# Hearsay

Article VIII

# Hearsay Outline

1. Does evidence constitute an out-of-court statement (i.e. “hearsay”)?
2. If yes, for what purpose does the proffering party offer the statement? (hearsay v. non-hearsay)
3. If the statement is offered for a non-hearsay purpose, is that purpose relevant and, if so, does it satisfy a Rule 403 analysis?
4. If the statement is offered for its truth (i.e. hearsay), does one of the exclusions (Rule 801) or exceptions (Rules 803, 804, 807) to the hearsay rule apply?
5. If the evidence is being offered against a criminal defendant, does the Confrontation Clause require its exclusion?

# Hearsay Rules

- Rule 801
  - Sections (a), (b) and (c) define “hearsay”
  - Section (d) lists **exclusions** from the hearsay definition
- Rule 802: General prohibition against the admission of hearsay evidence.
- **Exceptions**:
  - Rule 803 (Regardless of declarant availability)
  - Rule 804 (Declarant must be unavailable)
  - Rule 807 (Residual Hearsay)

# Hearsay Prohibition

- Sincerity: Does the statement accurately reflect the declarant's belief?
- Perception: Did the declarant have an adequate opportunity to observe the events to which the hearsay refers?
- Memory: How well did the declarant recall those events at the time the hearsay statement was made?
- Communication Difficulties: How accurately does the declarant's choice of words describe those events?
- Trigger Question: Who would I need to cross examine to answer these questions?
  - If you cannot conduct meaningful cross examination about these issues in the absence of the person who made the out-of-court statement, that should trigger consideration of the hearsay definition.

# Hearsay Definition

Rule 801(c)

- A “declarant”
- Makes an out-of-court verbal or written assertion
- OR engages in non-verbal conduct that is intended as an assertion
- Offered to prove the truth of the matter asserted

# "Truth of the Matter Asserted"

- A statement is offered for its truth if the statement must be accurate to be relevant.
- Example:
  - "The bank where I work has decided to substitute blanks for real bullets in its guards' guns."
  - Hearsay: If statement is offered to prove that the guns were loaded with blanks in a suit filed against the bank for not adequately protecting its customers.
  - Not Hearsay: If offered to prove motive in a criminal robbery case against the person who overheard the statement prior to the robbery. Accuracy of statement is irrelevant if offered to show what defendant believed about the bank's security measures (or lack thereof).

# Declarants

Rule 801(b) limits declarants to natural persons (i.e. animals and mechanical devices are not “declarants”)

# Out-of-Court

A statement is made “out-of-court” if made at any time other than by a witness in the trial in which the statement is offered

# "Statement"

Definition: An utterance, writing or conduct intended to make the assertion (whether directly or indirectly) that the statement is offered to prove.

# Indirect Statements

1. Sub-assertions
2. Linked assertions
3. Invisible assertions
4. Vicarious assertions
5. Assertive conduct
6. Implied assertions

# Sub-assertions

- Entire statement v. portions of the statement
- Example: To prove Jill was in the area of the murder at 3pm, P offers a witness to testify that around 4pm that day, a friend told the witness, "About an hour ago, I saw Jack and Jill run up the hill to fetch a pail of water."
  - P cannot argue that utterance is not an assertion because it is only offered to prove the first part (running up the hill) and not the second part (fetching a pail of water) and therefore it is not offered to prove the statement in its entirety.

# Linked Assertions

- Utterance must be linked to the context in which it is made to determine whether it constitutes an assertion for hearsay purposes.
- Example:
  - Al: Did Jenni run the red light?
  - Ed: Yes.
  - Ed's statement must be linked to Al's question. Ed's linked assertion is that "Jenni ran the red light."
- Example: "Someday maybe that will finally be me."
  - Linked assertion: I have never had a hole in one.

# Invisible Assertions

- Assertion may be implied even though neither the question nor the answer refers to it specifically.
- Example:
  - Q: After talking to the plaintiff, what was your belief as to whether the defendant had run the red light?
  - A: I had the firm impression that the defendant had run a red light.
- Example: Did your spouse talk to the landlord? Yes.
- *United States v. Brown*: Testimony from gov't witness in tax fraud case: "I examined the tax returns prepared by the defendant and found that they consistently overstated deductions."
  - Witness could only have known that deductions were overstated if she spoke with the taxpayers for whom the returns were prepared.

