ment that it [has] been against Brown's pecuniary, propri­
etary or penal interest at the time of its making."). Determining
whether the statement is, in fact, against interest requires
an examination of the context in which the statement was
For example, a statement acknowledging a debt of $500
would, under most circumstances be a statement against
the declarant's pecuniary interest. If, however, the
declarant made the statement while disputing a $1000 debt,
and the statement is offered to prove the debt was only
$500, the statement is not against interest. By its terms,
the rule requires the "against interest" standard to be
judged by a "reasonable man" viewpoint.

The declaration against interest exception has been
the subject of constitutional attack. In Chambers v.
Mississippi, 410 U.S. 284 (1973), the U.S. Supreme Court
held that the exclusion of declarations against penal
interest offered by a criminal defendant for the purpose
of exculpation was a violation of due process. See also
Green v. Georgia, 442 U.S. 95 (1979). It should be noted
that the declarant in Chambers was not unavailable.
Thus, in criminal cases the applicability of Rule 804(B)(3)
is affected by constitutional considerations. See general­
Corroboration requirement

The rule provides that a "statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The use of the word "accused" indicates that the corroboration requirement was intended to apply only in criminal cases.

In contrast to the Ohio rule, Federal Rule 804(b)(3) expressly requires corroboration only when the statement is offered to exculpate the accused. The federal cases, however, have applied the corroboration requirement to inculpatory statements. McCormick, Evidence § 279, at 826 (3d ed. 1984). The corroboration requirement was explained by the federal drafters as follows:

The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, ... but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake ... The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations ... The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication. Advisory Committee's Note, Fed. R. Evid. 804.

The Ohio Staff Note makes the following observation: Note that the language is "corroborating circumstances" not "corroborating evidence." See also State v. Saunders, 23 Ohio App.3d 69, 73, 491 N.E.2d 313 (1984) ("[A] bare showing of some extent of corroboration is not enough.").

The Ohio rule also requires corroboration of statements inculpating the accused — for example, a statement by an accomplice that he and the accused committed a crime. The corroboration requirement was added because such statements are often self-serving, and their admission raises confrontation issues. See United States v. Alvarez, 584 F.2d 894 (5th Cir. 1978). A draft of the Federal Rules explicitly excluded such statements. "This exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." 51 F.R.D. 439 (1971) (revised draft). This provision was reinserted by the House Judiciary Committee. See H.R. Rep. No. 850, 93d Cong., 1st Sess. (1973), reprinted in [1974] U.S. Code Cong. & Ad. News 7075, 7090. It was subsequently deleted by the Senate Judiciary Committee because that Committee believed it unnecessary. See S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7066.

Although Federal Rule 804 as adopted allows the introduction of statements inculpating the accused, the Advisory Committee's Note to the rule recognizes that such statements may not always be reliable: "Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus, a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest ... On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation."

See also State v. Liberatore, 69 Ohio St.2d 583, 587, 433 N.E.2d 561 (1982) (Declant's statements made to FBI agents in an effort to be accepted into the witness protection program were not against his interest, but for his interest); Neighbours v. State, 121 Ohio St. 525, 169 N.E. 839 (1930).

RESIDUAL EXCEPTION

Federal Rule 804(b)(5) recognizes a residual or catch-all exception, which under certain circumstances permits the admission of hearsay statements that do not fall within the scope of the exceptions enumerated in Federal Rule 804. This provision was not adopted in Ohio. Thus a case, such as Erion v. Timken Co., 52 Ohio App.2d 123, 368 N.E.2d 312 (1976), which adopted an ad hoc approach to hearsay exceptions, is no longer controlling. See State v. Fowler, 27 Ohio App.3d 149, 153, 27 OBR 182, 500 N.E.2d 390 (Cuyahoga 1985) ("[T]he Ohio rules contain neither of the 'catch-all' exceptions...").

DOUBLE HEARSAY

Rule 805 governs the admissibility of multiple hearsay. The rule permits the admission of hearsay within hearsay if each part of the hearsay chain falls within an exception. Multiple hearsay problems most frequently arise in connection with public records, Rule 803(6), and business records, Rule 803(6), especially hospital records. The Advisory Committee's Note to Federal Rule 805 contains the following explanation:

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant ...

