 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional by Grabau v. Department Of Health, Bd. of Psychology, Fla.App. 1 Dist., Apr. 22, 2002

West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.803

90.803. Hearsay exceptions; availability of declarant immaterial

Effective: October 1, 2014
Currentness

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) Spontaneous statement.--A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

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

(3) Then-existing mental, emotional, or physical condition.--

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

(4) Statements for purposes of medical diagnosis or treatment.--Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) 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 by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity.--

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, 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 such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) Absence of entry in records of regularly conducted activity.--Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity 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 show lack of trustworthiness.

(8) Public records and reports.--Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law

enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) Records of vital statistics.--Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) Absence of public record or entry.--Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

(11) Records of religious organizations.--Statements of births, marriages, divorces, deaths, parentage, 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.

(12) Marriage, baptismal, and similar certificates.--Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

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

(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 contents of the original recorded or filed 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 authorized the recording or filing of the document in the office.

(15) Statements in documents affecting an interest in property.--A statement contained in a document 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.

(16) Statements in ancient documents.--Statements in a document in existence 20 years or more, the authenticity of which is established.

(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 if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) Admissions.--A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) Reputation concerning personal or family history.--Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.--Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

(21) Reputation as to character.--Evidence of reputation of a person's character among associates or in the community.

(22) Former testimony.--Former testimony given by the declarant which testimony was 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, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

(23) Hearsay exception; statement of child victim.--

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(24) Hearsay exception; statement of elderly person or disabled adult.--

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of

the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Credits

Laws 1976, c. 76-237, § 1; Laws 1977, c. 77-174, § 1; Laws 1978, c. 78-361, § 20. Amended by Laws 1985, c. 85-53, § 4, eff. July 1, 1985; Laws 1987, c. 87-224, § 11; Laws 1990, c. 90-139, § 2, eff. Oct. 1, 1990; Laws 1990, c. 90-174, § 3, eff. Oct. 1, 1990; Laws 1991, c. 91-255, § 12, eff. July 1, 1991; Laws 1995, c. 95-147, § 498, eff. July 10, 1995; Laws 1995, c. 95-158, § 1, eff. July 1, 1995; Laws 1996, c. 96-330, § 2, eff. July 1, 1996; Laws 1998, c. 98-2, § 1; Laws 2003, c. 2003-259, § 2, eff. July 1, 2003; Laws 2013, c. 2013-98, § 1, eff. Jan. 1, 2014; Laws 2014, c. 2014-200, § 1, eff. Oct. 1, 2014.

Editors' Notes

VALIDITY

<For validity of subsec. (24) of this section, see Conner v. State, 748 So.2d 950 (1999).>

FLORIDA SUPREME COURT OPINIONS

<The Supreme Court of Florida has declined to adopt Laws 2013, c. 2014-200, § 1, to the extent it is procedural. See In re Amendments to the Florida Evidence Code, 210 So.3d 1231 (2017).>

COMMITTEE COMMENT

The Florida Bar Code and Rules of Evidence Committee Comment

1988 Amendment. Section 90.803(22), Florida Statutes was amended by the Florida Legislature at Chapter 98-2, section 1, Laws of Florida. In *In Re: Amendments to the Florida Evidence Code,* 25 F.L.W. S909 (Fla. Oct. 26, 2000), [782 So.2d 339], the Florida Supreme Court declined to adopt the amended section 90.803(22) (chapter 98-2, section 1) as a rule of evidence, and expressed concern about the constitutionality of the amendment.

LAW REVISION COUNCIL NOTE--1976

Subsections (1) and (2) These two exceptions provide admissibility for the bulk of the evidence that has heretofore been admissible under the so-called *res gestae* exception. The term *res gestae*, which has been criticized often, does not appear in this code, as it does not in the Federal Rules of Evidence. For example, the court in Green v. State, 93 Fla. 1076, 1080, 113 So. 121, 123 (1927), referred to the term as "a sort of ?catch-all? in which to save a point when it may not be clearly brought under some better and more clearly defined head." 6 Wigmore, *Evidence* § 1767 (3rd ed. 1940) was quoted with approval in Williams v. State, 188 So.2d 320, 323 (Fla.2nd Dist. 1966), modified, 198 So.2d 21 (Fla.1967):

The phrase "res gestae" has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some well established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. No rule of Evidence can be created or applied by the mere muttering of a shibboleth.

The expansiveness and lack of precision with which the term *res gestae* has been used is illustrated in Morgan, *The Law of Evidence, 1941-45*, 59 Harv.L.Rev. 481, 568 (1946), where it was stated that:

Courts and lawyers constantly use *res gestae* to describe:

(a) part of a relevant transaction the offered evidence of which has no hearsay aspect,

(b) declarations of presently existing subjective symptoms offered in evidence as tending to prove the existence of those symptoms,

(c) declarations of a presently existing mental condition offered in evidence as tending to prove that condition, its probable continuance and its previous existence, and to prove conduct in accord with that mental condition,

(d) declarations of a past mental condition or of past symptoms, and

(e) spontaneous statements or statements made contemporaneously with a relevant event or condition, evidence of which is offered as tending to prove the truth of the matter stated.

Florida courts have similarly used the term *res gestae* to cover a wide variety of circumstances. See The Florida Bar, *Evidence in Florida*, Chap. 9, Hearsay Exceptions--Res Gestae (1971). Under this code the evidence that has been admitted in Florida under the *res gestate* label will continue to be admissible, but it will be admissible either as not involving hearsay, or under more precisely stated exceptions.