# Vicarious Assertions

- Statement made by a declarant that is treated as if it were made by a different person.
- Rule 801(d)(2)(C)(D) & (E) specifically excludes certain vicarious statements from the definition of hearsay

# Assertive Conduct

- Rule 801(a): “nonverbal conduct, if the person intended it as an assertion.”
- Example of Assertive Conduct: Witness’ act of pointing to “number 3” in the line up.
  - Assertion: Number 3 is the robber.
- Examples of Non-assertive conduct:
  - Car swerving back and forth on the road
  - Pedestrian jumping out of the way

# Implied Assertions

Examples of the intentional implied assertion that Dan drove negligently:

1. I can't believe Dan didn't notice the stop sign.
2. Dan's car was an accident waiting to happen.
3. Look at how Dan was driving and tell me that we don't need more traffic cops on out streets.

*U.S. v. Zenni* (E.D. Ky. 1980): unintended assertions are not "statements" for purposes of the hearsay rule. (Majority Rule)

# Hearsay Misconceptions

- It's not hearsay if you paraphrase. NOT TRUE
- It's not hearsay if the witness is also the declarant. NOT TRUE
- It's not hearsay if the statement is circumstantial evidence. NOT TRUE
- It's not hearsay if the statement was made in a police officer's presence. NOT TRUE

# Confrontation Clause

Sixth Amendment

# Sixth Amendment

"In all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

- Applies to evidence offered against a defendant in a criminal case.

# Out-of-Court Statements

*Ohio v. Roberts* (1980) – Confrontation issues guided by reliability:

1. "Firmly rooted" hearsay exception
2. Particularized guarantees of trustworthiness

→ If either prong met, statement may be admitted without violating the Confrontation Clause

***OVERTURNED BY CRAWFORD***

# *Crawford v. Washington*

- Testimony: Wife's recorded police statement
- State court upheld introduction under second prong of *Roberts*
- Supreme Court reversed
  - Scalia, et al. (majority) – shifted Confrontation Clause inquiry from one of reliability to issue of whether statement is "testimonial"
  - Rehnquist/O'Connor (concurrence) – insufficient "indicia of reliability"

# Majority Opinion

"The Confrontation Clause commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

# Crawford Test

If statement is **testimonial**, it violates Confrontation Clause to admit at trial UNLESS:

1. The witness is unavailable, AND
2. Testimony was subject to prior cross examination.

OR

The witness is unavailable due to conduct by the defendant "designed to prevent the witness from testifying." *Giles v. CA* (2008)

→ Forfeiture by Wrongdoing doctrine

If statement is **non-testimonial**, states may determine admissibility under general evidentiary standards

# "Testimonial"

Statements are "testimonial" where the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose for the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

If the circumstances objectively indicate that the primary purpose for the interrogation is to enable police assistance to meet an ongoing emergency, the statements are "non-testimonial."

# General Examples

**Testimonial**

- Prior testimony at a preliminary hearing
- Prior testimony before a grand jury
- Former trial testimony
- Police interrogations

**NOT Testimonial**

- Statements in furtherance of a conspiracy
- Business Records (but see *Melendez-Diaz)*
- 911 Call (if statement addresses ongoing emergency)

# Non-Testimonial Statements

### *Davis v. Washington*

- 911 Call
- "he's here jumpin' me again"
- He's "usin' his fists"
- "He's running now"
- NOT testimonial, b/c made to obtain assistance to meet an ongoing emergency

### *Michigan v. Bryant*

- Police responded to reported shooting
- Asked V what happened, who shot him, where the shooting occurred
- V responded "Rick" shot him 25 minutes earlier at V's home
- NOT testimonial b/c police questions directly addressed an ongoing threat to the public at large (i.e. man with gun)

# Testimonial Statements

## *Hammon v. Indiana*

- Amy's narrative of past events was delivered at a time removed from the danger she described.
- After Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, “[t]o establish events that have occurred previously.”

## Crawford v. Washington

- Statements were made to the police during an interrogation which occurred after the incident at issue.
- Sylvia Crawford was a suspect at the time of the interrogation.

# Scientific Tests

*Melendez-Diaz v. Mass.* (2009)

Court applied *Crawford* to the admission of test results on a substance seized by the police (which turned out to be cocaine)

- 5-4 Majority held that analysts' certificates are within the core class of testimonial statements covered by the Confrontation Clause.
- Document created solely for an evidentiary purpose, made in aid of a police investigation is testimonial.

# *Bullcoming v. NM* (2011)

- Court applied *Melendez-Diaz* and held that, absent unavailability and prior opportunity to cross examine, the confrontation clause requires a live witness who is competent to testify regarding the truth of the statements in the report.
- A random lab employee with no personal knowledge of the report at issue is not sufficient.

