# Alabama Rules of Evidence

Article VIII. Hearsay

## Rule 803.

## Hearsay exceptions; availability of declarant immaterial.

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

(1) PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

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

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

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(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 or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling

of every kind, whether or not conducted for profit.

(7) ABSENCE OF ENTRY IN RECORDS KEPT IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, when offered against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state or governmental authority in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) RECORDS OF VITAL STATISTICS. Records or data compilations, in any form, of vital statistics such as those relating to births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) ABSENCE OF PUBLIC RECORD OR ENTRY. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

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

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

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

(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and

an applicable statute authorizes the recording of documents of that kind in that office.

(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 that was prepared before January 1, 1998, 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.

(18) LEARNED TREATISES. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY. Reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) REPUTATION AS TO CHARACTER. Reputation of a person’s character among associates or in the community.

(22) JUDGMENT OF PREVIOUS CONVICTION. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state or other governmental authority in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) JUDGMENT AS TO PERSONAL, FAMILY, OR GENERAL HISTORY, OR BOUNDARIES. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[Amended 8-15-2013, eff. 10-1-2013; Amended 1-30-2020.]

## Advisory Committee's Notes

**Paragraph (1). Present sense impression.** This paragraph, adopted without change from its federal counterpart, is commonly referred to as the "present sense impression exception." The event and the statement that describes or explains the event must be substantially contemporaneous. It is this closeness in time, negating the likelihood of deliberate conscious misrepresentation, that provides the requisite trustworthiness to satisfy hearsay concerns. See Fed.R.Evid. 803(1) advisory committee's note.

The declarant must have perceived the event or condition described. There is no requirement, however, that the declarant have participated in it. The subject matter of a permissible declaration is limited to a description or explanation of the event or condition.

Most statements falling within this exception would have been admissible under preexisting Alabama hearsay law. Many would have qualified as within the res gestae. See *St. Louis & San Francisco Ry. v. Sutton*, 169 Ala. 389, 55 So. 989 (1910). Yet others would have been admissible under what could fairly be described as an exception embracing contemporaneous statements of nonstartling matters. See *Sexton v. State*, 239 Ala. 287, 196 So. 744 (1940). See also C. Gamble, McElroy's Alabama Evidence § 265.02 (4th ed. 1991) (containing a discussion of the admissibility of contemporaneous declarations made while the declarant is perceiving a nonstartling event or condition that the statement narrates, describes, or explains).

**Paragraph (2). Excited Utterance.** This paragraph, identical to the corresponding federal provision, adopts the traditional common law exception for excited utterances. The theory underlying this exception is that the heat of excitement negates reflection, thus precluding conscious fabrication and guaranteeing trustworthiness. See 6 J. Wigmore, Wigmore on Evidence § 1750 (Chadbourn rev. 1976); R. Hutchins & D. Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 Colum.L.Rev. 432 (1928); R. Hursh, Annotation, *Admissibility as Res Gestae of Statements or Exclamations Relating to Cause of, or Responsibility for, Motor Vehicle Accident*, 53 A.L.R.2d 1245 (1957).

This exception does not require that the declarant have participated in the startling event or condition. One may well be startled by an event in which he or she has not participated. See Fed.R.Evid. 803(2) advisory committee's note.

As compared with Rule 803(1), which limits a qualifying statement to a description or explanation of an event or condition, Rule 802(2) embodies a broader scope of subject matter coverage. An excited utterance need only "relate" to the startling event or condition. See Fed.R.Evid. 803(2) advisory committee's note.

This Rule 803(2) exception exists under preexisting Alabama law and is sometimes termed the "excited utterance exception" or the "spontaneous exclamation exception." See *Ex parte Lawson*, 476 So.2d 122 (Ala.1985); C. Gamble, McElroy's Alabama Evidence § 265.01 (4th ed. 1991). These terms would appear preferable, particularly in limiting the scope to spontaneous declarations, to the term "res gestae," which is often used in Alabama decisions to describe this same exception. Use of the res gestae doctrine in this area has been soundly

criticized by Alabama courts and commentators. See, e.g., *Illinois Cent. R.R. v. Lowery*, 184 Ala. 443, 63 So. 952 (1913); C. Gamble, McElroy's Alabama Evidence § 265.01(1) (4th ed. 1991).

**Paragraph (3). Then existing mental, emotional, or physical condition.** This paragraph is identical to the corresponding federal provision. It makes admissible statements concerning the declarant's "then existing state of mind, emotion, sensation, or physical condition." Illustrative examples are statements indicating the declarant's "intent, plan, motive, design, mental feeling, pain, and bodily health."