A few Florida cases apply *res gestae* to circumstances which do not involve oral statements and therefore apply the concept although no hearsay exception was required for admissibility. In Browne v. State, 92 Fla. 699, 109 So. 811 (1926), the clothes of a deceased worn at the time of an alleged murder were admissible as *res gestae* evidence. In Powell v. State, 131 Fla. 254, 175 So. 213 (1937), a prosecution of a husband for the murder of his wife, both the wife and his mother-in-law were murdered at the same time, but not by the same physical act, and both bodies were disposed of in the same manner and in the same place. The court found that evidence in regard to the circumstances surrounding the death of the mother-in-law constituted a part of the *res gestae* of the death and circumstances surrounding the murder of the wife and was therefore admissible. The use of the *res gestae* doctrine would appear to be improper in both these cases. The admissibility of such evidence should depend on relevancy alone, since hearsay is not involved.

Although there is considerable overlap in subsection (1), the spontaneous statement exception, and subsection (2), the excited-utterance exception, the drafters of the Federal Rules thought them both necessary in order to avoid "needless niggling." In general, the exceptions to the exclusionary rule proceed upon a theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify introduction of the evidence at the trial even though the declarant may be available. The circumstantial guarantee of subsection (1) is that when a spontaneous statement of narration is made simultaneously with perception, the substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misinterpretation. The theory of subsection (2) is simply that when an excited utterance is made, the circumstances produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication. The key element in both is spontaneity.

Permissible subject matter is somewhat different under the two subsections. Under subsection (1) it is limited to description or explanation of the event or condition. In subsection (2), the statement need only "relate" to the startling event or condition.

Decisions involving subsection (1) are far less numerous than those involving subsection (2), since unexciting events are less likely to evoke memorable comment. Apparently, illustrative of subsection (1) is Tampa Elec. Co. v. Getrost, 151 Fla. 588, 10 So.2d 83 (1942), where an assistant to an electric lineman was permitted to testify that the lineman told him that he had called the plant and ordered the power in the line cut off. The lineman had proceeded to work on the wire and was electrocuted. The court observed that at the time the utterance was made there was no occasion for it to have resulted from reflection or premeditation, nor was there any motive that would make it self-serving. The court asked whether the hearsay vices were present, and finding that they were not, held that the conversation was admissible.

Subsection (2) is illustrated in Gauck v. Meleski, 346 F.2d 433 (5th Cir. 1965), where after a rear-end collision of trucks in the Northern District of Florida, the first witness to arrive at the scene of the accident stated that he found the decedent alive and that he said, "He hit me from behind." The court indicated that on remand the evidence would be admissible. In Foster v. Thornton, 125 Fla. 699, 170 So. 459 (1936) an action against a chiropractor for malpractice, it was held that statements made by the patient immediately after regaining consciousness were admissible as *res gestae* since they were an outgrowth of the treatment, explanatory of it, excluded any idea of design or deliberation and were corroborated by the evidence of several other witnesses. Similar provisions are found in Uniform Rule 63(4)(a) and (b) [1953]; Calif.Evid.Code § 1240 (as to subsection (2) only); Kansas Code of Civ.Pro. § 60-460(d)(1) and (2); New Jersey Evid.Rule 63(4); Fed.Rule Evid. 803(1) and (2).

Subsection (3) This exception to the hearsay rule, which is generally accepted in most modern decisions, makes admissible evidence of extrajudicial statements made by a declarant of his bodily condition (symptoms, pain or other feelings) or mental state as they then exist. See 6 Wigmore, *Evidence* §§ 1725-30 (3rd ed. 1940); McCormick, *Evidence* §§ 291, 294 (2nd ed. 1972). Since these statements relate to an existing bodily or mental condition, they possess a spontaneous quality. Presumably they are the sincere and natural manifestation of a subjective condition. This exception does not admit a statement when it was made under circumstances indicating that the statement is not trustworthy.

A statement concerning bodily condition must describe existing symptoms and feeling and cannot relate to the cause or the nature of the injury. A statement of declarant's then existing state of mind is relevant to show the declarant's state of mind. Generally, the statement of then existing state of mind is admissible to show that the declarant did certain acts which he intended to do. However, under this exception a statement of memory or belief is not admissible to prove the fact remembered or believed, *i.e.*, a past fact. If the evidence of state of mind were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event, would be admissible to prove that the event occurred. However, a statement of memory or belief is admissible to prove the fact remembered or believed

if it relates to the execution, revocation, identification, or terms of declarant's will for reasons of expediency and necessity--it may very well be the best evidence available. For similar provisions, see Calif.Evid.Code §§ 1250-51; New Jersey Evid.Rule 63(12); Fed.Rule Evid. 803(3).

Although Florida case law has not developed this area extensively, there is substantial accord. Prior declarations were admitted to show intent in Wetjen v. Williamson, 196 So.2d 461 (Fla.1st Dist. 1967), where, in determining whether chattels had been annexed to realty and become fixtures, the court allowed declarations of a party to be admitted in order to determine if he intended that the article be permanently annexed, and Bowen v. Keen, 154 Fla. 161, 171, 17 So.2d 706, 711 (1944), where the court stated that, "The rule is quite generally recognized that the statements of a deceased person as to the purpose and destination of a trip or journey he is about to take are admissible."

