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Hearsay: Part II

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HEARSAY: PART II

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This is the second of a series of articles on the hearsay rule. The first article discussed the definition of hearsay. This article examines a number of hearsay exceptions.

Ohio Evidence Rule 803 specifies twenty-two hearsay exceptions. Rule 804 recognizes five additional exceptions. In contrast to the exceptions enumerated in Rule 804, the Rule 803 exceptions do not depend on the unavailability of the declarant.

Rule 803 changed prior Ohio law in a number of respects. These changes are discussed in connection with the specific exceptions to which they relate. The rule also differs from Federal Rule 803. These differences are also discussed in connection with specific exceptions. Two exceptions recognized in Federal Rule 803 were not adopted in Ohio. *See* Fed. R. Evid. 803(18) (learned treatise exception); Fed. R. Evid. 803(24) (residual exception).

HEARSAY EXCEPTIONS: UNDERLYING THEORY

The hearsay exceptions recognized in Rules 803 and 804 are based on some circumstantial guarantee of trustworthiness that is thought to warrant admissibility notwithstanding the lack of cross-examination, oath, and personal appearance of the declarant. In some cases, an exception is also supported by a necessity argument. Wigmore argued that all exceptions were based on these two considerations — "a circumstantial probability of trustworthiness and a necessity, for the evidence." 5 Wigmore, Evidence § 1420, at 251 (Chadbourn rev. 1974).

The necessity principle is clearly present in the exceptions specified in Rule 804, because the unavailability of the declarant is required as a condition of admissibility. The Rule 803 exceptions, however, also may be justified upon a modified necessity argument, that is, the hearsay statement is thought to be superior to the declarant's trial testimony. Wigmore explained this consideration as follows: "The assertion may be such that we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources. This appears more or less fully in the exception for spontaneous declarations, for reputation, and in part elsewhere. Here we are not threatened: . . . with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated." *Id.* § 1421, at 253.

Wigmore explained the guarantee of trustworthiness consideration as follows: "The second principle which, combined with the first [necessity], satisfies us to accept the evidence untested is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statements is practically sufficient, if not quite equivalent to that of statements tested in the variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name." *Id.* § 1422, at 253.

FIRSTHAND KNOWLEDGE AND OPINION RULES

Several hearsay exceptions specifically require firsthand knowledge on the part of the declarant. *E.g*, Rules 803(5) and (6). For other exceptions, firsthand knowledge is not explicitly required. Nevertheless, firsthand knowledge is a requirement for all exceptions. This has been the traditional view. *See* 5 Wigmore, Evidence § 1424 (Chadbourn rev. 1974). The Advisory Committee's Note to Federal Rule 803 reads: "In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602."

PRESENT SENSE IMPRESSIONS

Rule 803(1) recognizes a hearsay exception for present sense impressions. The rule requires: (1) a statement describing or explaining an event or condition, (2) about which the declarant had firsthand knowledge, (3) made at the time the declarant was perceiving the event or immediately thereafter, (4) under circumstances that do not indicate a lack of trustworthiness. The present sense impression exception was not recognized under prior Ohio law, although statements that fall within this exception may have been admitted as *res gestae.*

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The reliability of present sense impressions rests upon the declarant's *lack of time* to fabricate. In the leading case, Houston Oxygen Co., Inc. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), the court held that the statement was "sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement." *Id.* at 6. The Advisory Committee's Note to Federal Rule 803 states: "The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." In addition, the time requirement — "substantial contemporaneity" — eliminates any problem associated with defects in the declarant's ability to remember the event.

This theory of admissibility differs from the theory which underlies the excited utterance exception recognized in Rule 803(2). The reliability of excited utterances is based upon the declarant's *lack of capacity* to fabricate. This difference in theory explains the differences between the requirements for the two exceptions. For example, a startling or exciting event is required for the excited utterance but not the present sense impression exception. Other differences are discussed below. Frequently, however, a statement will satisfy the requirements of both exceptions.