Specifically excluded from this rule of admissibility, with one exception, are statements of "memory or belief" when offered "to prove the fact remembered or believed." This is consistent with traditional Alabama law, under which this exception is limited to statements of mind expressed before the commission of the act as to which the state of mind is relevant. See *McCord v. State*, 220 Ala. 466, 126 So. 873 (1930). See also C. Gamble, McElroy's Alabama Evidence § 262.01 (4th ed. 1991). By express exception under Rule 803(3), however, a "statement of memory or belief" is admissible if it relates to the execution, revocation, identification, or terms of the declarant's will. Preexisting Alabama law likewise recognizes such an exception for the statements of a testator or testatrix. See *Craig v. Perry*, 565 So.2d 171 (Ala.1990); *Hale v. Cox*, 231 Ala. 22, 163 So. 335 (1935); C. Gamble, McElroy's Alabama Evidence § 263.01 (4th ed. 1991).

Rule 803(3) is consistent with traditional Alabama hearsay law providing for the admission of statements that reflect a then existing physical or mental condition, including statements of one's own design, plan, intent, motive, emotion, etc. See *Cook v. Latimer*, 279 Ala. 294, 184 So.2d 807 (1966); C. Gamble, McElroy's Alabama Evidence § 262.01 (4th ed. 1991). A specialized illustration of this exception, as applied under preexisting Alabama practice, is found in that line of authority allowing the admission of statements involving the declarant's own then existing pain or physical sensation. *Fidelity Serv. Ins. Co. v. Jones*, 280 Ala.195, 191 So.2d 20 (1966). See C. Gamble, McElroy's Alabama Evidence § 261.01 (4th ed. 1991).

**Paragraph (4). Statements for purposes of medical diagnosis or treatment.** This paragraph is identical to its federal counterpart. At common law, statements relating pain were admissible only if the pain existed when the statements were made. It was said that such statements must deal with present pain and suffering. Statements reflecting past pain and suffering were admitted under traditional law, but only if made to a physician. See *Seaboard Sys. R.R. v. Keen*, 514 So.2d 1018 (Ala.1987). See also C. Gamble, McElroy's Alabama Evidence §§ 261.01(3), 110.01 (4th ed. 1991). Rule 803(4) picks up on and expands this latter exception to include all statements that (1) are made for "purposes of medical diagnosis or treatment" and (2) describe "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Unlike preexisting Alabama law, this Rule 803(4) exception allows all statements serving reasonably as the basis of diagnosis or treatment. Such statements are admitted as substantive proof of the matter asserted. Contra *State Realty Co. v. Ligon*, 218 Ala. 541, 119 So. 672 (1929) (containing language indicating that statements made by the patient were receivable to show the basis for the expert's opinion but not as proof of the truth of the matters

asserted). Contrary to traditional Alabama authority, Rule 803(4) allows statements as to causation, so long as they are "reasonably pertinent to diagnosis or treatment." *Lowery v. Jones*, 219 Ala.201, 121 So. 704 (1929); C. Gamble, McElroy's Alabama Evidence § 110.01(2) (4th ed. 1991). Statements of fault ordinarily do not qualify.

Alabama's preexisting counterpart to this exception applied only to statements made to a physician. Rule 803(4) expands the exception to include qualifying statements made to anyone whose participation or involvement is necessary in the process of diagnosis or treatment. See Fed.R.Evid. 803(4) advisory committee's note (stating that the statement may be made to hospital attendants, ambulance drivers, or even members of the family). Rule 803(4) supersedes prior Alabama authority to the effect that a physician could not relate statements made during a consultation held solely for the purpose of enabling the physician to testify. See *Southern Ry. v. Roberts*, 380 So.2d 774 (Ala.1979), overruled by *Tidball v. Orkin Exterminating Co.*, 583 So.2d 239 (Ala.1991); C. Gamble, McElroy's Alabama Evidence § 261.01(3) (4th ed. 1991).

**Paragraph (5). Recorded recollection.** Rule 803(5), identical to its federal counterpart, presents the classic hearsay exception known as "past recollection recorded." A witness may not be able to recollect that to which he or she is called to testify but yet be able to testify that, while the matter was still fresh in the witness's mind, he or she drafted or adopted the writing and knew that it correctly reflected his or her knowledge. The contents of the writing become evidence in lieu of the witness's former recollection. This doctrine has long existed under preexisting Alabama practice. See *Worsham v. Fletcher*, 454 So.2d 946 (Ala.1984); C. Gamble, McElroy's Alabama Evidence § 116.03 (4th ed. 1991).

This is to be distinguished from the doctrine of "present recollection revived," commonly known as "refreshing memory," under which a writing is never admissible to prove the truth of the matter asserted therein but, rather, is just a tool to stimulate the witness's recollection. See Ala.R.Evid. 612; Ala.R.Evid. 801(c). In true refreshing, as contrasted with the present rule, the witness's refreshed recollection is the evidence and not the contents of the writing. See *Ex parte Moore*, 540 So.2d 706 (Ala.1988); C. Gamble, McElroy's Alabama Evidence § 116.02 (4th ed. 1991).

