

ARTICLE VIII. HEARSAY

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Introductory Comment

The Federal Rules of Evidence list 24 exceptions from the hearsay rule in which the availability of the declarant is immaterial, five exceptions in which the declarant must be unavailable, and four exceptions from the definition of hearsay (which are, in reality, exceptions from the hearsay rule), for a total of 33.

The Pennsylvania Rules of Evidence, while following the federal numbering system as far as possible, recognize fewer exceptions, and arrange them more logically. Article VIII of the Pennsylvania Rules of Evidence lists 16 exceptions from the hearsay rule in which the availability of the declarant is immaterial, five exceptions in which the declarant must be unavailable, and three exceptions in which the testimony of the declarant is necessary, for a total of 24.

Defendant's Constitutional Right of Confrontation in Criminal Cases

The hearsay rule is applicable both in civil and criminal cases. In a criminal case, however, hearsay that is offered against a defendant under an exception from the hearsay rule may sometimes be excluded because its admission would violate defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment of the United States Constitution, or "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

The relationship between the hearsay rule and the Confrontation Clause in the Sixth Amendment was explained by the Supreme Court in *California v. Green*, 399 U.S. 149, 155-56 (1970):

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once

found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . .

Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.

In *Crawford v. Washington*, 541 U. S. 36, 124 S.Ct. 1354 (2004), the Supreme Court, overruling its prior opinion in *Ohio v. Roberts*, 446 U. S. 56 (1980), interpreted the Confrontation Clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule, except, perhaps, if the hearsay qualifies as a dying declaration (Pa.R.E. 804(b)(2)).

In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution, and (3) admission of the evidence would violate defendant's right "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

Source

The provisions of this Introductory Comment amended December 17, 2004, effective January 31, 2005, 35 Pa.B. 8. Immediately preceding text appears at serial pages (245781) to (245782).

Rule 801. Definitions.

The following definitions apply under this article:

- (a) *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) *Declarant*. A "declarant" is a person who makes a statement.
- (c) *Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Comment

Pa.R.E. 801 is identical to subsections (a), (b) and (c) of F.R.E. 801. It is consistent with Pennsylvania law. F.R.E. 801(d) is not adopted. The subjects of F.R.E. 801(d), admissions and prior statements of witnesses, are covered in Pa.R.E. 803(25), Pa.R.E. 803.1., and Pa.R.E. 613(c).

a. *Statement*.

The definition of "statement" is consistent with Pennsylvania law. See, e.g., *Rafter v. Raymark Indus., Inc.*, 429 Pa. Super. 360, 632 A.2d 897 (1993) (oral or written assertion); *Commonwealth v. Rush*, 529 Pa. 498, 605 A.2d 792 (1992) (non-verbal conduct intended as an assertion). Communications that are not assertions are not hearsay. These would include questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc.

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b. *Declarant.*

Subsection (b) is consistent with Pennsylvania law. For hearsay purposes, the “declarant” is the person who makes an out-of-court statement, not the person who repeats it on the witness stand.

c. *Definition of Hearsay.*

Subsection (c), which defines hearsay, is consistent with Pennsylvania law, although the Pennsylvania cases have usually used the phrase “out-of-court statement,” in place of the phrase “other than one made by the declarant while testifying at the trial or hearing.” See *Heddings v. Steele*, 514 Pa. 569, 526 A.2d 349 (1987). The adoption of the language of the Federal Rule is not intended to change existing law.

A statement, other than one made by the declarant while testifying at the trial or hearing (an out-of-court statement), is hearsay only if it is offered to prove the truth of the matter asserted. There are

many situations in which evidence of an out-of-court statement is offered for a purpose other than to prove the truth of the matter asserted.

Sometimes an out-of-court statement has direct legal significance, whether or not it is true. For example, one or more out-of-court statements may constitute an offer, an acceptance, a promise, a guarantee, a notice, a representation, a misrepresentation, defamation, perjury, compliance with a contractual or statutory obligation, etc.

More often, an out-of-court statement, whether or not it is true, constitutes circumstantial evidence from which the trier of fact may infer, alone or in combination with other evidence, the existence or non-existence of a fact in issue. For example, a declarant's out-of-court statement may imply his or her particular state of mind, or it may imply that a particular state of mind ensued in the recipient. Evidence of an out-of-court statement, particularly if it is proven untrue by other evidence, may imply the existence of a conspiracy, or fraud. Evidence of an out-of-court statement made by a witness, if inconsistent with the witness' testimony, may imply that the witness is an unreliable historian. Conversely, evidence of an out-of-court statement made by a witness that is consistent with the witness' testimony may imply the opposite. See Pa.R.E. 613.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Source

The provisions of this Rule 801 amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993. Immediately preceding text appears at serial pages (245782) and (265703).

Rule 802. Hearsay Rule.