Time requirement

Rule 803(1) requires the statement be made "while the declarant was perceiving the event or condition, or immediately thereafter." The statement must be nearly contemporaneous with the perception of the event. This requirement is more restrictive than the time requirement for excited utterances. An excited utterance could be made minutes (sometimes hours) after the exciting event, so long as the declarant is under the influence of the excitement caused by the event at the time the statement is made. The Advisory Committee's Note to Federal Rule 803 provides the following explanation: "With respect to the *time element*, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) [excited utterances] the standard of measurement is the duration of the state of excitement."

Subject matter requirement

The rule requires that the statement describe or explain an event or condition. This requirement follows from the theory underlying the exception — lack of time to fabricate. Statements beyond descriptions or explanations indicate that the declarant has had sufficient time to think about the event. In contrast, the subject matter of an excited utterance is not so circumscribed — statements "relating to a starling event" are admissible.

The Advisory Committee's Note to Federal Rule 803 states: "Permissible *subject matter* of the statement is limited under Exception (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception (2) [excited utterances], however, the statement need only 'relate' to the startling event or condition, thus affording a broader scope of subject matter coverage." Murphy Auto Parts Co. v. Ball, 249 F.2d 508 (D.C. Cir. 1957), cert. denied, 355 U.S. 932 (1958), cited in the Note, illustrates the difference between the two exceptions. In that case the statement of a driver who was involved in an accident was admitted as an excited utterance. The statement revealed that the driver was acting as an agent at the time of the accident. This statement would not qualify as a present sense impression because it does not explain or describe the event. The statement did qualify as an excited utterance because it "related" to the event.

Circumstances of lack of trustworthiness

In contrast to Federal Rule 803(1), the Ohio rule explicitly permits the exclusion of a statement that would otherwise qualify as a present sense impression if the "circumstances indicate a lack of trustworthiness." Identical phrases appear in the business records and public records exceptions. *See* Rule 803(6) and (8). *See also* Fla. Stat. Ann. Evid. Code § 90.803(1).

One of the guarantees of trustworthiness upon which the present sense impression exception is based is verification. For example, the following statement appears in the second edition of McCormick: "the statement will usually have been made to a third party (the person who subsequently testifies to it) who, being present at the time and scene of the observation, will usually have an opportunity to observe the situation himself and thus provide a check on the accuracy of the declarant's statement." McCormick, Evidence 710 (2d ed. 1972). But if the witness (the third party) heard the statement but did not perceive the event, this safeguard is not present. The "lack of trustworthiness" clause was intended to protect against this possibility. The Staff Note contains the following commentary:

> One of the principal elements of the circumstantial guaranty of trustworthiness of this exception is that the statement was made at a time and under circumstances in which the person to whom the statement was made would be in a position to verify the statement. The provision requiring exclusion if the circumstances do not warrant a high degree of trustworthiness would justify exclusion if, for example, the statement were made by a declarant concerning a perceived event to another by way of a C.B. radio transmission. Other circumstances other than the lack of verification may also taint the trustworthiness of this class of hearsay declaration.

The latest edition of McCormick, however, argues that the verification requirement is not necessary. McCormick, Evidence § 198, at 862 (3d ed. 1984).

EXCITED UTTERANCES

Rule 803(2) recognizes a hearsay exception for excited utterances. The rule requires: (1) a startling event; (2) a statement relating to that event; (3) made by a declarant with firsthand knowledge; and (4) made while the declarant was under the stress of the excitement caused by the event.

The excited utterance exception had been recognized in the prior Ohio cases, although rarely by that name. The early cases treat such statements as *res gestae. See* New York, Chicago & St. Louis R.R. Co. v. Kovatch, 120 Ohio St. 532, 166 N.E. 582 (1929); State v. Lasecki, 90

Ohio St. 10, 106 N.E. 660 (1914). Later cases use the term "spontaneous exclamations." *See* State v. Price, 60 Ohio St.2d 136, 398 N.E.2d 772 (1979), cert. denied, 446 U.S. 943 (1980).