One rather old case, Jacksonville Elect. Co. v. Sloan, 52 Fla. 257, 42 So. 516 (1906), reached a conclusion contrary to this exception. Statements made by the deceased in the morning before the afternoon when he was killed concerning his physical condition were excluded from evidence as not being a part of the *res gestae*.

Existing Florida law is apparently in accord with the rule admitting statements of memory or belief relating to the execution, revocation, identification, or terms of a declarant's will to prove the fact remembered or believed. In Marshall v. Hewett, 156 Fla. 645, 24 So.2d 1 (1945), the testimony of the draftsman of a will concerning the verbal instructions given him by the testator was admissible for the purpose of making clear the desires and intent of the testator. See Calif.Evid.Code § 1260.

Subsection (4) Because of the strong motivation to be truthful when making statements to physicians for the purpose of diagnosis and treatments, the statements are treated as an exception to the hearsay rule. See McCormick, *Evidence* § 292 (2nd ed. 1972); 6 Wigmore, *Evidence* §§ 1719-20 (3rd ed. 1940); Annot., 37 A.L.R.3d 778 (1971). Existing Florida law apparently recognizes the admissibility as substantive evidence of statements made to the treating physician. This exception permits testimony relating to causation only when it is reasonably pertinent to diagnosis or treatment. See Brown v. Seaboard Airline R. Co., 434 F.2d 1101 (5th Cir. 1970). The court in Wilkinson v. Grover, 181 So.2d 591 (Fla.3rd Dist. 1966) seemed to exclude all statements to the physician relating to causation unless they were "admissions" or *res gestae*.

Under this subsection, statements need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

While existing Florida law permits a treating physician to testify based on the history given by the patient, see Bill Kelley Chevrolet, Inc. v. Kerr, 258 So.2d 280 (Fla.3rd Dist. 1972), the courts are currently divided over whether a physician who is consulted only for the purpose of qualifying him to testify may base his opinion even in part on information the patient tells him at the examination. Compare Bondy v. West, 219 So.2d 117 (Fla.2nd Dist. 1969) (expert testimony based in part on patient's medical testimony is inadmissible) with Raydel, Ltd. v. Medcalfe, 162 So.2d 910 (Fla.3rd Dist.1964), quashed on other grounds, 178 So.2d 569 (Fla.1965), conformed to 179 So.2d 124 (expert allowed to testify from medical history given him by patient when he also bases his opinion on findings of his examination). To the extent that an examining physician is allowed to base his opinion on information supplied by the patient, such information must be in the record. While the information supplied by the patient to such an "examining" physician is admitted for the purpose of supplying a basis for the physician's opinion and not as substantive evidence, the distinction is one unlikely to be made by a juror. This section accordingly rejects this limitation.

This subsection is in accord with the *Raydel* position. The fact that an "examining" physician depends in part on information gained from the patient in addition to findings from his examination will not prevent the physician from testifying as an expert nor will it prevent the physician from relating statements made by the patient.

This subsection is consistent with the provisions of § 90.704 which allow expert testimony to be based on facts which are not admissible in evidence if they are of a kind ordinarily relied upon by experts in the field.

See Wisc.Rule Evid. 908.03(4); Fed.Rule Evid. 803(4).

Subsection (5) The "past recollection recorded" exception is generally recognized in federal and state courts. See McCormick, *Evidence* §§ 299-303 (2nd ed. 1972). As stated in the Advisory Committee's Note to Proposed Federal Rule of Evidence 803:

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. . . . [T]he absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of investigators, or claim adjusters. Hence, the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately."

Existing Florida law is in agreement with this exception. Montgomery Ward & Co. v. Rosenquist, 112 So.2d 885 (Fla.2nd Dist. 1959). See Smith v. Hinkley, 98 Fla. 132, 123 So. 564 (1929) (witness who had no present recollection allowed to testify from writing made when memory perfect). *Cf.* Great Atl. & Pac. Tea Co. v. Nobles, 202 So.2d 603 (Fla.1st Dist. 1967).

For similar rules see Calif. Evid.Code § 1237; New Jersey Evid.Rule 63(1)(b); Wisc.Rule Evid. 908.03 (omits the last sentence of this exception; Fed.Rule Evid. 803(5).

Subsection (6) This exception combines the "Shop-Book Rule" and "Business Record Act." The exception is generally recognized because of the reliability of business records supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, and by a duty to make an accurate record as part of a continuing job or occupation.

This exception restates existing § 92.36 of the Florida Statutes which provides, in part, that:

A record of an act, condition or event, including a record kept by means of electronic data processing, shall, in so far 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 court, the sources of information, method and time of preparation were such as to justify its admission.

This exception provides a change from existing law. Opinions and diagnoses which are in a qualified record are admissible as long as the opinion is one which the witness could give under §§ 90.701-90.705 if called to testify. The recorder of entries on a hospital chart makes the entry with the knowledge that life and death often hang in the balance. Whether these diagnostic entries are admissible has not been determined in Florida. However, in Brevard County v. Jacks, 238 So.2d 156, 158-59 (Fla.4th Dist. 1970), the court found error in the trial judge's refusal to admit hospital records under the business records act. The court relied on 40 Am.Jur.2d *Hospitals and Asylums* § 43, p. 884, which it quoted as follows:

"Unless subject to such specific objections as irrelevancy, inadequate sources of information, self-serving character, or exceeding the bounds of legitimate expert opinion, the admissibility of hospital records in evidence under the Uniform Business Records Act may extend to such matters, among others, as the physical examination findings, the patient's symptoms and complaints, treatment and progress records, diagnoses by those qualified to make them, the

results of analyses and laboratory tests, X-rays, and the behavior of the patient, and those parts of the patient's history inherently necessary or at least helpful to the observation, diagnosis, and the treatment of the patient."