The primary difference between Rule 803(5) and the principle embodied in Alabama common law lies in the respective threshold requirements regarding the degree of deterioration in the witness's memory that is a condition precedent to admissibility. Under prior Alabama law, a writing was not admissible under the "past recollection recorded" exception unless the witness manifested "no present recollection" of the matter. See *St. Paul Fire & Marine Ins. Co. v. Johnson*, 259 Ala. 627, 67 So.2d 896 (1953). Rule 803(5) requires only that the witness manifest an "insufficient recollection to enable the witness to testify fully and accurately."

The declarant witness, who has insufficient recollection, may have executed the writing, but it is not required that that witness have done so. Such a witness may have seen and adopted what someone else wrote about the event. This principle is consistent with preexisting Alabama practice. See *Metropolitan Life Ins. Co. v. Fox*, 37 Ala.App. 31, 64 So.2d 122 (1952), cert. denied, 258 Ala. 579, 64 So.2d 135 (1953). Whether the witness wrote or adopted the writing, however, that act must have been done while the matter was still fresh in the witness's memory. See *United States v. Orrico*, 599 F.2d 113 (6th Cir.1979). Compare *Roll v. Dockery*, 219 Ala. 374, 122 So. 630 (1929).

This exception is to be used cautiously, so as to preclude misuse, such as could occur if a witness feigns insufficient recollection in order to get before the jury a written statement of the witness's testimony that has been carefully prepared for purposes of the litigation.

Much debate existed at common law regarding whether the jury should be allowed to take a "past recollection recorded" writing into the jury room. Rule 803(5) permits the writing to be read to the jury but does not permit it to be admitted as an exhibit unless the adverse party so offers it. This treatment of such writings is consistent with the modern practice regarding depositions. Ala.R.Civ.P. 32; *Century Plaza Co. v. Hibbett Sporting Goods, Inc.*, 382 So.2d 7 (Ala.1980).

**Paragraph (6). Records of regularly conducted activity.** Paragraph (6) is identical to its federal counterpart. It is the modern, expanded counterpart of the "business records exception" as found in common law hearsay principles. At least as regards business records, this rule is similar to two preexisting Alabama evidence principles – one based on a statute and the other based on a rule of procedure. Alabama business records are admissible under an exception to the hearsay rule in civil cases by authority of Ala.R.Civ.P. 44(h). In criminal cases, they are exempted from the hearsay ban by statute. Ala. Code 1975, § 12-21-43.

This exception is based upon both reliability and necessity. The historic basis for accepting business records as reliable lay in the belief that business records were made by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." See Fed.R.Evid. 803(6) advisory committee's note. Ala.R.Evid. 803(6) carries through this same principle by the requirement that the document must have been kept in the course of regularly conducted business activity, with it being the regular practice of the business to make the record. From the perspective of necessity, the rule represents that continuing effort to relax "the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type." See Fed.R.Evid. 803(6) advisory committee's note.

Rule 803(6) expands the scope of admissibility by defining the term "business" as including any "business, institution, association, profession, occupation, and calling of every kind," without regard to whether it is conducted for profit. This breadth of definition is not new to the evidence law of Alabama. See, e.g., Ala. Code 1975, § 12-21-43 (ending with the statement: "The term "business' shall include a business, profession, occupation and calling of every kind."); Ala.R.Civ.P. 44(h) (extending the exception to "any business, profession, occupation, or calling").

This rule of admissibility includes records made when the person entering the information received it from another. Consequently, and as under preexisting Alabama practice, the person who makes the entry in the record does not have to have possessed firsthand knowledge of the facts entered. See *Meriweather v. Crown Inv. Corp.*, 289 Ala. 504, 268 So.2d 780 (1972); Ala. Code 1975, § 12-21-43; Ala.R.Civ.P. 44(h) (providing: "The circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker,... may be shown to affect its weight but ... not... its admissibility."). See also C. Gamble, McElroy's Alabama Evidence § 254.01(2) (4th ed. 1991). Compare *United*

*States v. Ahrens*, 530 F.2d 781, 784 (8th Cir.1976) (holding that Federal Rule 803(6) requires no personal knowledge on the part of the maker of the record). While the entrant or maker of the record is not required to possess a firsthand knowledge of the matters recorded, Rule 803(6) does require that one transmitting information that another records in the regular course of business must have "knowledge" of the facts communicated. Compare *Meriweather v. Crown Inv. Corp.*, 289 Ala. 504, 268 So.2d 789 (1972); *Bailey v. Tennessee Coal, Iron & R.R. Co.*, 261 Ala. 526, 75 So.2d 117 (1954). Equally clear is the fact that the person transmitting the information must be doing so in conformance with regular business practice. Indeed, all parties participating in making the record should be acting within the routine of the business in question.