The reliability of excited utterances rests upon the declarant's lack of capacity to fabricate. "The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Advisory Committee's Note, Fed. R. Evid. 803. The Note also recognizes the principal criticism of the exception — "That excitement impairs accuracy of observation as well as eliminating conscious fabrication." *Id.* The trial court determines the admissibility of excited utterances under Rule 104(a) and is accorded wide discretion in this determination. State v. Rohdes, 23 Ohio St.3d 225, 229, 492 N.E.2d 430 (1986).

Startling event requirement

The rule requires that the statement relate to a "startling event or condition." This requirement follows from the theory underlying the exception; without a startling event, the declarant's capacity to reflect and fabricate will not be suspended. In State v. Duncan, 53 Ohio St.2d 215, 373 N.E.2d 1234 (1978), the Supreme Court stated the requirement as follows: "[T]here [must be] some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs. . ." *Id.* (syllabus, para. 1); *accord*, Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140 (1955); New York, Chicago & St. Louis R.R. Co. v. Kovatch, 120 Ohio St. 532, 166 N.E. 682 (1920).

The declarant may be a participant in the event — for example, the victim of an assault or the driver of a vehicle involved in an automobile accident. The declarant may also be a bystander. *See* New York, Chicago & St. Louis R.R. Co. v. Kovatch, *supra*; State v. Lasecki, 90 Ohio St. 10, 106 N.E. 660 (1914); Advisory Committee's Note, Fed. R. Evid. 803 ("*Participation* by the declarant is not required.").

If the bystander-declarant is unidentified, admissibility of the statement requires close scrutiny. The federal drafters recognized this problem. "[W]hen declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, . . . a result which would under appropriate circumstances be consistent with the rule." Advisory Committee's Note, Fed. R. Evid. 803. *See also* New York, Chicago & St. Louis R.R. Co. v. Kovatch, *supra* (unidentified bystander's statement admitted).

Proof of the startling event may consist of extrinsic evidence of the event, including the condition of the declarant. In addition, the utterance itself may establish the existence of a startling event. *See* McCormick, Evidence § 297 (3d ed. 1984). Consideration of the statement itself for this purpose is permissible because under Rule 104(A) "the judge is not limited by the hearsay rule in passing upon preliminary questions of fact." Advisory Committee's Note, Fed. R. Evid. 803.

Under the stress of excitement requirement

The rule requires that the statement have been made "while the declarant was under the stress of excitement caused by the event or condition." This requirement follows from the theory underlying the exception; unless the declarant is speaking while under the influence of the event, his capacity to reflect and fabricate will not be suspended.

The federal drafters refer to this requirement as the "time element." "Under Exception (2) the standard of measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.' Slough, Spontaneous Statement and State of Mind, 46 Iowa L. Rev. 224, 243 (1961) . . ." Advisory Committee's Note, Fed. R. Evid. 803. In State v. Boston, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), the Supreme Court commented: "[T]he lapse of time between the startling event and the out-of-court statement is not dispositive in the application of Evid. R. 803(2). Rather, the question is whether the declarant is still under the stress of nervous excitement from the event." *Id.* at 118.

In State v. Duncan, 53 Ohio St.2d 215, 373 N.E.2d 1234 (1978), the Supreme Court stated the requirement as follows: "[T]he statement or declaration, even if not strictly contemporaneous with the exciting cause, [must be] made before there has been time for such nervous excitement to lose a domination over [the declarant's] reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs. . ." *Id.* (syllabus, para 1); *accord*, Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140 (1955); New York, Chicago & St. Louis R.R. Co. v. Kovatch, 120 Ohio St. 532, 166 N.E. 682 (1929); State v. Lasecki, 90 Ohio St. 10, 106 N.E. 660 (1914).