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Comment

Pa.R.E. 802 is similar to F.R.E. 802. It differs by referring to other rules prescribed by the Pennsylvania Supreme Court, rather than the United States Supreme Court, and by referring to statutes in general, rather than Acts of Congress. This rule is consistent with prior Pennsylvania case law.

Often, hearsay will be admissible under an exception provided by these rules. See, e.g., Pa.R.E. 803, 803.1 and 804. On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. 4020, or a videotape deposition of an expert witness may be admitted pursuant to Pa.R.C.P. 4017.1(g).

Also, hearsay may be admitted pursuant to a state statute. Examples include:

1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. See Comment located at Pa.R.E. 803(8) [Not Adopted].
2. A record of vital statistics may be admitted pursuant to 35 Pa.C.S. § 450.810. See Comment located at Pa.R.E. 803(9) [Not Adopted].
3. In an action arising out of a contract under the Uniform Commercial Code, a document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the

contract to be issued by a third party, may be introduced as prima facie evidence of the document's own authenticity and of the facts stated therein by the third party, pursuant to 13 Pa.C.S. § 1202.

4. In a civil case, a deposition of a licensed physician may be admitted pursuant to 42 Pa.C.S. § 5936.
5. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S. § 5919.
6. In a criminal or civil case, an out-of-court statement of a witness 12 years of age or younger, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5985.1.
7. In a dependency hearing, an out-of-court statement of a witness under 16 years of age, describing certain types of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5986.
8. In a prosecution for speeding under the Pennsylvania Vehicle Code, a certificate of accuracy of an electronic speed timing device (radar) from a calibration and testing station appointed by the Pennsylvania Department of Motor Vehicles may be admitted pursuant to 75 Pa.C.S. § 3368(d).

On rare occasion, hearsay may be admitted pursuant to a federal statute. For example, when a person brings a civil action, in either federal or state court, against a common carrier to enforce an order of the Interstate Commerce Commission requiring the payment of damages, the findings and order of the Commission may be introduced as evidence of the facts stated in them. 49 U.S.C. § 11704(d)(1).

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions to the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 changes updating the seventh paragraph of the Comment published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Source

The provisions of this Rule 802 amended March 23, 1999, effective immediately, 29 Pa.B. 1712; amended March 24, 2000, effective March 25, 2000, 30 Pa.B. 1639; amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993. Immediately preceding text appears at serial pages (265703) to (265704).

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present Sense Impression.
- (2) Excited Utterance.
- (3) Then Existing Mental, Emotional, or Physical Condition.
- (4) Statements for Purposes of Medical Diagnosis or Treatment.
- (5) Recorded Recollection [Not Adopted].
- (6) Records of Regularly Conducted Activity.

- (7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6) [Not Adopted].
- (8) Public Records and Reports [Not Adopted].
- (9) Records of Vital Statistics [Not Adopted].
- (10) Absence of Public Record or Entry [Not Adopted].
- (11) Records of Religious Organizations.
- (12) Marriage, Baptismal, and Similar Certificates.
- (13) Family Records.
- (14) Records of Documents Affecting an Interest in Property.
- (15) Statements in Documents Affecting an Interest in Property.
- (16) Statements in Ancient Documents.
- (17) Market Reports, Commercial Publications.
- (18) Learned Treatises [Not Adopted].
- (19) Reputation Concerning Personal or Family History.
- (20) Reputation Concerning Boundaries or General History.
- (21) Reputation as to Character.
- (22) Judgment of Previous Conviction [Not Adopted].
- (23) Judgment as to Personal, Family, or General History, or Boundaries [Not Adopted].
- (24) Other Exceptions [Not Adopted].
- (25) Admission by Party-Opponent.
 - (1) *Present Sense Impression*. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Comment

Pa.R.E. 803(1) is identical to F.R.E. 803(1). It is consistent with Pennsylvania law. See *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986).

For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.

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

Comment

Pa.R.E. 803(2) is identical to F.R.E. 803(2). It is consistent with Pennsylvania law. See *Allen v. Mack*, 345 Pa. 407, 28 A.2d 783 (1942); *Commonwealth v. Barnes*, 310 Pa. Super. 480, 456 A.2d 1037 (1983).

This exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is startling. However, it is broader in scope because an excited utterance (1) need not describe or explain the startling event or condition; it need only relate to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In *Commonwealth v. Gore*, 262 Pa. Super. 540, 547-48, 396 A.2d 1302, 1305 (1978), the court explained:

The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit. . . . Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an "excited utterance." . . . The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.

(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. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.

Comment

Pa.R.E. 803(3) is similar to F.R.E. 803(3). The wording has been changed to improve readability and to eliminate a confusing double negative. The meaning remains the same.

This exception combines what might otherwise be considered several different exceptions to the hearsay rule. The common factor is that they are all sometimes referred to by the non specific phrase, "state of mind."

This exception is consistent with Pennsylvania law. See *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978) (statements of present physical condition and emotional feelings); *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926) (statement of intent or plan); *Ickes v. Ickes*, 237 Pa. 582, 85 A. 885 (1912) (statement of motive or design).

