

Business Affidavits
Admissible or Inadmissible

Texas Rules of Evidence

Article VIII: Hearsay

Computer data as hearsay: Rule 801 2 - "Computer data that is compilation of information entered by a person is hearsay."¹

Impeachment: Rule 801 4 (3)

Vicarious admissions : Rule 801 (e) (2) (D) A statement made by an agent or employee is admissible against a party if (1) the statement is made by the party's agent or employee, (2) the statement concerns a matter within the scope of the agency ore employment, and (3) the statement is made during the existence of the relationship.²

Hearsay Exceptions; Availability of Declaratory Immaterial: Rule 803 (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnose, made at or near the time by, or form information transmitted by, a person with knowledge, if kept in the course of a regularly conduced 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 affidavit that complies with Rule 902 (10), unless the source information or the method or circumstances of preparation indicate lack of trustworthiness.

Hearsay Exceptions; Availability of Declaratory Immaterial: Rule 803 (15) Statements Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter

¹ Murray, 804 S.W2d at 284 (computer printout is often simply "the feeding back of data placed into a computer by a person; although the data may be in a different form than it was when it was fed into the computer, it retains its status as the statement or statements made by a person" and thus fits the definition of hearsay).

² Big Mack Trucking Co. v. Dickerson, 497 S.W2d 283, 287-88 (Tex. 1973)

stated was relevant to the purpose of the document, unless dealing with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

Rule 803

Unreflective Statements

Rule 803 (1)

Present sense impression. A hearsay statement is admissible under the present-sense-impression exception if the statement (1) describes or explains an event or condition and (2) was made while the declarant was perceiving the event or condition or immediately thereafter.³

(1)Statement describes or explains event. The exception encompasses only statements that describe or explain an event or condition.

- A. Statement made while declarant was perceiving event or condition or “immediately thereafter”. Obviously, what constitutes “immediately” requires judicial discretion, but Texas courts have both admitted and excluded declarations made 30 minutes after the event.⁴*

Reliable Documents

Rule 803 (5): Recorded recollection

Rule 803 (5) created a hearsay exception for memoranda and records that contain a witness’s recollection about a matter at issue. There are four prerequisites to admissibility under this exception: (1) the witness must once have had personal knowledge but now does not recall the matter well enough to testify fully and accurately, (2) the statement contained in the recorded recollection must have been either made or adopted by the witness, (3) the recorded recollection must accurately reflect the witness’s prior knowledge,

³ Implicit in the requirement that the statement be made while the declarant was perceiving the event or condition or immediately there after is that the declarant have personal knowledge of the facts contained in the statement.

⁵ Jack B Weinstein & Margret A. Berger, Weinstein’s Federal Evidence §803.03[2], at 803-15 (Joseph M. McLaughlin ed., 2d ed. 2009).

⁴ Harris v. State, 736 S.W.2d 166,167 (Tex. App. – Houston {14th Dist.} 1987, no pet.),Moore v Drummet, 478 S.W.2d 177, 182 (Tex. Civ. App. – Houston [14 the District] 1972, no writ)

and (4) the recollection must have been recorded when the event was fresh in the witness's memory.⁵

Rule 803 (6): Records of regularly business conducted activity.

Rule 803 (6) creates an exception to the hearsay rule for records of "acts, events, conditions, opinions, or diagnoses" if those records were made at or near the time of events described and were made by a person with knowledge of the events (or from information transmitted by a person with such knowledge).

A business record may nonetheless be ruled inadmissible if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."⁶

Rule 803 (6) (4) Record made by a person with knowledge of the event or from information transmitted by a person with knowledge. The source of information must be someone with personal knowledge of the events contained within the record.⁷ The party opposing the admission of the business records has the burden to show lack of trustworthiness.

Rule 803 (6) (9) Reasons to exclude business records. Even if the components of Rule 803 (6)'s evidentiary foundation have been established, business records (or certain statements within those records) may still be excluded for the following reasons.

Rule 803 (6) (9) (a) lack of trustworthiness. Rule 803 (6) states that a business record may be ruled inadmissible if "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."⁸

⁵ Tex. R. Evid. 803 (5); Johnson v. State, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998)

⁶ Crane v. State, 786 S.W.2d 338, 353-54 (Tex. Crim App. 1990); Philpot v. State, 897 S.W.2d 848,852 (Tex App. Dallas 1995, pet. Ref'd); Porter v. State, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979)

⁷ Venable v. State, 113 S.W.3d 797, 800-01 (Tex. App. – Beaumont 2003, pet. Ref')

⁸ Crane v. State, 786 S.W.2d 338, 353-54 (Tex. Crim App. 1990); Philpot v. State, 897 S.W.2d 848,852 (Tex App. Dallas 1995, pet. Ref'd); Porter v. State, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979)

Lack of trustworthiness is most frequently found when the record was prepared in anticipation of litigation.

Rule 803 (10): Absence of public record or entry. As with Rule 803 (7), dealing with the absence of business records, Rule 803 (10) permits the absence of a public record to be evidence of the nonoccurrence of an event of a fact that would have been found in the particular public record had it occurred or existed.

Article IX: Authentication & Identification

Rule 901 (b) (1)

However, a bare assertion that a particular document is a specifically described item is insufficient authentication.⁹

Rule 902 (10) Business records accompanied by affidavit

The prerequisites to authentication by affidavit under Rule 902 (10) include (1) the records and the affidavit must be filed with the court clerk at least 14 days before trial, (2) notice of such filing must be given to all parties, (3) the records must be made available for inspection and copying, and (4) the affidavit must conform to the Rules 803 (6) and 803 (7).

⁹ Mega Child Care, 29 S.W.3d at 308 (witness's testimony that an exhibit was a copy of administrative judge's order opinion and order was insufficient authentication when "she was not the author of the opinion and order; neither did she purport to have any personal knowledge of the opinion and order by which she could confidently authenticate a copy").