See McCormick, *Evidence* §§ 307, 313 (2nd ed. 1972).

See Fed.Rule Evid. 803(6); New Jersey Evid.Rule 63(13), Calif.Evid.Code § 1271, Kansas Code of Civ.Pro. § 60-460(m).

Problems of the motivation of the informant have been a source of difficulty and disagreement. If the recorder's motive is not to be correct but rather is to prepare for litigation, the report is inadmissible. See Laughlin, *Business Entries and the Like*, 46 Iowa L.Rev. 276, 285 (1961). Because of the difficulty of stating in specific terms the circumstances of admissibility, the exception contains the phrase "unless the sources of information or other circumstances indicate lack of trustworthiness."

All participants must be acting routinely in the supplying and recording of the information. If the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. For example, when a police report incorporates information obtained from a bystander, the officer qualifies as acting in the regular course but the informant does not. The report is thus inadmissible. See Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

Existing Section 92.37 is included in this exception. Under that section, shop books and books of account of a party in which charges and entries were made are admissible. The entry must have been made in the regular course of business, at or near the time of the act, condition, or event. E.Z.E. Inc. v. Jackson, 235 So.2d 337 (Fla.4th Dist. 1970). This section is no longer necessary since the business records act is an extension of it, and was "intended to liberalize the rules as to the allowance of shop book memoranda." Exchange Nat. Bank v. Hospital & Welfare Bd., 181 So.2d 9, 11 (Fla.2nd Dist. 1965).

Subsection (7) Technically, evidence of the absence of a record may not be hearsay, but in order to set the question to rest in favor of admissibility, it is specifically treated. The failure of a record to mention a matter that would be ordinarily mentioned can be viewed as circumstantial evidence of its nonexistence. Since the record is not offered to prove the truth of the facts it contains, the inference from the absence of an entry is arguably not hearsay. It may be argued that the lack of an entry is a negative assertion that the transaction did not occur and is therefore hearsay. Similar provisions are found in Calif.Evid.Code § 1272; Kansas Code of Civ.Pro. § 60-460(n); and New Jersey Evid.Rule 63(14); Wisc.Evid.Rule 908.03(7); Fed.Rule Evid. 803(7).

Subsection (8) Public records are a recognized hearsay exception at common law. McCormick, *Evidence* § 315 (2nd ed. 1972). The exception recognizes the inconvenience that would result from requiring the officer who made the report to testify to the authenticity of the official document. The influence of an official duty to make accurate statements and the force of habit and routine provide the necessary assurance of reliability. It is also unlikely that a public official will remember details independently of the record.

While public records have been the subject of general statutes in a number of states, no statute is present in Florida. Existing Florida law is in accord with items (a) and (b). The leading case is Bell v. Kendrick, 25 Fla. 778, 785, 6 So. 868, 869 (1889), in which the court stated:

> Official registers or books kept by persons in public office in which they are required, whether by statute or by the nature of the office, to write down particular transactions occurring in the course of their public duties, and under their personal observation, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by the ordinary test of truth, the obligation of an oath, and an opportunity to cross-examine the person

> on whose authority the truth of the document depends . . .. It is not necessary to the admissibility in evidence of an official register of this kind that a statute should expressly require it to be kept, or that the nature of the office should render it indispensable.

See Branch v. State, 76 Fla. 558, 80 So. 482 (1919); Corbett v. Berg, 152 So.2d 196 (Fla.3rd Dist. 1963).

Numerous cases in Florida have upheld the admissibility of hospital records under the public records exception because of the requirement of Fla.Stat. § 382.31 that hospitals maintain records concerning their patients. See, *e.g.*, Wilkinson v. Grover, 181 So.2d 591 (Fla.3rd Dist. 1965), certiorari denied, 188 So.2d 824 (Fla.1966); Comment, *Evidence: The Admissibility of Hospital Records Under Florida Statutes, Section 382.31*, 18 U.Fla.L.Rev. 512 (1965).

The provision that the exception applies to matters observed pursuant to a duty imposed by law "as to matters there was a duty to report; excluding in criminal cases matters observed by police officers or other law enforcement personnel", was added by the Senate Judiciary-Criminal Committee to make certain that a defendant's right to confrontation could not be abridged in a criminal case. The committee adopted the view of the Federal Rules of Evidence.

Nothing in this subsection affects existing statutes that make privileged specific public records, *e.g.*, police accident reports, or that provide for the admissibility of specific government reports.

See New Jersey Evid.Rule 63(15) and Calif.Evid.Code § 1280.

Wisc.Rule Evid. 908.03(8) and Fed.Rule Evid. 803(8) are similar but specifically provide that factual findings resulting from investigations are admissible.

Subsection (9) Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. 5 Wigmore, *Evidence* §§ 1643, 1644 (3rd ed. 1940). Existing Fla.Stat. § 382.20 makes certificates of birth, death or stillbirth admissible in evidence as prima facie evidence of the facts contained therein. Although § 382.20 does not require the admissibility of marriage records, § 382.23 requires the county judge to transmit marriage licenses to the bureau of vital statistics, and the common-law hearsay exception admitting public records would make them admissible. See comment to subsection (8). Consequently, this subsection is in substantial accord with existing Florida law.