# Cross Examination

Facts D entitled to cross examine lab witness about:

- observations regarding the particular test at issue
- observations regarding the particular matter that was subjected to testing
- The particular testing process employed

→ Expose any lapses or untruths by the testing analyst

→ In this case, testing analyst was placed on unpaid leave – D had no opportunity to inquire regarding the reason(s) for the unpaid leave (incompetence, evasiveness, dishonesty)

# *Williams v. Illinois* (2012)

- Plurality opinion
- Majority (5) agreed that expert witnesses could rely on DNA test results that they had no personal knowledge of as part of their opinion
  - Statements relied on in this fashion are not offered for the truth of the matter asserted
  - Statements are not testimonial because the test results were compiled at a time before the defendant had been identified as a suspect and in response to the ongoing emergency of finding an alleged rapist.

# Statements offered for non-hearsay purposes

Not for the truth of the matter asserted

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3. **If the statement is offered for a non-hearsay purpose, is that purpose relevant and, if so, does it satisfy a Rule 403 analysis**?
4. If the statement is offered for its truth (i.e. hearsay), does one of the exclusions (Rule 801) or exceptions (Rules 803, 804, 807) to the hearsay rule apply?
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# RULE 801(c)

- (c) **Hearsay.** "Hearsay" means a statement that:
  - (1) the declarant does not make while testifying at the current trial or hearing; and
  - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

# “Truth of the Matter Asserted”

A statement is offered for its truth if the statement must be accurate to be relevant.

# Non-Hearsay Purposes

- State of Mind
  - Declarant
  - Listener
- Words of Independent Legal Significance
- Prior Inconsistent Statement
- Context and Meaning

# Declarant's State of Mind

An assertion may be admissible as non-hearsay when offered as circumstantial evidence of a declarant's subjective belief.

Relevant when:

(1) The declarant's belief is itself a material fact.

(2) The declarant's belief is circumstantial evidence of the declarant's behavior.

# Listener's State of Mind

An assertion may be admissible as non-hearsay when offered as circumstantial evidence of a listener's subjective belief.

Relevant when:

(1) The listener's belief is itself a material fact.

(2) The listener's belief is circumstantial evidence of the declarant's behavior.

# Independent Legal Significance "Verbal Acts"

An assertion is non-hearsay when the assertion itself constitutes direct evidence of a material fact.

- Issue is about whether the assertions were made, not what was asserted.
- Person claiming the existence of the assertion(s) testifies and is subject to cross-examination.

Examples:

1. Alleged defamatory words in a slander case.
2. Written agreement in a breach of contract case.
3. Verbal parts of acts: Cash + "This should take care of your vote on the trash collection contract."

# Prior Inconsistent Statements

Statements used to impeach a witness are not offered for the truth of the matters asserted therein.

- They are offered only to show that the witness made inconsistent statements which impacts his credibility.
- Rule 801(d)(1)(A): Allows some inconsistent statements to be admitted for their truth.

# Context & Meaning

- Statements offered only to offer context to a witness' testimony are not hearsay because they are not offered for their truth, but instead to portray a detailed and accurate version of the events.

# Analysis

1. Identify non-hearsay purpose
2. Show relevance of evidence for non-hearsay purpose
3. Anticipate Rule 403 Argument
   - → Risk that the jury will improperly use the assertion for the truth of its contents outweighs the probative value of the non-hearsay use.
   - → Ask for limiting instruction.

# Testifying Witness' Prior Statements

Rule 801(d)(1)

# Hearsay Outline

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3. If the statement is offered for a non-hearsay purpose, is that purpose relevant and, if so, does it satisfy a Rule 403 analysis?
4. **If the statement is offered for its truth (i.e. hearsay), does one of the exclusions (Rule 801) or exceptions (Rules 803, 804, 807) to the hearsay rule apply?**
5. If the evidence is being offered against a criminal defendant, does the Confrontation Clause require its exclusion?

# Exclusions v. Exceptions

- Both have the same result: the statement is admissible for its truth
- Different theories of admission
  - Rule 801 exclusions: opposing party has opportunity to cross examine the declarant
  - Rules 803/804/807: Based on circumstantial guarantees of trustworthiness
- Rule 807 (Residual Hearsay)

# Rule 801(d) – Exclusions from the definition of Hearsay

The declarant testifies and is subject to cross examination about a prior statement, and the statement:

(A) Inconsistent and given under oath (Prior Inconsistent statement under oath)

(B) Consistent and offered to rebut or rehabilitate (Prior consistent statement)

(C) Identifies a person as someone the declarant perceived earlier.