The exception for a declarant's statement of memory or belief concerning declarant's will is consistent with Pennsylvania law. See *Glockner v. Glockner*, 263 Pa. 393, 106 A. 731 (1919); *In re Kirkander*, 326 Pa. Super. 380, 474 A.2d 290 (1984).

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* A statement made for purposes of medical treatment, or medical diagnosis in contemplation of 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 treatment, or diagnosis in contemplation of treatment.

Comment

Pa.R.E. 803(4) is similar to F.R.E. 803(4) in that both admit statements made for purposes of medical treatment. Pa.R.E. 803(4) differs from F.R.E. 803(4) because it permits admission of statements made for purposes of medical diagnosis only if they are made in contemplation of treatment. Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation. Pa.R.E. 803(4) is consistent with Pennsylvania law. See *Commonwealth v. Smith*, 545 Pa. 487, 681 A.2d 1288 (1996).

An expert medical witness may base an opinion on the declarant's statements of the kind discussed in this Rule, even though the statements were not made for purposes of treatment, if the statements comply with Pa.R.E. 703. Such statements may be disclosed as provided in Pa.R.E. 705, but are not substantive evidence.

This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. See *Smith, supra*. Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible. See *Smith, supra*.

(5) *Recorded Recollection* [Not Adopted].

Comment

Recorded recollection is dealt with in Pa.R.E. 803.1(3). It is an exception to the hearsay rule in which the current testimony of the declarant is necessary.

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

Comment

Pa.R.E. 803(6) is similar to F.R.E. 803(6), but with two differences. One difference is that Pa.R.E. 803(6) does not include opinions and diagnoses. This is consistent with prior Pennsylvania case law. See *Williams v. McClain*, 513 Pa. 300, 520 A.2d 1374 (1987); *Commonwealth v. DiGiacomo*, 463 Pa. 449, 345 A.2d 605 (1975). The second difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the "sources of

information or other circumstances indicate lack of trustworthiness.” The Federal rule allows the court to do so only if “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”

Rule 803(6) was amended in 2001 consistent with the December 1, 2000 amendments to F.R.E. 803(6) that permit records of regularly conducted activity to be authenticated by certification. This amendment is designed to save the expense and time consumption caused by calling needless foundation witnesses. The notice requirements provided in Pa.R.E. 902(11) and (12) will give other parties a full opportunity to test the adequacy of the foundation.

If offered against a defendant in a criminal case, an entry in a business record may be excluded if its admission would violate the defendant’s constitutional right to confront the witnesses against him or her. See *Commonwealth v. Mc Cloud*, 457 Pa. 310, 322 A.2d 653 (1974).

Pa.R.E. 803(6) differs only slightly from 42 Pa.C.S. § 6108, which provides:

- (a) *Short title of section.*—This section shall be known and may be cited as the “Uniform Business Records as Evidence Act.”
- (b) *General Rule.*—A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.
- (c) *Definition.*—As used in this section “business” includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

Pa.R.E. 803(6) refers to “data compilation” and includes a record “in any form.” This language encompasses computerized data storage.

Pa.R.E. 803(6) expressly includes an association in the definition of a business.

Pa.R.E. 803(6) places the burden on an opposing party to show that the sources of information or other circumstances indicate that a business record is untrustworthy, and thus does not qualify for exception to the hearsay rule. The statute places the burden on the proponent of the evidence to show circumstantial trustworthiness.

Pa.R.E. 803(6) permits records of regularly conducted activity to be authenticated by certification.

(7) *Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6)* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(7), which reads as follows:

Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Principles of logic and internal consistency have led Pennsylvania to reject this rule. The absence of an entry in a record is not hearsay, as defined in Pa.R.E. 801(c). Hence, it appears irrational to except it to the hearsay rule.

On analysis, absence of an entry in a business record is circumstantial evidence,—it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. See Pa.R.E. 401, et seq.

Pennsylvania law is in accord with the object of F.R.E. 803(7), i.e., to allow evidence of the absence of a record of an act, event, or condition to be introduced to prove the nonoccurrence or nonexistence thereof, if the matter was one which would ordinarily be recorded. See *Klein v. F.W. Wool-*

worth Co., 309 Pa. 320, 163 A. 532 (1932) (absence of person's name in personnel records admissible to prove that he was not an employee). See also *Stack v. Wapner*, 244 Pa. Super. 278, 368 A.2d 292 (1976).

(8) *Public Records and Reports* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(8). An exception to the hearsay rule for public records is provided by 42 Pa.C.S.A. § 6104:

- (a) *General rule.*—A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.
- (b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

Subsection (b) of the statute is limited to “facts.” It does not include opinions or diagnoses. This is consistent with Pa.R.E. 803(6), as well as Pennsylvania decisional law interpreting 42 Pa.C.S.A. § 6108 (Uniform Business Records As Evidence Act). See Comment to Pa.R.E. 803(6).