See Calif.Evid.Code § 1281; Wisc.Evid.Rule 908.03(9); Fed.Rule Evid. 803(9).

Subsection (10) This subsection permits the proof of the non-occurrence of an event by evidence of the absence of a public record which would regularly be made of its occurrence. It applies to the public records of the kind mentioned in subsections (8) and (9) and is similar to subsection (7) which concerns records of a regularly conducted activity.

8 U.S.C. § 1284(b) recognizes this method of proof by providing that proof of absence of alien crewman's name from outgoing manifest is prima facie evidence of failure to detain or deport.

No Florida cases were found that are in accord with this exception. One old case, Parker et al. v. Cleveland, 37 Fla. 39, 19 So. 344 (1896), held that a clerk's certificate that certain land described had not been transferred or mortgaged was inadmissible on the grounds that: "The law as to certificates of clerks as custodians of records only extends to transcripts of such records. If their testimony is desired upon other points, they should be regularly sworn, and testify as other witnesses." *Id.* at 50-51, 19 So. at 346.

Dean Wigmore describes the principle that a custodian of documents lacked authority to certify that a specific document did not exist as one that:

will some day be reckoned as one of the most stupid instances of legal pedantry in our annals. The certificate of a custodian that he has diligently searched for a document or an entry of a specified tenor and has been unable to find it ought to be usually as satisfactory for evidencing its non-existence in his office as his testimony on the stand to this effect would be . . ..

5 Wigmore, *Evidence* § 1678(7), p. 754 (3rd ed. 1940).

For similar provisions see Fed.Rule Evid. 803(10); Uniform Rule 63(17) [1953]; Calif.Evid.Code § 1284; Kansas Code of Civ.Pro. § 60-460(o);

New Jersey Evid.Rule 63(17); and Wisc.Rule Evid. 908.03(10).

Subsection (11) Church records are generally admissible as business records under § 90.803(6) to prove the occurrence of a church activity such as baptism, confirmation, or marriage. 5 Wigmore, *Evidence* § 1523 (3rd ed. 1940). Because it is unlikely that § 90.803(6) would permit such records to be used as evidence of the age or relationship of the participants, this subsection is included to permit church records to be used to prove certain additional information. Facts of family history, such as birth dates, relationships, marital histories, that are ordinarily reported to church authorities and recorded in connection with the church's baptismal, confirmation, marriage, and funeral records may be proven by such records. The justification for this exception is the unlikelihood that false information would be furnished on occasions of this kind.

Apparently, the only Florida case which comments on this exception is Cone v. Benjamin, 157 Fla. 800, 822, 27 So.2d 90, 102 (1946), in which the court stated that: “It is also well settled that entries as to births, deaths and marriages shown by family Bibles, Church registers and certificates and inscriptions on monuments . . . are admissible under certain circumstances.” The court did not elaborate on what these circumstances were, and did not cite any earlier Florida cases as authority for this statement.

Calif.Evid.Code § 1315; Wisc.Rule Evid. 908.03(11) and Fed.Rule Evid. 803(11) are similar.

Subsection (12) This subsection extends the certification procedure of a public official as provided in subsection (8) to clergymen and the like who perform marriages and other ceremonies or administer sacraments.

5 Wigmore, *Evidence* § 1645 (3rd ed. 1940) stated that:

No doubt such certificates, or their equivalent, ought to be furnished, for convenient use in evidence by the parties to a marriage, especially in this our country of numerous jurisdictions and migratory population.

But Wigmore conceded that: “In the *United States*, there is little common-law authority, and that not harmonious.”

Apparently the only Florida case that makes a statement concerning such certificates is Cone v. Benjamin, 157 Fla. 800, 822, 27 So.2d 90, 102 (1946) in which the court said that:

It is . . . well settled that entries as to births, deaths, and marriages shown by family Bibles, Church registers and certificates and inscriptions on monuments; hospital records and hotel registers (under certain circumstances and for certain purposes); letters of deceased relatives containing statements as to family matters, although entitled to different degrees of credibility; recitals in wills, deeds of conveyance, and in marriage settlements and certificates; inscriptions on family portraits, rings, and other family memorials; school censuses and other books and public records which mention births, marriages, and deaths, are admissible under certain circumstances.

The court did not elaborate on what these "certain circumstances" were, but held that a privately published book containing a family history and genealogy was admissible to prove pedigree.

Admissibility under this subsection is limited to certified statements that the maker "performed" a marriage or other ceremony or administered a sacrament, and does not extend to other facts which might be stated in the certificate, such as the date of birth stated in a baptismal certificate.

The justification for this exception is the same as that for the exception for public documents: the assumption of regular performance of the act, and the unlikelihood of independent recollection.

When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see § 90.902, is lacking and proof is required that the person was authorized and did make the certificate. However, the time element required in the subsection, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar provisions, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18) [1953]; Calif.Evid.Code § 1316; Kansas Code of Civ.Pro. § 60-460(p); New Jersey Evid.Rule 63(18); Fed.Rule Evid. 803(12).

Subsection (13) Records of family history kept in family Bibles have long been received in evidence. 5 Wigmore, *Evidence* §§ 1495-96 (3rd ed. 1940) (citing numerous statutes and decisions from jurisdictions adopting this view). Cone v. Benjamin, 157 Fla. 800, 27 So.2d 90 (1946) expresses approval for the admission of such evidence. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. See Fed.Rule Evid. 803(13); Wisc.Rule Evid. 908.03(13); Calif.Evid.Code § 1312.