As a condition precedent to admissibility under this hearsay exception, the proponent must call a witness to lay the prescribed foundation. This is largely the same foundation applicable under pre-rules case law and includes testimony that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of that business activity to make the record. See *Ex parte Frith*, 526 So.2d 880 (Ala.1987). There is no requirement that the authenticating witness be the custodian, entrant, or maker of the record. See *Hammett v. State*, 482 So.2d 1330, 1334 (Ala.Crim.App.1985). Not only must the record be relevant to regularly conducted business, but it must be shown that the generation of such a record is a regularly conducted activity of the business. It is this latter requirement that has caused courts to exclude certain records made solely in anticipation of, and in preparation for, pending litigation. See, e.g., *United States v. Kim*, 595 F.2d 755, 761 (D.C.Cir.1979).

It should be emphasized that satisfying the present hearsay exception does not give the evidence carte blanche admissibility over other independent objections, such as those relating to opinion, irrelevancy, best evidence, etc. See *Reeves v. King*, 534 So.2d 1107 (Ala.1988); *Gullatt v. State*, 409 So.2d 466 (Ala.Crim.App.1981). These other evidentiary rules of exclusion would have to be satisfied also. See C. Gamble & F. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1987*, 40 Ala.L.Rev. 95, 121 (1988). Rule 803(6), by use of the words "opinions" and "diagnoses," merely stands for the proposition that these things are admissible through records if they are otherwise qualified under the opinion rule, as would be the case if the statement had been made by an expert, as recognized by Ala.R.Evid. 702, or is "helpful," as now provided by Ala.R.Evid. 701. Such an interpretation is consistent with Alabama's preexisting common law.

The forms of a business record are many and varied. This is indicated by the use of the phrases "data compilation" and "in any form." Use of these phrases is consistent with preexisting Alabama law. See, e.g., Ala. Code 1975, § 12-21-43 (while limiting its provisions to writings or records, this statute calls for the admission of such "in any form"); Ala.R.Civ.P. 44(h); Ala. Code 1975, § 12-21-43 (specifically expanding business records to include any photostatic or photographic copy of the record). The committee anticipates that such forms may include computerized records. See J. Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with Law*, 71 Yale L.J. 239 (1961); Norton v. State, 502 So.2d 393 (Ala.Crim.App.1987).

Rule 803(6) vests discretion in the trial court to exclude records for a lack of trustworthiness even if the customary elements are satisfied. Such exclusion is in order when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." In most instances, satisfaction of the rule's other requirements should result

in admissibility unless special trustworthiness problems appear. Cf. *United States v. Panza*, 750 F.2d 1141, 1150 (2d Cir.1984) (minor incompleteness of files judged as going to weight rather than admissibility). The party objecting to the admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. *In re Japanese Electronic Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir.1983), reversed by *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

A hospital record that satisfies the elements of this rule would be admissible as under pre-rules Alabama evidence law. See *Smoot v. State*, 520 So.2d 182 (Ala.Crim.App.1987). Use of the term “diagnoses” makes this clear. Such admissibility abrogates the necessity for, at least for hearsay purposes, the preexisting specialized statute making admissible certified copies of hospital records that are generated in the usual and regular course of the hospital’s business. Ala. Code 1975, § 12-21-5. It is to be emphasized that hospital records satisfying Rule 803(6) are not hereby granted carte blanche admissibility. See *Reynolds v. State*, 484 So.2d 1171 (Ala.Crim.App.1985).

**Paragraph (7). Absence of entry in records kept in accordance with the provisions of paragraph (6).** This paragraph is identical to the corresponding federal provision, except for the addition of a comma after the word "memoranda." Rule 803(6) governs the admissibility of business records, with the term "business" broadly defined. A search for a business record, however, may be undertaken without success. In that event, Rule 803(7) provides that evidence that a particular matter is not included in business records where it logically would have been expected is admissible to prove the nonoccurrence or nonexistence of the matter, if the matter searched for was of a kind regularly made and preserved in the business records made admissible by Rule 803(6). The party objecting to the admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. *In re Japanese Electronic Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), reversed, *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Some common-law authority stands for the proposition that evidence of an absence of a regular entry is nonhearsay. Yet other decisions, however, have treated such evidence as hearsay and as not within any exception to the hearsay rule. Rule 803(7) lays this issue to rest, in favor of admissibility. See E. Cleary, *McCormick on Evidence* § 250 (3d ed. 1984).

Alabama authority, predating Rule 803(7), recognized an "absence of entry" exception. See, e.g., *Jenkins v. Avery*, 257 Ala. 387, 59 So. 2d 671 (1952) (school records); *Reichert v. Jerome H. Sheip, Inc.*, 212 Ala. 300, 102 So. 440 (1924) (church records). See also C. Gamble, *McElroy’s Alabama Evidence* § 220.02 (4th ed. 1991).

The committee intends that this rule have no impact upon that line of Alabama decisions regarding the admission of a futile search as evidence of the unavailability or nonexistence of a certain person. See *Seibold v. Rogers*, 40 Ala. 438, 18 So. 312 (1895). See also C. Gamble, *McElroy’s Alabama Evidence* §§ 257.02, 257.07(9), 233.01(15) (4th ed. 1991).