(9) *Records of Vital Statistics* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(9). Records of vital statistics are also business records and may be excepted to the hearsay rule by Pa.R.E. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S.A. § 6104 (text quoted in Comment to Pa.R.E. 803(8)).

The Vital Statistics Law of 1953 (35 P. S. § 450.101 et seq.) provides for registration of births, deaths, fetal deaths, and marriages, with the State Department of Health. The records of the Department, and duly certified copies thereof, are excepted to the hearsay rule by 35 P. S. § 450.810 which provides:

Any record or duly certified copy of a record or part thereof which is (1) filed with the department in accordance with the provisions of this act and the regulations of the Advisory Health Board and which (2) is not a “delayed” record filed under section seven hundred two of this act or a record “corrected” under section seven hundred three of this act shall constitute prima facie evidence of its contents, except that in any proceeding in which paternity is controverted and which affects the interests of an alleged father or his successors in interest no record or part thereof shall constitute prima facie evidence of paternity unless the alleged father is the husband of the mother of the child.

(10) *Absence of Public Record or Entry* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(10) for the same reasons that it did not adopt F.R.E. 803(7). See Comment to Pa.R.E. 803(7).

42 Pa.C.S.A. § 6104(b), provides for admissibility of evidence of the absence of an entry in a public record to prove the nonexistence of a fact:

- (b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the . . . nonexistence of facts which . . . would have been . . . recorded had the facts existed shall be admissible as evidence of the . . . nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

Pennsylvania also has a complementary statute, 42 Pa.C.S.A. § 5328, entitled “Proof of Official Records,” which provides, in pertinent part:

- (d) *Lack of records.*—A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in this section in the case of a domestic record, or complying with the requirements of this section for a summary in the case of a record in a foreign country, is admissible as evidence that the records contain no such record or entry.

(11) *Records of Religious Organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Comment

Pa.R.E. 803(11) is identical to F.R.E. 803(11). It is an expansion of a more limited exception that was statutorily adopted in Pennsylvania.

42 Pa.C.S.A. § 6110 provides:

- (a) *General rule.*—The registry kept by any religious society in their respective meeting book or books of any marriage, birth or burial, within this Commonwealth, shall be held good and authentic, and shall be allowed of upon all occasions whatsoever.
- (b) *Foreign burials.*—The registry of burials of any religious society or corporate town, in places out of the United States, shall be prima facie evidence of the death of any person whose burial is therein registered, and of the time of his interment, if the time be stated in the registry, and extracts from such registries, certified by the proper officers, in the mode of authentication usual in the place in which they are made and authenticated as provided in section 5328 (relating to proof of official records), shall be received as copies of such registries, and be evidence accordingly.

(12) *Marriage, Baptismal, and Similar Certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Comment

Pa.R.E. 803(12) is identical to F.R.E. 803(12). It is consistent with Pennsylvania law. See *Estate of Loik*, 493 Pa. 512, 426 A.2d 1134 (1981); *District of Columbia's Appeal*, 343 Pa. 65, 21 A.2d 883 (1941).

(13) *Family Records*. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

Comment

Pa.R.E. 803(13) is identical to F.R.E. 803(13). It is consistent with Pennsylvania law. See *Carskadden v. Poorman*, 10 Watts 82 (1840).

(14) *Records of Documents Affecting an Interest in Property*. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Comment

Pa.R.E. 803(14) is identical to F.R.E. 803(14). It is consistent with Pennsylvania law. See *David v. Titusville & Oil City Ry. Co.*, 114 Pa. 308, 6 A. 736 (1886).

(15) *Statements in Documents Affecting an Interest in Property*. A statement contained in a document, other than a will, purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Comment

Pa.R.E. 803(15) is similar to F.R.E. 803(15). It differs in that Pennsylvania does not include a statement made in a will.

Pa.R.E. 803(15) is consistent with 21 P.S. § 451, which provides that an affidavit swearing to matters delineated in the statute that may affect the title to real estate in Pennsylvania, filed in the county in which the real estate is located, shall be admissible evidence of the facts stated in it.

Pa.R.E. 803(15) appears inconsistent with dictum in *Brock v. Atlantic Refining Co.*, 273 Pa. 76, 80, 116 A. 552, 553 (1922), which states that “recitals in deeds are mere hearsay, and inadmissible as against third persons who claim by a paramount title.” However, the holding in the *Brock* case approved admission of such a recital on the ground that there was an exception “in the case of ancient deeds accompanied by possession.”

Whatever the significance of the above cited dictum, Pa.R.E. 803(15) brings Pennsylvania law close to that which now prevails in the great majority of jurisdictions in this country.

Pennsylvania’s variation from the federal rule with respect to wills is consistent with its more recent decisional law. See *In Re Estate of Kostik*, 514 Pa. 591, 526 A.2d 746 (1987).