Hence, statements made after a substantial time has elapsed may be admissible so long as the declarant remained under the influence of the exciting event when the statement was made. *See* State v. Duncan, *supra*; McCormick, Evidence § 297 (3d ed. 1984). In State v. Wallace, 37 Ohio St.3d 87, 524 N.E.2d 466 (1988), the statement was made 15 hours after the event, during which time the declarant was unconscious. The Court held the statement admissible.

A statement made in response to a question may also fit within this exception. *See* State v. Duncan, *supra*; State v. Dickerson, 51 Ohio App.2d 255, 367 N.E.2d 927 (1977); Bergfeld v. New York, Chicago & St. Louis R.R. Co., 103 Ohio App. 87, 144 N.E.2d 483 (1956). In State v. Wallace, 37 Ohio St.3d 87, 524 N.E.2d 466 (1988), the Court ruled

> that the admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties. *Id.* at 93.

Subject matter requirement

The rule requires that the statement "relate" to a startling event. *See* State v. Duncan, 53 Ohio St.2d 215, 373 N.E.2d 1234 (1978); Potter v. Baker, 162 Ohio St. 488, 124

N.E.2d 140 (1955). This requirement is simply a refinement of the "under the stress of the excitement" requirement discussed previously. Statements that do not "relate" to the starting event indicate that the declarant is no longer speaking while under the influence of the event. In Murphy Auto Parts Co. v. Ball, 249 F.2d 508 (D.C. Cir. 1957), cert. denied, 355 U.S. 932 (1958), the court explained: "[A]s soon as the excited utterance goes beyond description of the exciting event and deals with past facts or with the future it may tend to take on a reflective quality. . . In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event." *Id.* at 511.

Firsthand Knowledge

The firsthand knowledge rule applies to excited utterances. *See* State v. Duncan, 53 Ohio St.2d 215, 373 N.E.2d 1234 (1978); Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140 (1955); New York, Chicago & St. Louis R.R. Co. v. Kovatch, 120 Ohio St. 532, 540, 166 N.E. 682, 684 (1929) (opportunity to observe inferred from circumstances); State v. Moorman, 7 Ohio App.3d 251, 455 N.E.2d 495 (Hamilton 1982) (personal knowledge may be "inferred"); McCormick, Evidence § 297, at 858 (3d ed. 1984) ("Direct proof is not necessary; if the circumstances appear consistent with opportunity [to observe] by the declarant, this is sufficient.").

Competency

Rules relating to the competency of witnesses (Rule 601), have not been applied to excited utterances. *See* McCormick, Evidence § 297 (3d ed. 1984). Most of the Ohio cases have involved the statements of a young child. *E.g.,* State v. Duncan, *supra* (six year old child); New York, Chicago & St. Louis R.R. Co. v. Kovatch, *supra* (five year old child); State v. Lasecki, 90 Ohio St. 10, 106 N.E. 660 (1914) (four year old child). In State v. Wallace, 37 Ohio St.3d 87, 524 N.E. 466 (1988), the Court ruled "that the inability to establish the competency of a child declarant does not affect the admissibility of the declarations for purposes of Evid. R. 803(2)." *Id.* at 88.

Opinion Rule

In Neisner Brothers, Inc. v. Schafer, 124 Ohio St. 311, 178 N.E. 269 (1931), the Supreme Court excluded an excited utterance because the utterance violated the opinion rule. McCormick criticized this case. "Where the declarant is an in-court witness, it is probably appropriate to require him to testify in concrete terms rather than conclusory generalizations. But in every day life people often talk in conclusory terms and when these statements are later offered in court there is no opportunity to require the declarant to substitute more specific language. Here, as elsewhere, the opinion rule should be applied sparingly, if at all, to out-of-court speech." McCormick, Evidence 859 and n. 40 (3d ed. 1984).