**Paragraph (8). Public records and reports.** Like business records, public records have attained common law recognition as an exception to the hearsay rule. This treatment is based upon both reliability and necessity. Reliability is based upon the assumption that a public official will carry out the duty to record properly. See E. Cleary, *McCormick on Evidence*

§ 315, at 888 (3d ed. 1984). Necessity is furnished by the inconvenience of requiring public officials to appear in court to testify.

**Subdivision (A).** This subdivision recognizes the admissibility of records, reports, statements, or data compilations setting forth the "activities of the office or agency." Such admissibility has long been recognized at common law. See *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123 (1919); *Ballew v. United States*, 160 U.S. 187 (1895).

**Subdivision (B).** Matters observed by a public official, set forth in a public record or report, are admissible if the official was under a duty to report such matters. Rule 803(8)(B) contains an additional requirement that the official must have observed the recorded matters pursuant to a duty imposed by law. Recognizing a potential conflict with a criminal defendant's right to confront witnesses, this subdivision provides that matters observed by police officers and other law enforcement personnel are not admissible under this rule when offered in criminal cases against the accused. Numerous decisions at common law have sustained the admission of records of matters observed. See, e.g., *T'Kach v. United States*, 242 F.2d 937 (5th Cir.1957); *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir.1945).

**Subdivision (C).** At common law a split of authority existed regarding the admissibility of the "evaluative report." Rule 803(8)(C), as does its counterpart under the Federal Rules of Evidence, adopts that line of cases calling for admissibility. See *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir.1950) (Bureau of Mines report regarding cause of gas tank explosion); *United States v. Dumas*, 149 U.S. 278 (1893). Such admissibility, because of the possible conflict with the constitutional right to confront witnesses, does not apply as to the defendant in a criminal case. Factual findings are admissible only if made pursuant to authority granted by law. The party objecting to the admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. In re Japanese Electronic Prods. Antitrust Litig., 723 F.2d 238 (3d Cir.1983), reversed, Matsushita Electric Indus. Co. v. ZenithRadio Corp., 475 U.S. 574 (1986).

Consistent with the general rule of interpretation that a state's adoption of a rule based upon a federal model renders as persuasive authority the federal decisions applying the rule, Rule 803(8)(C) is intended to incorporate the interpretation set out in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). Regarding a split in authority over the question of whether "factual findings" includes "opinions" or "conclusions," the Supreme Court in that case adopted a broad, liberal view of Federal Rule 803(8)(C), in light of the "liberal thrust" of the Rules – as illustrated, e.g., in Rules 701-705, dealing with admission of expert testimony. The Supreme Court held that "portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." 488 U.S. at 170.

Rule 803(8)(C) is likewise intended to carry the Eleventh Circuit's interpretation of *Beech Aircraft Corp. v. Rainey*. Footnote 13 of the *Rainey* opinion observes that the case presented no question of whether the Rule distinguishes between opinions regarding "fact" and opinions regarding "law" – i.e., whether "legal conclusions" contained in official reports are admissible. In *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989), the court decided that "legal conclusions" are not made admissible through Federal Rule 803(8)(C). The *Hines* opinion offers some guidance for distinguishing "factual" conclusions from "legal"

conclusions: “Another way of looking at this inquiry is: Would the conclusion, if made by the district court, be subject to the clearly erroneous standard of review on appeal? If so, then the conclusion is factual; if not, then the conclusion is legal.” 886 F.2d at 303.

By way of illustration, nothing in Rule 803(8)(C) is intended to guarantee the carte blanche or presumptive admissibility of police accident reports as public records. Such records may be excluded because the attendant circumstances indicate a lack of trustworthiness. If a police officer has little training or experience, for example, then the officer’s expertise may not be sufficient to authorize admission of an expert opinion or conclusion. See Ala.R.Evid. 702. No matter what the level of expertise possessed by the investigating officer, a naked legal conclusion found in a police accident report could be excluded if it would not be helpful, as required by Ala.R.Evid. 701(b), or would not assist the trier of fact, as required under Ala.R.Evid. 702.

Some evaluative reports continue to be admissible under federal statutes. See, e.g., 7 U.S.C. § 78 (1994) (findings of Secretary of Agriculture as to grade of grain); 7 U.S.C. § 210(f) (1994) (Secretary of Agriculture’s findings in damages action against stockyard owner); 7 U.S.C. § 292 (1994); 7 U.S.C. § 1622(h) (1994); 8 U.S.C. § 1440(c) (1994); 18 U.S.C. § 4245 (1988); 42 U.S.C. § 269(b) (1988); 46 U.S.C § 679 (1988).