Subsection (14) Public records of documents affecting an interest in property are admissible to prove the execution and delivery of the documents as well as their contents. A problem seemingly exists when the record is offered to prove execution and delivery, since the recorder lacks first-hand knowledge. This problem has been solved by qualifying for recording only those documents which have been executed and delivered. 5 Wigmore, *Evidence* §§ 1647-1651 (3rd ed. 1940). A public record must be receivable as evidence of the contents of the recorded document or the recording process is useless.

Existing Fla.Stat. § 92.121 is similar to this subsection in that it provides that deeds and records which have been proved for record and recorded according to law are admissible "as prima facie evidence in the courts of this state without requiring proof of the execution." That section limits the use of certified copies of the deeds and mortgages to those cases in which the original is not within the custody or control of the party offering such copy. This subsection would expand existing § 92.121 by applying to all recorded documents affecting real property rather than just deeds and mortgages. See generally Fla.Stat. ch. 695 (Record of Conveyances of Real Estate).

See Wisc.Rule Evid. 908.03(14); Fed.Rule Evid. 803(14).

Subsection (15) This subsection, which makes admissible certain statements in documents affecting an interest in property, recognizes that litigation may arise years after a conveyance when the declarant of a statement in a deed would often be dead. Similarly, witnesses are often unavailable. The absence of other evidence creates the necessity of using the document to prove the recited fact. This exception is limited to those situations in which there have not been dealings which are inconsistent with the truth of the statement.

The Advisory Committee's Note to Proposed Federal Rule of Evidence 803(15), explains the reasons for including this rule as an exception to the hearsay exclusion

Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one.

While existing § 92.121 provides that recorded deeds and mortgages shall be taken as prima facie evidence, it is not clear whether this provision makes admissible a statement in the deed or mortgage.

Similar provisions are contained in Uniform Rule 63(29); Calif.Evid.Code § 1330; Kansas Code of Civ.Pro. § 60-460(aa); Wisc.Evid.Rule 908.03(15); Fed.Rule Evid. 803(15).

Subsection (16) This subsection provides that statements contained in ancient documents are admissible to prove the facts contained therein. See McCormick, *Evidence* § 323 (2nd ed. 1972). The justification lies in the propositions that ordinary testimonial evidence may be practically unavailable and the improbability that people would undertake the risk of forgery solely for posterity. 7 Wigmore, *Evidence* § 2137 (3rd ed. 1940). Authentication of ancient documents occurs under Section 90.901, but the admissibility of assertive statements contained therein as against a hearsay objection is a separate question. The ancient document technique of authentication is universally conceded to apply to all types of documents, including letters, records, contracts, maps, and certificates, in addition to title documents. 7 Wigmore, *Evidence* § 2145 (3rd ed. 1940).

This subsection provides admissibility for statements in all ancient documents authenticated per § 90.901, and expands two existing statutory provisions. Fla.Stat. § 92.07 provides that judgments and decrees of record more than twenty years old are admissible to prove the facts recited, and Fla.Stat. § 92.08 provides that deeds and powers of attorney of record more than twenty years old are admissible to prove truth of facts recited.

See Wisc.Rule Evid. 908.03(16); Fed.Rule Evid. 803(16). Calif.Evid.Code § 1331 contains a similar provision, but with a 30-year time period and the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter."

Subsection (17) Ample authority at common law supports the admission into evidence of items falling in this category. The basis of trustworthiness is the general reliance by the public, or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate. 6 Wigmore, *Evidence* §§ 1702-1706 (3rd ed. 1940). While Wigmore's text is narrowly oriented to lists and similar matters prepared for the use of a trade or profession, he cites authorities which include other kinds of publications, *e.g.*, newspaper market reports, telephone directories, and city directories.

Florida has enacted the Uniform Commercial Code, including § 2-724 (Fla.Stat. § 672.724) which provides that:

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 in 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.

There appears to be no reported Florida case law on this subject.

For similar provisions, see Uniform Rule 63(30) [1953]; Calif.Evid.Code § 1340; Kansas Code of Civ.Pro. § 60-460(bb); New Jersey Evid.Rule 63(30); Fed.Rule Evid. 803(17).

Subsection (18) This subsection provides that admissions by a party are admissible as exceptions to hearsay. Existing law treats admissions as an exception to the hearsay rule although it tends to confuse "admissions" with "declarations against interest" and terms them "admissions against interest."

It is well settled that an admission against interest may be introduced into evidence as substantive evidence of the truth of the matter stated. This is so even though the person making the admission against interest subsequently denies making such admission.

Seaboard Coast Line R.R. Co. v. Nieuwendaal, 253 So.2d 451, 452 (Fla.2nd Dist. 1971).

There are five types of statements included as admissions.

(*1*) This category includes admissions by a party in either his individual or representative capacity. If the party has a representative capacity, *e.g.*, executor, and the admission is offered against him in that capacity, it does not matter whether the party was acting as an individual or a representative when he made the statement. See Calif.Evid.Code § 1220; Fed.Rule Evid. 801(d)(2)(A).