Moreover, in a later case the Court ruled that an excited utterance was not inadmissible because it was in the form of a conclusion — that the declarant had just seen her boss "murdered" for "no reason." State v. Rohdes, 23 Ohio St.3d 225, 228, 492 N.E.2d 430 (1986).

STATEMENTS OF PHYSICAL CONDITION OR MIND

Rule 803(3) recognizes a hearsay exception for statements of a declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health). . ." The rule explicitly excludes statements "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." Many of the prior Ohio cases treated statements falling within this exception as part of the vague *res gestae* rule.

For purposes of analysis, the subject matter of Rule 803(3) is divided into four categories: (1) statements of presently existing physical condition, (2) statements of presently existing state of mind offered to prove that state of mind, (3) statements of presently existing state of mind offered to prove the declarant acted in accordance with that state of mind, and (4) statements of memory or belief offered to prove the fact remembered or believed.

Presently existing physical condition

Statements of presently existing physical condition or sensation, including statements of "pain" and "bodily health," are admissible under Rule 803(3). The critical requirement is that the statement relate to a *present* condition and not to past conditions, pains, or symptoms. The statement must be contemporaneous with the condition, not the event which caused the condition. Statements of past physical conditions are governed by Rule 803(4), which requires that such statements be made for the purposes of medical treatment or diagnosis. This requirement is not found in Rule 803(3); a statement of present physical condition may be made to any person for any reason. Rules 803(3) and 803(4) overlap somewhat because the latter rule also covers statements of present physical conditions made for the purpose of medical treatment or diagnosis.

The reliability of statements of presently existing physical condition rests on the spontaneity of the statement, which reduces the risk of conscious fabrication. *See* McCormick, Evidence § 291, at 838 (3d ed. 1986). In addition, this exception is justified on a necessity argument. "Being spontaneous, they are considered of greater probative value than the present testimony of the declarant." *Id. See also* 6 Wigmore, Evidence § 1714 (Chadbourn rev. 1976).

The few prior Ohio cases on this issue are not consistent. In Stough v. Industrial Comm., 148 Ohio St. 415, 75 N.E.2d 441 (1947), the Supreme Court upheld the admissibility of a statement, "He said he had a headache," on the theory that the statement was part of the *res gestae.* In Smith v. Young, 109 Ohio App. 463, 168 N.E.2d 3 (1958), the court excluded the testimony of the plaintiff's wife "to the effect that she had heard plaintiff complain of pain in his chest." *Id.* at 470. The court held the statement inadmissible hearsay and self-serving. The result in this case would be different under Rule 803(3), which does not exclude statements merely because they are self-serving. *See* McCormick, Evidence § 290 (3d ed. 1984).

Statements of presently existing state of mind

Statements of presently existing state of mind or emotion, including statements of "intent, plan, motive, design, [or] mental feeling," are admissible under Rule 803(3). A person's state of mind is often a consequential or material fact under the substantive law.

This exception rests on the same reliability rationale as statements of presently existing physical condition, *i.e.*, the spontaneity of the statement reduces the risk of conscious fabrication. *See* McCormick, Evidence § 294 (3d ed. 1984). In addition, the exception is supported by a necessity argument; in most cases, the statement is more probative of state of mind than later trial testimony.

Frequently, statements regarding the mental state of the declarant are not hearsay because they are not offered to prove the truth of the assertion contained in the statement. For example, a declarant's statement, "I will kill John Doe," offered to prove intent in a homicide prosecution, is hearsay but falls with the exception of Rule 803(3). The statement, "John Doe is the most despicable person I know," offered to prove intent, is not offered to prove the truth of the assertion and is, therefore, not hearsay.

See State v. Apanovitch, 33 Ohio St.3d 19, 21, 514 N.E.2d 394 (1987) (declarant's statement that she was "fearful" and "apprehensive" admitted); State v. Sage, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987) (declarant's statement that she intended to "break up" with defendant admitted).