Traditional Alabama common law recognizes the admissibility of public records. See *Zinn v. State*, 527 So.2d 148 (Ala.1988); *Vizzina v. City of Birmingham*, 533 So.2d 652 (Ala.Crim.App.1987), aff’d, 533 So.2d 658 (Ala.1988); C. Gamble, *McElroy’s Alabama Evidence* § 218.01 (4th ed. 1991). In addition to case law, a general statute and a rule of court recognize the exception. See Ala. Code 1975, § 12-21-35; Ala.R.Civ.P. 44. Additionally, there exist numerous other statutes providing for the admissibility of specific public records. See, e.g., Ala. Code 1975, § 12-21-35 (official record of person to whom license plate has been issued; superseded as to civil cases by Ala.R.Civ.P. 44); § 40-7-6 (tax assessment as proof of value or ownership); § 35-16-3 (mortality tables); § 35-16-1 (annuity tables); § 12-17-270 (official reporter’s transcript); § 15-16-20 (adjudication of competency to stand trial); § 15-16-22 (report of lunacy commission); § 11-7-8 (survey or plat of county surveyor); § 40-10-30 (recitals in a tax deed); § 12-21-99 (sheriff’s deed or return; superseded in civil cases by Ala.R.Civ.P. 44); § 12-21-93 (statutes of other states).

**Paragraph (9). Records of vital statistics.** This paragraph is very similar to its federal counterpart. Under this paragraph, records or data compilations in any form – regarding such vital statistics as those relating to births, fetal deaths, deaths, or marriages – are admissible if the statistics were reported to a public office pursuant to the requirements of law. This exception to the hearsay rule has long been recognized in Alabama by both statute and rule of court. See, e.g., Ala. Code 1975, § 12-21-101; Ala.R.Civ.P. 44. There are also more specialized Alabama statutes dealing with such reports. See, e.g., Ala. Code 1975, § 22-9A-14 (births and deaths as kept by state or local registrar of vital statistics), § 30-1-13 (county health officer’s record of death). C. Gamble, McElroy’s Alabama Evidence § 267.01 (4th ed. 1991); J. Colquitt, Alabama Law of Evidence § 8.3(G) (1990). The term “fetal deaths” as used in this paragraph has the same meaning that it has under Alabama’s vital statistics statutes. See Ala. Code 1975, § 22-9A-1.

**Paragraph (10). Absence of public record or entry.** It sometimes becomes material to prove that a particular thing does not appear in the records of a public office or agency. In

many instances such evidence is offered to show the nonoccurrence or nonexistence of a matter regarding which a record otherwise would regularly have been made and preserved by the public office or agency. Rule 803(10), identical to its federal counterpart, provides for the admissibility of such proof of absence so long as it is offered in one of two forms. The proof may be offered either by a certification meeting the requirements of Ala.R.Evid. 902, or by testimony of a diligent but unsuccessful search for the record, report, statement, data compilation, or entry. This exception is similar to that extended under Ala.R.Evid. 803(7) to evidence regarding the absence of an entry in records relating to regularly conducted business activities.

Evidence as to the absence of a matter from a public office or agency likewise may be admissible under a number of federal statutes. See, e.g., 8 U.S.C. § 1284(b) (1994); 8 U.S.C. § 1360(d) (1994); 42 U.S.C. § 405(c)(3), (4)(B), (4)(C) (1988). Alabama common law precluded the admission of such proof. See *Whitman v. Whitman*, 253 Ala. 643, 46 So.2d 422 (1950). See also C. Gamble, McElroy's Alabama Evidence § 269.03 (4th ed. 1991). By subsequent legislation and court rules, however, proof of the absence of a record, at least if such proof is certified, is now admissible. Ala. Code 1975, § 12-21-34; Ala.R.Civ.P. 44.

**Paragraph (11). Records of religious organizations.** After the adoption of these rules of evidence, records of activities of religious organizations could be admissible as business records if they meet the requirements of Ala.R.Evid. 803(6). Rule 803(11), however, recognizes a specialized exception for such records. The breadth of this exception includes statements regarding "facts of personal or family history." Rule 803(11) expands upon preexisting rules and statutes under which such records are admissible, at least as they regard marriages, births, and deaths. See Ala. Code 1975, § 12-21-101 (superseded in civil cases by Ala.R.Civ.P. 44); § 30-1-7(b).

**Paragraph (12). Marriage, baptismal, and similar certificates.** Religious and public officials, as well as others, are authorized, either by the rules or practices of a religious organization or by law, to perform certain acts. Marriage and baptismal ceremonies are illustrative examples of such acts. Rule 803(12), identical to its federal counterpart, provides for the admissibility, over a hearsay objection, of an authorized individual's certificate that such an act was performed. The certificate must purport to have been issued at the time the act was performed or within a reasonable time thereafter.

If the person performing the act is a public official, then the person's statements may be admissible under Ala.R.Evid. 803(8), if self-authentication is established as prescribed in Ala.R.Evid. 902. Consequently, this Rule 803(12) could have limited, duplicative application; as, for example, in the case of a judge who performs a marriage ceremony. The field of application for Rule 803(12), however, is much broader and extends to certification by clergymen and the like who perform marriages and other ceremonies or administer sacraments. This would include, beyond marriages, baptisms and confirmations. See Fed.R.Evid. 803(12) advisory committee's note.