The Staff Note cites as an example of double hearsay a case involving a hospital record which contains a statement by a party. According to the Note, the record is admissible because the hospital record qualifies as a business record, Rule 803(6), and the statement of the party qualifies as an admission of a party-opponent, Rule 801(D)(2)(a). Although the Staff Note's conclusion that the record is admissible is correct, its analysis is not. Admissions of party-opponents, by definition, are not
hearsay. Thus, the particular example set out in the Staff Note does not present a "double hearsay" problem.

The Rule is consistent with prior Ohio law. In Westinghouse Electric Corp v. Dolly Madison Leasing & Furniture Corp., 42 Ohio St.2d 122, 326 N.E.2d 651 (1975), the Supreme Court in considering the admissibility of statements contained in an official record, stated: "This statute [RC 2317.42] allows the admission of official records, although these records may constitute hearsay, insofar as they consist of facts recorded by public officials who are not present as witnesses. However, the statute does not render admissible statements contained in official reports, where such statements are themselves hearsay." Id. at 130. See also Green v. Cleveland, 150 Ohio St. 441, 83 N.E.2d 63 (1948); 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."); Ohio Credit Corp v. Brigham, 25 Ohio Misc. 241, 266 N.E.2d 867 (Muni. 1970).

IMPEACHMENT OF DECLARANTS

Rule 806 governs the admissibility of evidence relating to the credibility of hearsay declarants and persons who make statements admitted pursuant to Rule 801(D)(2)(c) (authorized admissions), Rule 801(D)(2)(d) (servant and agent admissions), and Rule 801(D)(2)(3) (co-conspirator admissions). The rule also provides that if a party against whom a hearsay statement is admitted calls the declarant as a witness, that party may examine the declarant "as if under cross-examination." This provision provides an automatic exception to Rule 611(C), which generally prohibits the use of leading questions on direct examination.

Rule 806 generally permits hearsay declarants and persons making representative admissions under Rule 801(D)(2) to be impeached and rehabilitated to the same extent as witnesses who testify at trial. See Rule 607 (impeachment of own witness); Rule 608(A) (impeachment by opinion and reputation evidence of character for truthfulness); Rule 608(B) (impeachment by evidence of specific acts of conduct relevant to character for truthfulness); Rule 609 (impeachment by evidence of prior convictions); Rule 613 (impeachment by prior inconsistent statements).

Rule 806 may be a trap for a defense counsel in a criminal case. If an accused's hearsay statements are elicited by the defense counsel through another witness, Rule 806 applies and the defendant may be impeached even though he never testified. See United States v. Noble, 754 F.2d 1324, 1330-31 (7th Cir. 1985), cert. denied, 474 U.S. 818 (1985) (impeachment by prior conviction); United States v. Bovain, 708 F.2d 606, 613 (11th Cir. 1983), cert. denied, 464 U.S. 898 (1983); United States v. Lawson, 608 F.2d 1129, (6th Cir. 1979), cert. denied, 444 U.S. 1129 (1980).

Inconsistent statements

The second sentence of Rule 806 establishes a special rule for impeachment by evidence of inconsistent statements: "Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain." Hence, Rule 613(B), which requires that a witness be provided with an opportunity to explain or deny an inconsistent statement before extrinsic evidence of that statement is admissible, does not extend to the impeachment of hearsay declarants. For example, inconsistent statements made subsequent to the hearsay statement are admissible. The Advisory Committee's Note to Federal Rule 806 provides the following explanation for this rule:

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are, however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a prior statement, which is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a subsequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment... .

The few Ohio cases that have addressed this issue appear to be divided. In an early case, Runyan v. Price, 15 Ohio St. 1 (1864), the Supreme Court held that impeachment by means of an inconsistent statement always requires that the declarant be afforded an opportunity to deny or explain the statement. In contrast, the court in State v. Earley, 49 Ohio App.2d 377, 361 N.E.2d 254 (1975), held that an accused had a due process right to introduce evidence impeaching the credibility of a declarant whose preliminary hearing testimony had been admitted at trial.