State of mind offered to prove future conduct

Statements of presently existing state of mind are admissible under Rule 803(3) to prove that the declarant subsequently acted in accordance with that state of mind. For example, a declarant's statement, "I will kill John Doe," is admissible to prove that the declarant killed Doe as well as to prove his intent to kill. Such statements are less reliable proof of further conduct than of present intent because people frequently do not or cannot carry out their intentions. As McCormick notes, the problem "becomes one of relevancy." McCormick, Evidence § 295, at 846 (3d ed. 1984).

The leading case on this point is Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892), where letters in which the declarant stated that he intended to travel from Wichita to Crooked Creek with another person (Hillmon) were offered in evidence. The U.S. Supreme Court held the letters admissible:

> The letters. . . were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention. *Id.* at 295-96.

Prior Ohio cases recognizing this exception have been decided as *res gestae* cases. *See* Outland v. Industrial Comm., 136 Ohio St. 488, 26 N.E.2d 760 (1940); Railway Co. v. Herrick, 49 Ohio St. 25, 29 N.E. 1052 (1892); Finnegan v. Metropolitan Life Insurance Co., 81 Abs. 417, 162 N.E.2d 216 (App. 1958).

This rule poses the problem of whether statements admissible under the rule may be offered to prove that a person other than the declarant also engaged in the intended conduct — for example, that Hillmon accompanied the declarant to Crooked Creek. The House Judiciary Committee Report attempted to limit the rule in this respect: "[T]he Committee intends that the Rule be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon. . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R. Rep. No. 650, 93rd Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7087. Some federal cases, however, have admitted such statements. United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), cert. denied sub nom, Inciso v. United States, 429 U.S. 1099 (1977). *But see* United States v. Delvecchio, 816 F.2d 859, 862-63 (2d Cir. 1987).

Statements of remembrance

Statements of "memory or belief [offered] to prove the fact remembered or believed" are inadmissible unless the statement relates to the execution, revocation, identification, or terms of declarant's will." The federal drafters explained this limitation: "The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Advisory Committee's Note, Fed. R. Evid. 803. *See also* Shepard v. United States, 290 U.S. 96 (1933); McCormick, Evidence § 296 (3d ed. 1984).

STATEMENTS OF MEDICAL DIAGNOSIS OR TREATMENT

Rule 803(4) recognizes a hearsay exception for 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." Such statements are often part of a hospital or medical record and thus may present double hearsay problems. *See* Rule 805 (multiple hearsay).

Statements made for treatment

The reliability of statements made for the purpose of medical treatment, including past symptoms and pain, rests on the theory that the declarant would not fabricate under these circumstances because the effectiveness of the treatment depends on the accuracy of the statement. *See* McCormick, Evidence § 292 (3d ed. 1988). In Pennsylvania Co. v. Files, 65 Ohio St. 403, 62 N.E. 1047 (1901), the Supreme Court stated: "It is to be presumed in such case, that he states the truth, as it is to his interest that he should do so, and not mislead the physician by false statements as to his condition. He is under a strong motive in such case to state the truth, and it is on this ground that such evidence is admitted." *Id.* at 406; *accord*, Baker v. Industrial Comm., 44 Ohio App. 539, 186 N.E. 10 (1933); Cunningham v. Ward Baking Co., 28

Abs. 111 (App. 1938); Hartley v. Model Dairy Products Co., 25 Abs. 146 (App. 1937).

Statements made for diagnosis

Rule 803(4) is not limited to statements made for the purpose of medical treatment. It also covers statements made for the purpose of diagnosis, *i.e.*, statements made to a physician solely for the purpose of presenting expert testimony at trial. Such statements were not admissible under prior Ohio law. *See* Pennsylvania Co. v. Files, 65 Ohio St. 403, 62 N.E. 1047 (1901); Lidyard v. General Fireproofing Co., 62 Ohio App. 500, 24 N.E.2d 635 (1939).