If the person executing the certificate is not a public official, then the self-authentication principles found in Ala.R.Evid. 902 would not apply; in such a case the party offering the certificate must lay a predicate establishing that the person was authorized to make, and did in fact make, the certificate at the prescribed time. Once such authority and authenticity have been established, the time element may safely be held to be supplied by the certificate itself,

particularly in light of the presumption that a document was executed on the date stated therein. See Fed.R.Evid. 803(12) advisory committee's note.

A provision similar to that of Rule 803(12) is found in Ala. Code 1975, § 30-1-13. Unlike Rule 803(12), however, this statute expressly applies only to marriages and it requires that a qualifying certificate have been filed with the judge of probate within one month after the marriage is solemnized.

**Paragraph (13). Family records.** This paragraph is identical to its federal counterpart. Statements of fact regarding family history, such as are subject to this rule, have historically been granted admissibility over hearsay objection, under both state and federal law. On occasion the statement is found in a family Bible. See 20 C.F.R. § 404.703(c) (Social Security regulation regarding proof of age by entry in family Bible); *Brown v. State*, 247 Ala. 288, 24 So.2d 223 (1945). See C. Gamble, McElroy's Alabama Evidence § 250.03(3) (4th ed. 1991); W. Schroeder, J. Hoffman, & R. Thigpen, Alabama Evidence § 8-9 (1987). In other cases, the courts have admitted evidence of inscriptions on tombstones. *Boyett v. State*, 130 Ala. 77, 30 So. 475 (1901). See C. Gamble, McElroy's Alabama Evidence § 250.03(2) (4th ed. 1991). Rule 803(13) broadens the scope of this common law doctrine to include "genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like."

This Rule 803(13) exception contemplates that the genealogy, chart, inscription, or other entry of family or personal history will have been recorded in the ordinary course of the family's life. Entries made in preparation for trial would not be admissible under this exception.

**Paragraph (14). Records of documents affecting an interest in property.** This paragraph, identical to its federal counterpart, embodies a long-standing policy toward the admissibility of title documents that have been recorded in compliance with statutes that authorize the filing of such documents in a prescribed public office. Compare Ala.R.Civ.P. 44; Ala. Code 1975, §§ 12-21-96 through -99. The record of such a document is admissible as proof of both the contents of the original recorded document and its execution and delivery by each person by whom it purports to have been executed. To be admissible under this exception, the record, of course, must satisfy the requirements of the statute authorizing its recordation. See Fed.R.Evid. 803(14) advisory committee's note.

**Paragraph (15). Statements in documents affecting an interest in property.** Recitals of fact are often contained in dispositive documents dealing with an interest in property. An example is a statement in a deed reciting that the grantors are all heirs of the last owner of record. Rule 803(15) exempts such statements from the hearsay rule. The circumstances under which such documents are executed, when combined with the requirement that the statement be relevant to the purpose of the document, are believed to furnish the requisite trustworthiness. By the terms of Rule 803(15), the judge may hold this exception inapplicable, resulting in inadmissibility, if "dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document." See Fed.R.Evid. 803(15) advisory committee's note.

This exception is limited to documents that are dispositive of the title to property, such as deeds, mortgages, wills, etc.

Application of this exception does not necessarily result in carte blanche admissibility of the document. Those statements irrelevant to the purpose of the document, for example, would not be admissible, under this exception, over a hearsay objection. Additionally, other nonhearsay objections may be appropriately raised against the admissibility of such documents.

Some Alabama statutes authorize the admissibility of statements in documents affecting ownership of, or an interest in, land. Affidavits relating to ownership of land, for example, are statutorily admissible to prove the truth of the matter asserted. Ala. Code 1975, § 35-4-69. By the statute, such affidavits, however, are not admissible unless the affiant is deceased; a nonresident; one whose residency is unknown to the party offering the affidavit; or is too old, infirm, or sick to attend court. Ala. Code 1975, § 35-4-70 (superseded by this rule). See C. Gamble, McElroy's Alabama Evidence § 260.02 (4th ed. 1991).

**Paragraph (16). Statements in ancient documents.** This rule adopts the "ancient documents exception," long recognized by the common law of hearsay. Unlike the corresponding federal rule, which adopts a twenty-year period, this Alabama rule adopts thirty years as the age required to establish the reliability that supports this exception to the hearsay rule. See Fed.R.Evid. 803(16). Even if exempted from the hearsay ban, however, such a document must be authenticated in compliance with Ala.R.Evid. 901(b)(8).

Pre-existing Alabama law recognized an exception for ancient documents. See *Stewart v. Peabody*, 280 Ala. 5, 189 So.2d 554 (1966). See also C. Gamble, McElroy's Alabama Evidence § 321.01 (4th ed. 1991). Rule 803(16) differs from the preexisting law, however, by abandoning any requirement that the document be without a suspicious appearance. See *McMillan v. Aiken*, 205 Ala. 35, 88 So. 135 (1920). The requirement that the document have a nonsuspicious appearance continues, but is now part of the authentication requirements. See Ala.R.Evid. 901(b)(8).