## Prior Inconsistent Statements – Statutory Elements Under Oath (FRE 801 (d)(1)(A)

1. Declarant testifies at the trial/hearing.
2. Declarant is subject to cross-examination concerning the prior statement
3. Prior statement is inconsistent with the declarant's testimony
4. The prior statement was given under oath and subject to penalty of perjury at a trial, hearing or other proceeding, or in a deposition.

# Prior Consistent Statements FRE 801 (d)(1)(B)

1. Declarant testifies at the trial/hearing
2. Declarant is subject to cross-examination concerning the prior statement
3. Prior statement is consistent with the declarant's testimony
4. Statement is offered to rebut an adversary's express or implied charge that the declarant's testimony is recently fabricated or the result of improper influence or motive

# Identification FRE 801 (d)(1)(C)

1. The declarant testifies at the trial or hearing
2. The declarant is subject to cross-examination concerning the prior statement
3. The prior statement identifies a person
4. The statement was made after the declarant perceived the person

# Opposing Party Statement

Rule 801(d)(2)

# Hearsay Outline

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4. **If the statement is offered for its truth (i.e. hearsay), does one of the exclusions (Rule 801) or exceptions (Rules 803, 804, 807) to the hearsay rule apply?**
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# Rule 801(d)(2) – Guiding Principles

1. Parties cannot offer their own hearsay statements into evidence under Rule 801(d)(2) – only their adversary's statements.
2. Statements are admissible regardless of whether they confess wrongdoing or were against the party's interest at the time they were made.
3. Statements are admissible under 801(d)(2) regardless of when they were made.

# Rule 801(d)(2) Categories

1. Declarant is the opposing party
2. Adoptive Statements
3. Authorized Statements
4. Employee Statements
5. Co-Conspirator Statements

# Declarant as Opposing Party Rule 801(d)(2)(A)

1. Declarant is a party to the lawsuit in which the statement is offered.
2. Declarant's adversary offers the statement into evidence.

# Adoptive Statements – Rule 801(d)(2) – Statutory Elements

1. A party adopted, or by words or conduct manifested belief in the truth of, a non-party declarant's statement.
2. The party's adversary offers the statement into evidence.

# Adoptions by Silence (Adoptive Admission)

- Circumstances must show the party heard the statement.
- The party must have understood the statement.
- The subject matter of the statement must have been within the party's personal knowledge.
- Under the circumstances, a reasonable person would have denied the statement had it not been true.

# Authorized Statements Rule 801(d)(2)(C)

1. A non-party hearsay declarant was expressly or impliedly a party's authorized agent.
2. The party's adversary offers the statement into evidence.

# Employee Statements Rule 801(d)(2)(D)

1. Non-party declarant is a party's agent or employee.
2. The declarant's statement concerns a matter within the scope of the agency or employment.
3. The declarant's statement was made during the existence of the agent/servant relationship.
4. The party's adversary offers the statement into evidence.

# Rule 801 (d)(E)-Co-Conspirator Statement

- Statements made by one member of a criminal conspiracy are admissible at trial against the other members of the conspiracy if certain foundational criteria are met.

# Co-Conspirator Statements Rule 801(d)(2)(E)

1. Declarant is a party's co-conspirator.
2. Statement was made while the conspiracy was ongoing.
3. Statement was made in furtherance of the conspiracy.
4. Party's adversary offers the statement into evidence.

# Exceptions to the Rule Against Hearsay

Rule 803

Declarant availability n/a

# Hearsay Outline

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# Rule 803 Exceptions

1. Defines categories of admissible hearsay
   → v. Rule 801 which excludes certain statements from the definition of hearsay
2. Statements are admissible for the truth of their contents
3. Availability of declarant is immaterial

# Rule 803 Categories

- Present Sense Impression
- Excited Utterance
- Then-existing Mental, Emotional or Physical condition
- Statement Made for Medical Diagnosis
- Recorded Recollection
- Business Records (or lack thereof)
- Public Records (or lack thereof)

# Present Sense Impression (PIS) Rule 803(1)

1. Declarant made a statement while or immediately after perceiving an event or condition
2. The statement describes or explains the event or condition.

# Va. R. Ev. 2:803(1)Present Sense Impression

- A spontaneous statement describing or explaining an event or condition made contemporaneously with, or while, the declarant was perceiving the event or condition.