This part of the rule does not rest on any special guarantee of trustworthiness, but rather on a pragmatic assessment of the use of expert testimony at trial. A physician, consulted only for the purpose of testifying as an expert, may state an opinion; the opinion is often based, in part, on medical history provided by the patient. Although the medical history was not admissible as substantive evidence under prior law, it was admissible to show the basis of the expert's opinion. *See* DiMarzo v. Columbus Transit Co., 100 Ohio App. 521, 137 N.E.2d 766 (1955) (patient informed physician she "had been injured in a bus accident."); *cf.* Scott v. Campbell, 115 Ohio App. 208, 184 N.E.2d 485 (1961) (patient informed physician she had suffered a "blow to her knee."). The federal drafters concluded that the distinction was too difficult for a jury to appreciate:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. Advisory Committee's Note, Fed. R. Evid. 803.

Other requirements

Although the rule requires the statement be made for medical diagnosis or treatment, the statement need not be made to a physician. "Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Advisory Committee's Note, Fed. R. Evid. 803.

The rule is limited to statements that describe "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." The provision relating to "causes" represents a change in Ohio law. For example, in Dugan v. Industrial Comm., 135 Ohio St. 652, 22 N.E.2d 132 (1939), the Supreme Court had held that "a physician will not be permitted to testify as to statements made by his patient relative to the cause of the claimed injury, when such statements were not spontaneous but were self-serving declarations and in the nature of a narrative of a past event." *Id.* at 655.

Statements relating to the cause of an injury, however, do not include statements of fault. "Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light." Advisory Committee's Note, Fed. R. Evid. 803. *See also* McQueen v. Goldey, 20 Ohio App.3d 41, 43, 484 N.E.2d 712 (1984) (statements in hospital record concerning manner in which accident happened excluded); Dorsten v. Lawrence, 20 Ohio App.2d 297, 253 N.E.2d 804 (1969) (opinion of lack of fault in hospital record excluded).

Child Sexual Abuse Cases

In State v. Boston, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), the Ohio Supreme Court questioned the applicability of this exception in a child sexual abuse case. The court questioned whether a young child would be motivated to make statements for the purpose of medical treatment. "The reason is that we really know that such a young child is not giving the doctor the information for the purposes required by Evid. R. 803(4). More than likely, the child does not even want to be seeing the doctor!" *Id.* at 122. The Court also questioned whether the exception covered a child's statement identifying the abuser.

The Court went on to specify the conditions under which such statements would satisfy both the requirements of Rule 803(4) and the Confrontation Clause:

> Where a child is either available or unavailable and the child declarant's out-of-court statements meet the rationale and policy of a firmly rooted exception to the hearsay rule, such as Evid. R. 803(4), and it is demonstrated that a good-faith effort has been made to produce the non-testifying declarant, the out-of-court statements are admissible through a third person. The statements, however, must have an "indicia of reliability" and factors such as the age of the child, the presence of corroborative physical evidence, the relationship of the victim to the accused, the child's relationship to the persons to whom the statements are made, and the terminology used by the child are to be used in determining reliability. *Id.* at 127.

RECORDED RECOLLECTION

Rule 803(5) recognizes a hearsay exception for past recollection recorded. The rule requires that: (1) the witness had firsthand knowledge of a matter; (2) the witness made or adopted a memorandum or record concerning the matter "when the matter was fresh in his memory"; (3) the memorandum or record reflects the witness' "knowledge correctly"; and (4) thewitness has "insufficient recollection to enable him to testify fully and accurately" about the matter recorded.

The exception for past recollection recorded should be distinguished from the practice of refreshing recollection, which does not involve hearsay evidence and is governed by Rule 612. In some cases a memorandum qualifying as recorded recollection under Rule 803(5) will itself contain hearsay. In such a case admissibility is governed by Rule 805 (multiple hearsay).