(16) *Statements in Ancient Documents*. Statements in a document in existence thirty years or more the authenticity of which is established.

Comment

Pa.R.E. 803(16) is similar to F.R.E. 803(16), except that Pennsylvania adheres to the common law view that a document must be at least 30 years old to qualify as an ancient document. The federal rule reduces the age to 20 years.

Pa.R.E. 803(16) is consistent with Pennsylvania law. See *Louden v. Apollo Gas Co.*, 273 Pa. Super. 549, 417 A.2d 1185 (1980); *Commonwealth ex rel. Ferguson v. Ball*, 227 Pa. 301, 121 A. 191 (1923).

(17) *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Comment

Pa.R.E. 803(17) is identical to F.R.E. 803(17). It is consistent with Pennsylvania law. See *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959).

When the price or value of goods that are regularly bought and sold in a commodity market is at issue, 13 Pa.C.S.A. § 2724 provides:

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or newspapers or periodicals of general circulation published as the reports of such markets shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

(18) *Learned Treatises* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to the hearsay rule for learned treatises. See *Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334 (1988).

Regarding the permissible uses of learned treatises under Pennsylvania law, see *Aldridge v. Edmunds*, 750 A.2d 292 (Pa. 2000).

(19) *Reputation Concerning Personal or Family History.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Comment

Pa.R.E. 803(19) is identical to F.R.E. 803(19). It changes prior Pennsylvania decisional law by expanding the sources from which the reputation may be drawn to include (1) a person's associates and (2) the community. Prior Pennsylvania decisional law, none of which is recent, limited the source to the person's family. See *Picken's Estate*, 163 Pa. 14, 29 A. 875 (1894); *American Life Ins. and Trust Co. v. Rosenagle*, 77 Pa. 507 (1875).

(20) *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

Comment

Pa.R.E. 803(20) is identical to F.R.E. 803(20). It is consistent with prior Pennsylvania law, at least with respect to boundaries of land. See *Hostetter v. Commonwealth*, 367 Pa. 603, 80 A.2d 719 (1951).

(21) *Reputation as to Character*. Reputation of a person's character among associates or in the community.

Comment

Pa.R.E. 803(21) is identical to F.R.E. 803(21). It is consistent with prior Pennsylvania law. It is also consistent with Pa.R.E. 404(a), 405(a), and 608(a). See *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967); Comment to Pa.R.E. 405.

(22) *Judgment of Previous Conviction* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(22).

With respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:

1. The judgment of conviction is conclusive, i.e., estops the party convicted from contesting any fact essential to sustain the conviction.
2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, only if offered against the party convicted.
3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment).
4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule).

For felonies and other major crimes, Pennsylvania takes approach number one. In subsequent litigation, the convicted party is estopped from denying or contesting any fact essential to sustain the conviction. Once a party is estopped from contesting a fact, no evidence need be introduced by an adverse party to prove it. See *Hurt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965); *In re Estate of Bartolovich*, 420 Pa. Super. 419, 616 A.2d 1043 (1992) (judgment of conviction conclusive under Slayter's Act, 20 Pa.C.S.A. § 8801-8815).

For minor offenses, Pennsylvania takes approach number four; it applies the common law rule. Evidence of a conviction is inadmissible to prove a fact necessary to sustain the conviction. See *Loughner v. Schmelzer*, 421 Pa. 283, 218 A.2d 768 (1966).

A plea of guilty to a crime is excepted to the hearsay rule as an admission of all facts essential to sustain a conviction, but only when offered against the pleader by a party-opponent. See Pa.R.E. 803(25); see also Pa.R.E. 410. A plea of guilty may also qualify as an exception to the hearsay rule as a statement against interest, if the declarant is unavailable to testify at trial. See Pa.R.E. 804(b)(3).

(23) *Judgment as to Personal, Family, or General History or Boundaries* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(23).

(24) *Other Exceptions* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 803(24) (now F.R.E. 807). The Federal Rule is often called the residual exception to the hearsay rule.

(25) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Comment

Pa.R.E. 803(25) differs from F.R.E. 801(d)(2), in that the word "shall" in the second sentence has been replaced with the word "may."

The federal rules call an admission by a party-opponent an exception to the definition of hearsay, and place it in Rule 801 under the heading of "Definitions." The Pennsylvania rules, like the common law, call an admission by a party-opponent an exception to the hearsay rule. The Pennsylvania rules, therefore, place admissions by a party opponent in Pa.R.E. 803 with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect.

The second sentence of Pa.R.E. 803(25) is consistent with Pennsylvania law. See *Commonwealth v. Smith*, 568 A.2d 600 (1989); *Commonwealth v. Dreibelbis*, 426 A.2d 1111 (1981).

The personal knowledge rule (Pa.R.E. 602) is not applicable to admissions. See *Salvitti v. Throppe*, 23 A.2d 445 (Pa. 1942).