# Important Factors

- Event need not be startling (as with Excited Utterance)
- Timing of statement is important – it must occur while or immediately after perceiving the event

# Excited Utterance (EU) Rule 803(2)

1. The declarant made a statement relating to a startling event or condition
2. The declarant was under the stress of excitement caused by the event or condition at the time the declarant made the statement.

# Va. R. Ev. 803(2)- Excited Utterance

- A spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation.

# Important Factors

- Objective and subjective components to "startling event"
- Timing not as important as with 803(1) – as long as the statement was made under the "stress of excitement"
- See Braxton v. Commonwealth, 26 Va. App. 176 (1997)(Statement by three year-old days after the startling event (mother's murder) admissible as EU)

# Statement of Presently-Existing State of Mind: Rule 803(3)(SOM)

- The declarant's statement identifies his or her currently existing state of mind, emotion, sensation, or physical condition

# Va. R. Ev. 2:803(3)- Then Existing Mental, Emotional, or Physical Condition

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

# Examples

- "Gene always carries a gun."
  - Circumstantial Evidence that the declarant was afraid of Gene at the time.
  - Admissible as non-hearsay (if offered to show state of mind v. fact that Gene always carries a gun)
  - Assertion of fact about the "outside world" surrounding a declarant
- "I'm really afraid of Gene."
  - Direct evidence of declarant's state of mind.
  - Hearsay, because offered for its truth
  - Admissible for such purposes under Rule 803(3)
  - Assertion describing the declarant's "inner world"

# *Mutual Life Ins. Co. v. Hillmon*

- An assertion of a declarant's concurrently existing intention to perform a future act is admissible as evidence that the declarant followed through and did it.
  - "will leave to see . . . going with a man by the name of Hillmon . . ."
  - "In a couple of days I'm going to head west to Crooked Creek."
  - Limitation: A statement of memory or belief CANNOT be used to prove the fact remembered or believed.
  - "The light was green."

# More Examples

- "He said that his back was killing him and he was in terrible pain."
  - Then-existing physical condition
  - Relevant to material fact of injury
- "Danny said he was going to tell Melissa that he was no longer interested in contributing to the cost of the car seat."
  - Then existing state of mind
  - Relevant to Melissa's motive to kill

# Statements Made for Purposes of Medical Diagnosis/Treatment – 803(4)

1. Declarant made a statement for the purpose of obtaining medical treatment or seeking a diagnosis
2. Information in the statement is reasonably pertinent to diagnosis or treatment
3. The statement concerns the declarant's medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the declarant's medical condition

# Va. R. Ev. 2:803(4) Statements for Purposes of Medical Treatment

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

# Examples

- "She said that [her right arm] was still very sore and that she couldn't lift it above her shoulder."
- "She mentioned that her right wrist had been sore for a long time after the accident, but that now it was feeling better."
  - Both Statements are admissible under Rule 803(4) to prove the extent and duration of the injuries allegedly caused by the accident.

# Medical Personnel

- Doctor
- Nurse
- Ambulance attendant
- Physical Therapist

# "Reasonably Pertinent to Diagnosis or Treatment"

*United States v. Tome* (1995)

- Statements made by child patient to pediatrician during a "get acquainted" conversation are pertinent to treatment because making patients comfortable is part of the examination process
- Same statements made to a children's services caseworker are not admissible under 803(4) because the caseworker is not a medical professional

Some courts have approved admission of identifying statements in child abuse cases because such statements are pertinent for purposes of physical and psychological treatment

# RULE 803(5)

- (5) **Recorded Recollection.** A record that:
  - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
  - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
  - (C) accurately reflects the witness's knowledge.

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

# Va. R. Ev. 2:803(5) – Recorded Recollection

- Except as provided by statute, a memorandum or record concerning a matter about which a witness once had firsthand knowledge made or adopted by the witness at or near the time of the event and while the witness had a clear and accurate memory of it, if the witness lacks a present recollection of the event, and the witness vouches for the accuracy of the written memorandum. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

# Past Recollection Recorded – Rule 803(5)

1. The declarant has personal knowledge of a matter;
2. The declarant has insufficient recollection to testify about the matter fully and accurately;
3. Declarant made a memorandum or record concerning the matter, or adopted a memorandum or record prepared by someone else;
4. The matter was fresh in the declarant's memory at the time the memorandum or record was made or adopted;
5. The declarant testifies that the memorandum or record is accurate
6. The offering party may only have the witness read the memorandum or record into evidence. Only an adverse party may offer the record itself into evidence.