(*2*) Also admissible as an exception to the hearsay rule are adoptive admissions, *e.g.*, those made by adopting or acquiescing in the statement of another, Sullivan v. McMillan, 26 Fla. 543, 8 So. 450 (1890). For example, if A makes a discrediting statement about B, in the presence of B and under circumstances that would call for a protest, silence by B would manifest a belief in the truth of the statement and constitute an admission by conduct. See McCormick, *Evidence* §§ 269-70 (2nd ed. 1972).

The constitutional right to remain silent in criminal cases, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is not affected by this provision, and an alleged tacit admission in a criminal case is not admissible when the defendant is privileged to remain silent, see State v. Galasso, 217 So.2d 326 (Fla.1968); Horton v. State, 285 So.2d 418 (Fla.2nd Dist. 1973); Jones v. State, 200 So.2d 574 (Fla.3rd Dist. 1967).

For similar provisions, see Calif.Evid.Code § 1221; Fed.Rule Evid. 801(d)(2)(B).

(*3*) A statement which a party authorizes another to make is generally treated as an admission of the party. Disagreement occurs when the statement is not to a third person but rather is a statement by the agent *to* the person authorizing the statement. Such statements generally take the form of reports and tend to be highly reliable. Under this provision, a party's books and records can be used against him without regard to any intent to disclose to third persons. "The high degree of trustworthiness of intra-company reports is equal to that of business records, which are admissible as an exception to the hearsay rule although they may be self-serving. Furthermore, there is no privilege that would preclude their use." Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 Fla.St.U.L.Rev. 191, at 211. See 5 Wigmore, *Evidence* § 1557 (3rd ed. 1940) (citing cases).

See New Jersey Evid.Rule 63(8)(a); Fed.Rule Evid. 801(d)(2)(C). Calif.Evid.Code § 1222 limits the use of these admissions to statements which are authorized to be made to third parties.

(*4*) Statements by an agent or servant which are related to matters within the scope of his agency or employment are admissible against the principal or employer. Florida has adopted this rule, rejecting the common-law view that

the statements would not be admissible when there had been no authority to speak. Myrick v. Lloyd, 158 Fla. 47, 27 So.2d 615 (1946). In Gordon v. Hotel Seville, Inc., 105 So.2d 175, 177 (Fla.3rd Dist. 1958) certiorari denied, 109 So.2d 767 (Fla.1959) the court stated:

An admission against interest made by an employee in the course of and within the scope of his employment and relating to a matter which is not beyond the penumbra of his duties or employment, is a recognized exception to the hearsay rule, and such a statement by the employee will be admissible against the employer as an admission against interest.

For similar provisions, see New Jersey Evid.Rule 63(9)(a); Kansas Code Civ.Pro. § 60-460(i)(1); Fed.Rule Evid. 801(d)(2)(D).

(*5*) Statements by a co-conspirator are admissible against the other conspirators when they are made in the course and furtherance of the conspiracy. Before this rule may be invoked, there must be evidence of a conspiracy and of the objecting party's participation in it. This provision is consistent with existing Florida law. See Honchell v. State, 257 So.2d 889 (Fla.1971); Farnell v. State, 214 So.2d 753 (Fla.2nd Dist. 1968).

For similar provisions, see Calif.Evid.Code § 1223; New Jersey Evid.Rule 63(9)(b); Fed.Rule Evid. 801(d)(2)(E).

Subsections (19) to (21) "The courts are generally agreed that there exists, as an exception to the hearsay rule, a principle justifying the admission of evidence of reputation as to matters of general public interest and concern." Annot., *Hearsay--Matter of Public Interest*, 58 A.L.R.2d 615. The reputation is a testimonial inference introduced to prove the truth of the fact asserted.

Reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. Trustworthiness of reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore, *Evidence* § 1580, p. 444 (3rd ed. 1940).

Subsection (19) concerns matters of personal and family history, which are commonly called "pedigree." The trustworthiness of reputation of marriage is based both on the fact that the husband and wife know of the consequences that would result from misrepresenting their relationship and in the constant exposure to observation and discussion by the community. Although marriage is generally conceded to be a proper subject of proof by evidence of reputation in the community, the decisions are divided as to such items as legitimacy, relationship, adoption, birth, and death. 5 Wigmore, *Evidence* §§ 1602, 1605 (3rd ed. 1940). The Advisory Committee's Note to Fed.Rule Evid. 803(19) comments on the expanded scope of the exception provided in the Federal Rules and adopted in this subsection:

All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated words and work, religious affiliation, and social activity, in each of which a reputation may be generated.

In Cone v. Benjamin, 157 Fla. 800, 821-22, 27 So.2d 90, 101-02 (1946) the Florida Supreme Court approved the use of "pedigree" testimony:

Generally speaking, the theory underlying the acceptance of the declarations as to pedigree made by deceased persons who were members of or intimately connected with the family is based upon the theory that such persons were familiar with those matters of family history, tradition and repute with which the members of most families are familiar,

although based upon hearsay within the family, and that, having been made before any controversy had arisen, there was no motive to speak other than the truth. As was said by Justice Paxson in the old case of Sitler v. Gehr, *supra* [105 Pa. 577, 51 Am.Rep. 207]:

"Indeed we scarcely realize how little we actually know from our own observation and investigation. We learn the truths of history, the secrets of science and our knowledge of the world generally, from what we have read, or from what others have told us. What does a man know of his deceased ancestors but what he has learned from his immediate relatives? How was the plaintiff, who had never seen Balser Behr, to know that the latter was his uncle except from his mother? It is in such cases that the strict rules of evidence are relaxed as regards hearsay. If it were otherwise pedigree could not be proved at all in many cases, and in one sense it is primary not secondary evidence."