A. *Party's Own Statement.* The admissibility of a party's own statement offered against the party as an exception to the hearsay rule is consistent with Pennsylvania law. See *Salvitti v. Throppe*, supra.

B. *Adoptive Admission.* Pa.R.E. 803(25)(B) is consistent with Pennsylvania law. See *Commonwealth v. Cheeks*, 239 A.2d 793 (Pa. 1968) (party expressly adopted statement); *Commonwealth v. Coccioletti*, 425 A.2d 387 (Pa. 1981) (party impliedly adopted statement by failing to deny the truth of a statement that party would be expected to deny under the circumstances).

C. *Statement by Authorized Agent.* Admitting, as an exception to the hearsay rule, the statement of a person authorized to speak for the party against the party is consistent with Pennsylvania law. See *McGarity v. New York Life Ins. Co.*, 359 Pa. 308, 59 A.2d 47 (1948).

D. *Statement by Agent Concerning Matter Within Scope of Agency.* This exception to the hearsay rule is new to Pennsylvania law. It is consistent with the overwhelming majority of American jurisdictions.

E. *Statement by a Co-conspirator.* The admissibility of a statement by a co-conspirator as provided by this rule is consistent with Pennsylvania law. See *Commonwealth v. Mayhue*, 639 A.2d 421 (Pa. 1994); *Commonwealth v. Dreibelbis*, 426 A.2d 1111 (Pa. 1981).

Official Note: Adopted, May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment received March 10, 2000, effective immediately; amended November 2, 2001, effective January 1, 2002.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions to the Comment for paragraph 25 published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 revision of the Comment for paragraph 25 published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

Final Report explaining the November 2, 2001, amendments to paragraph 6 published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

Source

The provisions of this Rule 803 amended March 23, 1999, effective immediately, 29 Pa.B. 1712; amended March 10, 2000, effective immediately, 30 Pa.B. 1639; amended May 16, 2001, effective July 1, 2001, 31 Pa.B. 2788; amended November 2, 2001, effective January 1, 2002, 31 Pa.B. 6381. Immediately preceding text appears at serial pages (276588) to (276589), (245785) to (245790) and (280387) to (280390).

Rule 803.1. Hearsay Exceptions; Testimony of Declarant Necessary.

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:

- (1) Inconsistent Statement of Witness. A statement by declarant that is inconsistent with the declarant's testimony, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.
- (2) Statement of Identification.
- (3) Recorded Recollection.

Comment

Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that the Pennsylvania rule classifies those kinds of inconsistent statements that are described therein as exceptions to the hearsay rule, not exceptions to the definition of hearsay. Subsections (b) and (c) are an expansion of the exception that is described in the federal rule.

Pa.R.E. 803.1(1) is consistent with prior Pennsylvania case law. See *Commonwealth v. Brady*, 507 A.2d 66 (Pa. 1986) (seminal case that overruled close to two centuries of decisional law in Pennsylvania and held that the recorded statement of a witness to a murder, inconsistent with her testimony at trial, was properly admitted as substantive evidence, excepted to the hearsay rule); *Commonwealth v. Lively*, 610 A.2d 7 (Pa. 1992). To qualify as a "verbatim contemporaneous recording of an oral statement," the "recording" must be an electronic, audiotaped, or videotaped recording. See *Commonwealth v. Wilson*, 707 A.2d 1114 (Pa. 1998). Inconsistent statements of a witness that do not qualify as exceptions to the hearsay rule may still be introduced to impeach the credibility of the witness. See Pa.R.E. 613.

- (2) *Statement of Identification.* A statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification.

Comment

Pa.R.E. 803.1(2) differs from F.R.E. 801(d)(1)(C) in several respects:

1. Pa.R.E. 803.1(2) classifies a statement of identification as an exception to the hearsay rule, not an exception to the definition of hearsay.
2. Pa.R.E. 803.1(2) is broader than its federal counterpart in that it includes identification of a thing, in addition to a person.

3. Pa.R.E. 803.1(2) is more restrictive than its federal counterpart in that it requires the witness to testify to making the identification.

Pa.R.E. 803.1(2) is consistent with Pennsylvania law, although we have found no reported cases dealing with prior identification of a thing, as distinguished from a person. See *Commonwealth v. Ly*, 599 A.2d 613 (Pa. 1991); *Commonwealth v. Saunders*, 125 A.2d 442 (Pa. 1956).

(3) *Recorded Recollection*. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

Comment

Pa.R.E. 803.1(3) is similar to F.R.E. 803(5), but differs in the following ways:

1. Pa.R.E. 803.1(3) classifies recorded recollection as an exception to the hearsay rule in which the testimony of the declarant is necessary, not as an exception in which the availability of the declarant is immaterial.
2. Pa.R.E. 803.1(3) makes clear that, to qualify recorded recollection as an exception to the hearsay rule, the witness must testify that the record correctly reflects the knowledge that the witness once had. In other words, the witness must vouch for the reliability of the record. The federal rule is ambiguous on this point and the applicable federal cases are conflicting.
3. Pa.R.E. 803.1(3) allows the record to be received as an exhibit, and grants the trial judge discretion to show it to the jury in exceptional circumstances, even when not offered by an adverse party.