# Comparison to Refreshing Recollection (Rule 612)

## Rule 612

- No part of the document is admitted if used to refresh recollection (unless an adversary moves for admission)
  - The witness reads the document to him/herself and then continues with the testimony
- Any document may be used to refresh a witness' recollection
- Used when a witness has temporarily forgotten an issue

## Rule 803(5)

- The document may be read into evidence by the declarant witness (only opposing counsel may offer the document itself into evidence)
- Limited to documents that the declarant prepared or adopted at a time when the information was fresh in his/her memory
- Used when the witness had recall of an issue at one time, but no longer does

# RULE 803(6)

- (6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion or diagnosis if:
  - (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
  - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
  - (C) making the record was a regular practice of that activity;

# RULE 803(6)- Con't.

- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) the opponent does not show that the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness.

# Va. R. Ev. 2:803(6)

Va. R. Ev. 2:803(6) Business Records. A memorandum, report, record, or data compilation, in any form, of acts, events, calculations or conditions, made at or near the time by, or from information transmitted by, a person with knowledge in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, organization, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

# Va. R. Ev. 2:803 (6) Records of a Regularly Conducted Activity. [ed. – new Rule 2:803(6) effective July 2015]

A record of acts, events, calculations, or conditions if:

(A) The record was made at or near the time of the acts, events, calculations, or conditions by – or from information transmitted by – someone with knowledge;

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

(C) Making and keeping the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and

(E) Neither the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

# “Business Entity”

- Business
- Institution
- Association
- Profession
- Occupation
- Whether or not conducted for profit
- Whether or not “business activity” is legal

# Personal Knowledge

- Business entity representatives must have personal knowledge v. someone outside the business
  - Trustworthiness of Business Records is based on the duty of business representatives to accurately report business-related information

- *Johnson v. Lutz* (Court found that accident report prepared by police officer was not a business record because it was based on information provided by bystanders (with no business duty to report information accurately)

# Statements made by Outside Parties

- Business records may include information from two (or more parties):
  - The person who records the information in the "record"
  - The person who supplies the information
  - If both the recorder and the supplier work for the business entity, they have duties to provide and record accurately
  - Problems arise when the supplier is an "outside" party (one who does not work for the business entity)

# "Opinions and Diagnoses"

- Medical diagnosis must be made by a qualified medical professional
- Routine v. Speculative diagnoses
  - Routine (admissible): Compound Fracture
  - Speculative (not admissible): Cause of a particular form of cancer
  - If not admissible at trial under Rule 702 (Expert Witnesses), then not admissible as part of a business record

# Regular Business Practice

- Reports prepared "in anticipation of litigation"
  - *Palmer v. Hoffman* (pre-Rules case): Court excluded accident report because it was "outside" the regular business of a railroad company
- Rule 803(6) takes a broader view and would include an accident report as a business record, as long as the company can show that such reports are "regularly prepared"
  - BUT: Reports prepared solely for purposes of litigation may not satisfy the trustworthiness requirement of Rule 803(6)(E)

# Procedures

- Custodian of Records must testify (or certify pursuant to Rule 902) regarding the foundational requirements for Rule 803(6)
- Once foundational requirements are satisfied, the burden shifts to the opposing party to show that the records are nonetheless untrustworthy
  - The less that a statement in a business record relates to a matter that a judge considers to be routine and objectively verifiable, the more likely a judge is to exclude it as falling outside the scope of the business records exception.
  - *Palmer v. Hoffman* argument

# RULE 803(8)

- (8) **Public Records.** A record or statement of a public office if:
  - (A) it sets out:
    - (i) the office's activities;
    - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
    - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigations; and
  - (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

# Activities of a Public Office

- Internal affairs records
- Examples:
  - Purchasing office receipts and disbursements
  - Return of service on a subpoena (Sheriff's Office)
  - Taxpayer refund (IRS)

# Matters Observed/Reported

- Personal knowledge
- Examples
  - Health Inspector's observations of conditions in a restaurant
  - Housing inspector's report about the condition of heaters in an apt. complex
  - Police officer's report indicating the lengths of skid marks behind two vehicles that collided in an intersection

# Factual Findings from an Authorized Investigation

- Admissible in civil cases
- Admissible if offered by a Defendant against the government in a Criminal Case
- *Beech Aircraft Corp. v. Rainey*: Interprets "factual findings" broadly to include conclusions based on factual investigations
  - "the aircraft's engine was operating at the time of impact"
  - "the most probable cause of the accident was the pilot's failure to maintain proper interval"