In General Properties Corp. v. Gore, 153 Fla. 236, 243, 14 So.2d 411, 415 (1943), the court quoted with approval 20 Am.Jur. *Evidence* § 473 (1939), "Declarations and general repute are admissible as proof of a marriage." In Stone v. State, 71 Fla. 514, 71 So. 634 (1916), the admission of hearsay testimony by an aunt concerning a child's age was approved because "ages are matters of common knowledge in families."

For comparable provisions see Uniform Rule 63(26), (27)(c) [1953]; Calif.Evid.Code §§ 1313-14; Kansas Code of Civ.Pro. § 60-460(x), (y)(3); New Jersey Evid.Rule 63(26), (27)(c); Fed.Rule Evid. 803(19).

The first portion of Subsection (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. 6 Wigmore, *Evidence* §§ 1580, 1587 (3rd ed. 1940). The necessity for this evidence stems from the probable unavailability of witnesses and the absence of boundary markers. An ancient Florida case is in accord with this rule. In Daggett v. Willey, 6 Fla. 482, 511 (1863), the court stated that:

[R]eputation or hearsay, . . . taken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks or other evidence than that of hearsay.

No Florida cases were found which deal with the requirement that the reputation arise prior to the controversy.

The second portion of this exception, which provides for admissibility of reputation evidence of general history, is likewise supported by authority. 5 Wigmore, *Evidence* §§ 1597, 1598 (3rd ed. 1940). The historical character of the subject matter negates the need that the reputation antedate the controversy with respect to which it is offered.

For similar provisions see Uniform Rule 63(27)(a), (b) [1953]; Calif.Evid.Code §§ 1321-22; Kansas Code of Civ.Pro. § 60-460(1); New Jersey Evid.Rule 63(27)(a); Prop.Fed.Rule Evid. 803(20).

Subsection (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. 5 Wigmore, *Evidence* §§ 1608-1621 (3rd ed. 1940); Cornelius v. State, 49 So.2d 332 (Fla.1950); Reddick v. State, 25 Fla. 112, 5 So. 704 (1889). This rule deals only with the hearsay aspect of this type of evidence. Limitations upon admissibility based on other grounds will be found in § 90.404 (relevancy of character evidence generally) and in § 90.609 (character of witness). Similar provisions are contained in Uniform Rule 63(28) [1953]; Calif.Evid.Code § 1324; Kansas Code of Civ.Pro. § 60-460(z); New Jersey Evid.Rule 63(28); Prop.Fed.Rule Evid. 803(21).

Subsection (22) This exception makes admissible testimony given by a witness at a civil trial when it is introduced at a subsequent civil trial which is substantially the same proceeding. Thus, in a retrial of a case it is unnecessary to call as a witness a person who testified during the first trial. This exception expands the use of evidence given at a former trial from that provided in existing Fla.Stat. § 92.22 which allowed the use of this evidence only when "a substantial

reason . . . why the original witness or document is not produced" is shown. Under this exception, this evidence is admissible regardless of availability of the witness.

Commentary on 1978 Amendment

Subsection (5) This subsection was amended to clarify the language that a memorandum or record offered under the subsection could be offered by any party, not just the adverse party, as the section originally was drafted. See Fed.Rule Evid. 803(5).

The subsection was also amended to delete the language which provided that a record was admissible if it was "adopted" by the witness when the record was fresh in his memory. This amendment only provides for the admission of a memorandum or recording made by the witness when the other foundation requirements are shown to be present.

Subsection (9) This amendment by the House Select Committee added the last sentence which provides that this section should not be construed to make admissible the prior or subsequent marriage of a party to the action, except for the purpose of impeachment. The intent of this amendment was to provide that when evidence of remarriage is offered in the form of a record of vital statistics, it is inadmissible on the issue of damages. Under Section 768.21(6)(c) of the Florida Wrongful Death Act evidence of remarriage of decedent's spouse is admissible. Thus, the effect of this amendment is to provide that if evidence of remarriage is offered it may not be done by use of an official record of the marriage; it may be proved by affirmative testimony of a witness with knowledge or by a marriage certificate offered under Section 90.803(8).

Subsection (17) This amendment provides that evidence of commercial lists is admissible as an exception to the hearsay rule only where the court, in addition to the other foundation requirements, finds that the source of information and method of preparation of the compilation were sufficiently trustworthy to justify the admission of the compilation.

Subsection (18)(e) This amendment was technical in nature, it amended the subsection to require the court to instruct the jury that the conspiracy and each co-conspirator's participation therein must be established by "independent evidence," before a co-conspirator's statements are admissible under this exception. This amendment struck the word "non-hearsay" from the type of evidence to be considered when determining if the foundational requirements are established. The conspiracy and the participation of the co-conspirators in it, may be established by hearsay evidence which is admissible under another exception to the hearsay rule.

Subsection (22) The amendment restricts the admissibility of former testimony under this exception to a retrial of a civil trial involving the identical parties and the same facts. The amendment did not affect the admissibility of former testimony under Section 90.804(2)(a) when the witness is unavailable.

Notes of Decisions (2393)

West's F. S. A. § 90.803, FL ST § 90.803
Current with laws and joint resolutions in effect from the 2022 Second Regular Session and Special C and D Sessions of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document