Pa.R.E. 803.1(3) is consistent with Pennsylvania law. See *Commonwealth v. Cargo*, 444 A.2d 639 (Pa. 1982); *Commonwealth v. Cooley*, 398 A.2d 637 (Pa. 1979).

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000, effective July 1, 2000.

Committee Explanatory Reports:

Final Report explaining the amendment to subsection (1) and the updates to the Comment to subsection (1) published with the Court's Order at 30 Pa.B. 1646 (March 25, 2000).

Source

The provisions of this Rule 803 amended March 10, 2000, effective immediately, 30 Pa.B. 1639. Immediately preceding text appears at serial pages (254226) and (245795).

Rule 804. Hearsay Exceptions; Declarant Unavailable.

(a) *Definition of Unavailability*. "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

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

(b) *Hearsay Exceptions.* The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former Testimony.
- (2) Statement Under Belief of Impending Death.
- (3) Statement Against Interest.
- (4) Statement of Personal or Family History.
- (5) Other Exceptions [Not Adopted].
- (6) Forfeiture by Wrongdoing.

Comment

Pa.R.E. 804(a) is identical to F.R.E. 804(a). Though there is no common definition of unavailability for hearsay purposes in prior Pennsylvania law, the rule is consistent with case law applying the four hearsay exceptions that require unavailability.

The exceptions to the hearsay rule in F.R.E. 804(b) apply only if the declarant is unavailable to testify in person. It seems reasonable to apply the same definition of unavailability to all of them. This definition is supplied by F.R.E. 804(a).

Pa.R.E. 804(b) differs somewhat from F.R.E. 804(b). The differences are explained in the Comments to the rule's subdivisions, which define individual exceptions to the hearsay rule.

(1) *Former Testimony.* Testimony given as a witness 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, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment

Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1), except that it adds the word "adequate" in front of opportunity. It is consistent with Pennsylvania law.

Pennsylvania has two statutes that provide exceptions to the hearsay rule for former testimony. Both are entitled, "Notes of evidence at former trial." 42 Pa.C.S. § 5917 applies only to criminal cases. 42 Pa.C.S. § 5934 applies only to civil cases. Both are reenactments of statutes that were originally passed in 1887.

These two statutes, which are limited in scope, have less significance than they might otherwise have because the Pennsylvania Supreme Court has recognized a broader exception to the hearsay rule for former testimony as a matter of its developing common law. See, e.g., *Commonwealth v. Graves*, 398 A.2d 644 (Pa. 1979); *Commonwealth v. Rodgers*, 372 A.2d 771 (Pa. 1977). The addition of an “adequate” opportunity to cross-examine is consistent with Pennsylvania law. See *Commonwealth v. Bazemore*, 614 A.2d 684 (Pa. 1992) (requiring a “full and fair” opportunity to cross-examine).

Depositions

Depositions are the most common form of prior testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.

The Judicial Code provides for the use of depositions in criminal cases. 42 Pa.C.S. § 5919 provides:

Depositions in criminal matters

The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

42 Pa.C.S.A. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

Again, the Pennsylvania Supreme Court, as a matter of common law development, has recognized an exception to the hearsay rule for depositions that is broader than the statute. See *Commonwealth v. Stasko*, 370 A.2d 350 (Pa. 1977).

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa.R.C.P. 4020(a)(3) and (5):

- (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
 - (a) that the witness is dead, or
 - (b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or
 - (c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or
 - (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or
 - (e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used....
- (5) A deposition upon oral examination of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

A videotape deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness’s availability, pursuant to Pa.R.C.P. 4017.1(g).

By statute, the testimony of a licensed physician taken by deposition in accordance with the Pennsylvania Rules of Civil Procedure is admissible in a civil case. There is no requirement that the physician testify as an expert witness. 42 Pa.C.S. § 5936 provides:

Medical testimony by deposition

- (a) *General rule.*—The testimony of any physician licensed to practice medicine may be taken by oral interrogation in the manner prescribed by general rule for the taking of depositions.
- (b) *Admissibility.*—A deposition taken under subsection (a) shall be admissible in a civil matter.

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Comment

Pa.R.E. 804(b)(2) is similar to F.R.E. 804(b)(2), except that the Pennsylvania rule applies in all cases, not just in homicide cases and civil actions. This is a departure from prior Pennsylvania law, which applied the exception only to statements made by the victim in a criminal prosecution for homicide.

The rationale for this exception from the hearsay rule was set forth in *Commonwealth v. Smith*, 454 Pa. 515, 314 A.2d 224, 225 (Pa. 1973):

The reliability of a dying declaration is provided not by an oath, nor by cross-examination; rather, its admissibility is based on the premise that no one "who is immediately going into the presence of his Maker will do so with a lie upon his lips." Luch, L.J., *Regina v. Osman*, 15 Cox C.C. 1, 3 (Eng. 1881).

