

Notwithstanding any other evidence rule, the court must admit an auditor's verified report prepared under Rule of Civil Procedure 172 and offered by a party. If a party files exceptions to the report, a party may offer evidence supporting the exceptions to contradict the report.

## ARTICLE VIII. HEARSAY

### Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

- (a) **Statement.** "Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.
- (b) **Declarant.** "Declarant" means the person who made the statement.
- (c) **Matter Asserted.** "Matter asserted" means:
  - (1) any matter a declarant explicitly asserts; and
  - (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter.
- (d) **Hearsay.** "Hearsay" means a statement that:
  - (1) the declarant does not make while testifying at the current trial or hearing; and
  - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (e) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
  - (1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
    - (A) is inconsistent with the declarant's testimony and:
      - (i) when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
      - (ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding—or in a deposition;

- (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
  - (C) identifies a person as someone the declarant perceived earlier.
- (2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:
- (A) was made by the party in an individual or representative capacity;
  - (B) is one the party manifested that it adopted or believed to be true;
  - (C) was made by a person whom the party authorized to make a statement on the subject;
  - (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
  - (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
- (3) ***A Deponent's Statement.*** In a civil case, the statement was made in a deposition taken in the same proceeding. "Same proceeding" is defined in Rule of Civil Procedure 203.6(b). The deponent's unavailability as a witness is not a requirement for admissibility.

### Notes and Comments

**Comment to 2015 Restyling:** Statements falling under the hearsay exclusion provided by Rule 801(e)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 803(24) exception for declarations against interest. No change in application of the exclusion is intended.

The deletion of former Rule 801(e)(1)(D), which cross-references Code of Criminal Procedure art. 38.071, is not intended as a substantive change. Including this cross-reference made sense when the Texas Rules of Criminal Evidence were first promulgated, but with subsequent changes to the statutory provision, its inclusion is no longer appropriate. The version of article 38.071 that was initially cross-referenced in the Rules of Criminal Evidence required the declarant-victim to be available to testify at the trial. That requirement has since been deleted from the statute, and the statute no longer requires either the availability or testimony of the declarant-victim. Thus, cross-referencing the statute in Rule 801(e)(1), which applies only when the declarant testifies at trial about the prior statement, no longer makes sense. Moreover, article 38.071 is but one of a number

of statutes that mandate the admission of certain hearsay statements in particular circumstances. *See, e.g.*, Code of Criminal Procedure art. 38.072; Family Code §§ 54.031, 104.002, 104.006. These statutory provisions take precedence over the general rule excluding hearsay, see Rules 101(c) and 802, and there is no apparent justification for cross-referencing article 38.071 and not all other such provisions.

#### **Rule 802. The Rule Against Hearsay**

Hearsay is not admissible unless any of the following provides otherwise:

- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

#### **Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:
  - (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
  - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.



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

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

- (6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:
- (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
  - (B) the record was kept in the course of a regularly conducted business activity;
  - (C) making the record was a regular practice of that activity;
  - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and
  - (E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

"Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

- (7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:
- (A) the evidence is admitted to prove that the matter did not occur or exist;
  - (B) a record was regularly kept for a matter of that kind; and
  - (C) the opponent fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.
- (8) ***Public Records.*** A record or statement of a public office if:

- (A) it sets out:
    - (i) the office's activities;
    - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
    - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
  - (B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.
- (9) ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.
- (10) ***Absence of a Public Record.*** Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:
- (A) the record or statement does not exist; or
  - (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.
- (11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate:
- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
  - (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
  - (C) purporting to have been issued at the time of the act or within a reasonable time after it.
- (13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

- (14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if:
- (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
  - (B) the record is kept in a public office; and
  - (C) a statute authorizes recording documents of that kind in that office.
- (15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
- (16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
- (17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
- (18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if:
- (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
  - (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

- (19) ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
- (20) ***Reputation Concerning Boundaries or General History.*** A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.



- (21) ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.
- (22) ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if:
- (A) it is offered in a civil case and:
    - (i) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
    - (ii) the conviction was for a felony;
    - (iii) the evidence is admitted to prove any fact essential to the judgment; and
    - (iv) an appeal of the conviction is not pending; or
  - (B) it is offered in a criminal case and:
    - (i) the judgment was entered after a trial or a guilty or nolo contendere plea;
    - (ii) the conviction was for a criminal offense;
    - (iii) the evidence is admitted to prove any fact essential to the judgment;
    - (iv) when offered by the prosecutor for a purpose other than impeachment, the judgment was against the defendant; and
    - (v) an appeal of the conviction is not pending.
- (23) ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
- (A) was essential to the judgment; and
  - (B) could be proved by evidence of reputation.
- (24) ***Statement Against Interest.*** A statement that:
- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the

declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and

- (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

**Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness**

- (a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

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

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

- (b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) **Former Testimony.** Testimony that:

- (A) when offered in a civil case:

- (i) was given as a witness at a trial or hearing of the current or a different proceeding or in a deposition in a different proceeding; and
- (ii) is now offered against a party and the party—or a person with similar interest—had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination.



- (B) when offered in a criminal case:
  - (i) was given as a witness at a trial or hearing of the current or a different proceeding; and
  - (ii) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or
  - (iii) was taken in a deposition under—and is now offered in accordance with—chapter 39 of the Code of Criminal Procedure.
- (2) **Statement Under the Belief of Imminent Death.** A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- (3) **Statement of Personal or Family History.** A statement about:
  - (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
  - (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

**Rule 805. Hearsay Within Hearsay**

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

**Rule 806. Attacking and Supporting the Declarant's Credibility**

When a hearsay statement—or a statement described in Rule 801(e)(2)(C), (D), or (E), or, in a civil case, a statement described in Rule 801(e)(3)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's statement or conduct, offered to impeach the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.