# Outsider Statements

- An investigator may rely on statements from non-government employees during an investigation
- Those outsider statements are NOT admissible for the truth of their contents
- BUT the investigator may rely on them in arriving at a conclusion

# Trustworthiness

- Timeliness of investigation
- Special skills and experience of the investigator
- Whether a hearing was held
- Motivations of the individuals who contributed to the report

# Exceptions to the Rule Against Hearsay

Rule 804

Declarant Unavailable

# Rule 804: Unavailability

1. Declarant is exempted from testifying due to privilege
2. Declarant refuses to testify despite a court order to do so
3. Declarant testifies to not remembering the subject matter
4. Declarant cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness or mental illness
5. Declarant is absent from the trial or hearing and the statement's proponent has not been able to procure the declarant's appearance by process or other reasonable means.

## Va. R. Ev. 2:804. Hearsay Exceptions Applicable where the Declarant is Unavailable (Rule 2:804(B)(5) derived from Code §8.01-397)

(a) Applicability. The hearsay exceptions set forth in subpart (b) hereof are applicable where the declarant is dead or otherwise unavailable as a witness.

# Unable to procure Appearance (Rule 804(a)(5))

*Gordon*: Court that foundational showing was insufficient where:

1. Proponent had not seen nor spoken to witness in 3 years
2. Letter sent 2 years prior was returned as undeliverable
3. Witness' creditors contacted proponent asking for information on her whereabouts
4. Unable to find listing for witness in any local phone directory
5. Witness' former attorney stated that he did not know of her whereabouts

# Investigatory Steps

- Checking hospital records
- DMV records
- Utility companies, Social Security, welfare agencies
- Declarant's last known employer
- Employee organizations of which declarant is/was a member
- Professional Investigator

# Former Testimony
# Rule 804(b)(1)

1. Declarant is unavailable
2. Declarant previously testified under oath in a hearing or deposition in the same or a different case
3. Party against whom the testimony is offered (or in civil cases a predecessor in interest)
   - Previously offered testimony, OR
   - Previously had an opportunity to cross examine
4. Party against whom testimony is offered has the same motive to "develop" testimony as when testimony was previously given

## Va. R. Ev. 2:804. Hearsay Exceptions Applicable where the Declarant is Unavailable

(B) Hearsay Exceptions. The following are not excluded by the hearsay rule:

(1) Former Testimony. Testimony given under oath or otherwise subject to penalties for perjury at a prior hearing, or in a deposition, if it is offered in reasonably accurate form and, if given in a different proceeding, the party against whom evidence is now offered, or in a civil case a privy, was a party in that proceeding who examined the witness by direct examination or had the opportunity to cross-examine the witness, and the issue on which the testimony is offered is substantially the same in the two cases.

# Hearing

- Trial
- Preliminary Hearing
- Grand Jury (only if offered by defense in a criminal case)
- Administrative hearing
- Pretrial hearing

# Similar Motive Requirement

- Party against whom testimony is offered had a valid opportunity and similar motive to develop the testimony at the prior hearing by direct, cross or redirect examination.
- *United States v. DiNapoli*: Court held that Defense could not offer statements made by witness to Grand Jury because the prosecutor had no interest in showing the falsity of the witness' testimony because record indicated that GJ did not believe the witness' denials re: bid rigging.
- Generally, motive requirement is satisfied if statement is offered against party who previously offered the testimony.

# Predecessor in Interest

- Applies in civil cases ONLY
- Two Approaches:
  1. Mutuality of Interest (landowner who deeds property to the party against whom the former testimony is offered)
  2. Similar motive and opportunity sufficient (ignores "predecessor in interest" language)

  → Broader interpretation

# Objections

Majority Approach:

- If offered against party who had opportunity to cross examine or initially offered it in evidence, only substantive objections are permitted.
- If offered against different party, both form and substantive objections are permissible.
- If objection relates to competency or privilege, those issues must have existed at the time the testimony was originally given.

# Dying Declarations
# Rule 804(b)(2)

1. Declarant is unavailable
2. Statement offered either in a homicide prosecution or a civil proceeding
3. Declarant believed that death was imminent at the time the statement was made
4. Statement concerns the cause or circumstances of what the declarant believed to be imminent death

## VA. R. Ev. 2:804(B)(2) Statement Under Belief of Impending Death

- Impending death. In a prosecution for homicide, a statement made by a declarant who believed when the statement was made that death was imminent and who had given up all hope of survival, concerning the cause or circumstances of declarant's impending death.