The common law traditionally, but illogically, excepted a dying declaration from the hearsay rule in a criminal prosecution for homicide, but not in a criminal prosecution for another crime, or in a civil case. Prior Pennsylvania case law followed the common law. See *Commonwealth v. Antonini*, 69 A.2d 436 (Pa. Super. 1949).

Reasoned analysis dictated a change. If a dying declaration is trustworthy enough to be introduced against a defendant charged with murder, it is trustworthy enough to be introduced against a defendant charged with attempted murder, robbery, or rape. It is also trustworthy enough to be introduced against a party in a civil case.

In *Crawford v. Washington*, 541 U. S. 36, 124 S.Ct. 1354 (2004), the Supreme Court interpreted the Confrontation Clause in the Sixth Amendment of the United States Constitution to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the Supreme Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Comment

The first sentence of Pa.R.E. 804(b)(3) is identical to the first sentence of F.R.E. 804(b)(3). The second sentence differs by requiring corroborating circumstantial evidence of trustworthiness before an assertion against the declarant's penal interest can be introduced by either side in a criminal case. The federal formulation requires such corroboration only when the statement is offered to exculpate the defendant.

Pa.R.E. 804(b)(3) is consistent with prior Pennsylvania decisional law. See *Rudisill v. Cordes*, 5 A.2d 217 (Pa. 1939) (civil case); *Commonwealth v. Williams*, 640 A.2d 1251, 1263 n.8 (Pa. 1994) (criminal case).

(4) *Statement of Personal or Family History*. A statement, made before the controversy arose:

(A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage, or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Comment

Pa.R.E. 804(b)(4) differs from F.R.E. 804(b)(4) by requiring the statement of pedigree to be made before the controversy arose, i.e., ante litem motam.

Pa.R.E. 804(b)(4) expands prior Pennsylvania decisional law in two respects:

1. The exception applies if the declarant is unavailable, as "unavailability" is defined in Pa.R.E. 804(a). Formerly, it was required that the declarant be dead. See *In re McClain's Estate*, 392 A.2d 1371 (Pa. 1978). The need for the evidence is the same, whether the declarant is dead or unavailable to testify for one of the other reasons delineated in Pa.R.E. 804(a).
2. Under Pa.R.E. 804(b)(4)(B), the declarant need not be related to the person of whom he or she spoke. It is sufficient that the declarant be so closely associated with the person's family as to have accurate information. Formerly, a familial relationship was required. See *In re Garrett's Estate*, 89 A.2d 531 (Pa. 1952). A statement of this type by a person closely associated with the person or family of which he or she spoke is likely to be sufficiently reliable to justify an exception to the hearsay rule.

Pennsylvania retains the requirement that the statement must be made before the controversy arose. See *In re McClain's Estate*, *supra*; *In re Garrett's Estate*, *supra*.

(5) *Other Exceptions* [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807). The Federal rule is often called the residual exception to the hearsay rule.

(6) *Forfeiture by Wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment

Pa.R.E. 804(b)(6) is identical to F.R.E. 804(b)(6). This exception is new to Pennsylvania law.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 revision of the Comment to paragraph (b)(4) published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

Source

The provisions of this Rule are amended March 10, 2000, effective immediately, 30 Pa.B. 1639; amended December 17, 2004, effective January 31, 2005, 35 Pa.B. 8. Immediately preceding text appears at serial pages (265707) to (265712).

Rule 805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Comment

Pa.R.E. 805 is identical to F.R.E. 805. It is consistent with Pennsylvania law. See *Commonwealth v. Galloway*, 302 Pa. Super. 145, 448 A.2d 568 (1982).

Rule 806. Attacking and Supporting Credibility of Declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Comment

Pa.R.E. 806 is similar to F.R.E. 806, except that Pa.R.E. 806 makes no reference to Rule 801(d)(2). The subject matter of F.R.E. 801(d)(2) (admissions) is covered by Pa.R.E. 803(25). The change is not substantive. Pa.R.E. 806 is consistent with Pennsylvania law. See *Commonwealth v. Davis*, 363 Pa. Super. 562, 526 A.2d 1205 (1987), appeal denied 518 Pa. 624, 541 A.2d 1135 (1988).

The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.E. 613(b) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.E. 613(b) is not appropriate.

HEARSAY

225 Rule 807

The last sentence of Pa.R.E. 806 allows the party against whom a hearsay statement has been admitted to call the declarant as a witness and cross-examine the declarant about the statement. This is consistent with Pennsylvania law. See *Commonwealth v. Haber*, 351 Pa. Super. 79, 505 A.2d 273 (1986).

Rule 807. Residual Exception [Not Adopted].

Comment

Pennsylvania has not adopted F.R.E. 807.

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