The trustworthiness of records of past recollection "is found in the reliability inherent in a record made while events were still fresh in mind and accurately

reflecting them." Advisory Committee's Note, Fed. R. Evid. 803. The rule is consistent with prior Ohio law. *See* State v. Scott, 31 Ohio St.2d 1, 285 N.E.2d 344 (1972); Moots v. State, 21 Ohio St. 653 (1871) (business records); Ronald v. Young, 117 Ohio App. 362, 187 N.E.2d 74 (1963) (business record).

Preparation of the record

The rule requires the record or memorandum "to have been made or adopted [by the witness] when the matter was fresh in his memory and to reflect [his] knowledge correctly." These requirements relating to the preparation of the record are designed to ensure the reliability of the matters contained in the record.

In State v. Scott, 31 Ohio St.2d 1, 285 N.E.2d 344 (1972), the Supreme Court held that the record had to have been made "at or near the time of the event." *Id.* (syllabus, para. 1). In contrast, the rule requires that the record have been prepared "when the matter was fresh in [the witness'] memory." This formulation follows Wigmore's view. *See* 3 Wigmore, Evidence §745 (Chadbourn rev. 1970). Wigmore argued that the "at or near the time" requirement was too restrictive and arbitrary. *Id.* "No precise formula can be applied to determine whether this test has been met; perhaps the best rule of thumb is that the requirement is not met if the time lapse is such, under the circumstances, as to suggest that the writing is not likely to be accurate." McCormick, Evidence 714 (2d ed. 1972).

The rule provides that the record may be either prepared or adopted by the witness so long as the witness vouches that the record reflects his "knowledge correctly." If the witness makes a statement to a third person who prepares a record, the record is admissible if the witness verified the accuracy of the record at a time when the event was fresh in his memory. Even if the witness did not verify the record, the record may be admissible if the recorder testifies that the record contains an accurate account of the witness' statement. This situation involves what McCormick refers to as "cooperative records." McCormick, Evidence § 303 (3d ed. 1984), *citing* Rathbun v. Brancatella, 93 N.J.L. 222, 107 A. 279 (1919). The Advisory Committee's Note to Federal Rule 803 indicates that cooperative records are admissible under the rule: "Multiple person involvement in the process of observing and recording, as in Rathbun v. Brancatella, . . . is entirely consistent with the exception."

Rule 803(5) differs from its federal counterpart in one respect. The Ohio rule requires that the accuracy of the record be established "by the testimony of the witness," a requirement not explicitly stated in the federal rule. This amendment was intended to avoid the suggestion in United States v. Payne, 492 F.2d 449 (4th Cir. 1974), cert. denied, 419 U.S. 876 (1974), that the accuracy of the record could be established through the testimony of a third person, even though the witness could not recall making the statement recorded.

Insufficient recollection

The rule requires that the witness have "insufficient recollection" of the matter contained in the record to enable him to testify "fully and accurately" at trial. This requirement is consistent with State v. Scott, 31 Ohio St.2d 1, 285 N.E.2d 344 (1972), in which the Supreme Court required that the witness "lack[ ] a complete present recollection of the event. . ." *Id.* (syllabus, para. 1).

The "insufficient recollection" requirement does not relate to the accuracy of the record or memorandum. Rather, it is aimed at avoiding abuse of the exception. "[T]he absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters." Advisory Committee's Note, Fed. R. Evid. 803.

Use of the record or memorandum at trial

Rule 803(5) provides that if a record qualifies as recorded recollection, "the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." The purpose of this provision is to avoid the risk that the record will be given undue weight. This point was made in the dissenting opinion in State v. Scott, 31 Ohio St.2d 1, 285 N.E.2d 344 (1972): "[A]dmitting the written paper as evidence results in it going to the deliberation room with the jury and a patent danger is that it will be given undue weight by the jury. . ." *Id.* at 12.