# Imminent Death

- Declarant's statements
  - "I think I'm dying."
  - "I'm not going to make it."
- Statements to the Declarant
  - "I think you're dying."
  - "You're not going to make it."
- Declarant's physical condition
  - Degree to injury (Objective and Subjective Test)

# Statements Against Interest Rule 804(b)(3)(Self-inclupatory)

1. Declarant unavailable
2. Statement is sufficiently contrary to the declarant's interests (pecuniary, proprietary, or penal) that a reasonable person in the situation would not have made the statement unless it was believed to be accurate.
3. A statement against penal interest offered in a criminal case must be supported by corroborating evidence to show trustworthiness.

## Va. R. Ev. 2:804(B)(3) Statement Against Interest

(A) A statement which the declarant knew at the time of its making to be contrary to the declarant's pecuniary or proprietary interest, or to tend to subject the declarant to civil liability. (B) A statement which the declarant knew at the time of its making would tend to subject the declarant to criminal liability, if the statement is shown to be reliable.

# “Interest”

1. Contrary to declarant’s pecuniary or proprietary interest
2. Tended to subject the declarant to civil or criminal liability
3. Tended to render invalid a claim by the declarant against another

# Foundational Evidence

- Rule 104(a) – Rules of evidence do not apply to foundational evidence (i.e. hearsay is admissible to prove the applicability of a hearsay exception)
- To show that an assertion that appears to be against declarant's interest really is not
- To show that an assertion that appears not to be against declarant's interest really is

# Hybrid Statements

- Declarant admitted to police that he was transporting cocaine for Williamson (defendant)
- Williamson v. United States, 512 U.S. 594 (1994)(held statements against the interest of the declarant under FRE 804(b)(3) did not allow admission of non self-inculpatory statement, even if they were made within a broader narrative that was generally self-inculpatory).
- See Burton v. United States, 391. U.S. 123(1968) (admission of accomplices out of court confession at defendant's joint trial violated 6th amendment confrontation clause)
- Examples:
  1. "Hamilton and I robbed the Conglomerate Bank on October 9."
  2. "I single-handedly robbed the Conglomerate Bank on October 9. Hamilton had nothing to do with it."

# Corroboration

- Statements against penal interest offered in criminal cases (by either the defendant or the prosecution) must be corroborated
- Types of corroboration:
  1. Circumstances surrounding making of the statement
     - Statement made shortly after robbery took place while declarant displaying wad of money that he said was proceeds of robbery
  2. Evidence supporting truth of statement
     - Another witness who saw what was relayed in the statement

# Forfeiture by Wrongdoing Rule 804(b)(6)

1. Declarant unavailable
2. Party against whom statement is offered engaged or acquiesced in wrongdoing that was intended to and did result in the declarant's unavailability

# Confrontation Clause

- *Giles v. California*: Supreme Court held that forfeiture by wrongdoing usurps a Confrontation Clause claim if the offering party can show by a preponderance of the evidence that the defendant killed the witness for the purpose of preventing her from testifying against him (at a yet to be filed assault trial)

# RULE 807. Residual Exception

- (1) the statement has equivalent circumstantial guarantees of trustworthiness compared to statements made admissible by Rules 803 and 804, but not specifically covered by those Rules.
- (2) Statement pertains to a material fact
- (3) Statement more probative than any other evidence that the party offering the statement can reasonably procure
- (4) Admission of the statement serves the interests of justice
- (5) Offering party gives the adversary adequate notice in advance of trial of the party's intent to offer the statement into evidence

# Notice

- Must include contact information about the declarant
- Sufficiently in advance of trial to give the adversary a fair opportunity to investigate and respond to Rule 807 argument
- Some judges will excuse if a continuance will give opposing counsel sufficient time to investigate and respond

# Arguments

- Compare to trustworthiness of specific exceptions
- Explain why general dangers of hearsay evidence are not present with the proposed statement

# Hearsay Prohibition

- Sincerity: Does the statement accurately reflect the declarant's belief?
- Perception: Did the declarant have an adequate opportunity to observe the events to which the hearsay refers?
- Memory: How well did the declarant recall those events at the time the hearsay statement was made?
- Communication Difficulties: How accurately does the declarant's choice of words describe those events?

# Near Miss Argument

- The residual exception should only apply to situations not contemplated by any of the specific exceptions
  - If the statement is of a type provided for by an existing hearsay exception and fails to meet that exception's requirements, it should be inadmissible.
- Majority of courts reject this argument
  - Most situations can be connected to one of the exception categories