**Paragraph (17). Market reports, commercial publications.** This exception, identical to its counterpart under the Federal Rules of Evidence, provides for the admissibility of certain commercial publications. See Fed.R.Evid. 803(17). The indicia of reliability underlying the exception are the motivation of compilers to publish accurate reports and the reliance upon such reports by either the public generally or those in a particular occupation. Qualifying commercial publications include, among others, newspaper market reports, telephone directories, and city directories. See 6 J. Wigmore, Wigmore on Evidence §§ 1702-1706 (Chadbourn Rev. 1976).

This exception is consistent with similar preexisting Alabama principles. A statute, for example, recognizes the admissibility of

> "[p]rice current and commercial lists, printed at any commercial mart, [as] presumptive evidence of the value of any article of merchandise specified therein, at that place, at the date thereof and of the rate of exchange between that and other places, also of the rates of insurance, freights and the times of arrival and departure of ships and other vessels." Ala. Code 1975, § 12-21-113; C. Gamble, McElroy's Alabama Evidence § 259.03 (4th ed. 1991); J. Colquitt, Alabama Law of Evidence § 8.3(1) (1990). Additionally, a section of Alabama's version of the Uniform Commercial Code recognizes the admissibility, when

offered to prove the prevailing price or value of goods bought and sold in any established commodity market, of reports appearing in official publications, trade journals, newspapers, or periodicals of general circulation. Ala. Code 1975, § 7-2-724.

**Paragraph (18). Learned treatises.** Alabama has long been in the minority of jurisdictions in permitting the admissibility of learned treatises as substantive evidence in the case. *Seaboard Sys. R.R. v. Page*, 485 So.2d 326 (Ala.1986). See Comment, *Learned Treatises As Direct Evidence: The Alabama Experience*, 1967 Duke L.J. 1169; C. Gamble, McElroy's Alabama Evidence § 258.01 (4th ed. 1991). Most jurisdictions, in contrast, have relegated the use of such treatises to the cross-examination of experts or to showing the basis for the expert's opinion. See *Brown v. United States*, 419 F.2d 337, 341 (8th Cir. 1969); 6 J. Wigmore, Wigmore on Evidence §§ 1609-1708 (Chadbourn Rev. 1976). Such treatises are held relevant to the weight or credibility the trier of fact is to give to the expert's testimony but not to constitute substantive evidence of the matter asserted in the treatise. See E. Cleary, McCormick on Evidence § 322 (3d ed. 1984).

Rule 803(18), identical to its federal counterpart, adopts Alabama's minority position, by which learned treatises constitute direct, substantive evidence of the relevant matter therein and, thereby, fall within their own exception to the hearsay rule of exclusion. Because of the inherent reliability of such works, they are now admissible to prove the truth of the matter asserted therein. This fact, of course, does not preclude the continued admission of such treatises as going to the weight or credibility of the expert's testimony.

The scope of this exception includes statements in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art. Aside from the limits established by the foregoing statement of scope, two conditions must be satisfied before such statements are admissible. First, the treatise, periodical, or pamphlet must be established as reliable authority, usually meaning that the author's expertise is recognized in the field and that other professionals acknowledge the accuracy of the publication. Reliability in the field may be established by the admission of the expert who is being questioned about the publication, through other expert testimony, or by judicial notice. See *Baenitz v. Ladd*, 363 F.2d 969, 970 (D.C.App.1966) (judicial notice of material found in Encyclopedia Britannica); Ala.R.Evid. 201 (judicial notice). Compare C. Gamble, McElroy's Alabama Evidence § 258.02 (4th ed. 1991) (judicial notice of material in dictionaries). The second condition is that the person offering the publication must show either that the publication was relied upon by the expert during direct examination or was called to the expert's attention on cross-examination. This second requirement, in the words of one author, is "designed to ensure that the materials are used only under the chaperonage of an expert to assist and explain in applying them." E. Cleary, McCormick on Evidence § 321, at 901 (3d ed. 1984). See C. Gamble, McElroy's Alabama Evidence § 258.01(3) (4th ed. 1991) (describing preexisting Alabama law as being that an expert witness either must have relied upon the treatise during direct examination or must have been confronted with it on cross-examination). Contrary to preexisting Alabama law, which allowed the treatise to be introduced, Rule 803(18) only permits the treatise statements to be read into evidence. Contra *Harrison v. Wientjes*, 466 So.2d 125 (Ala.1985).

**Paragraph (19). Reputation concerning personal or family history.** In a number of instances, throughout these rules and under preexisting Alabama law, witnesses are allowed to give testimony relating to reputation. Rule 803(19) recognizes the admissibility of such

evidence when it relates to personal and family history. Under Rule 803(19), which is identical to its federal counterpart, the reputation as to which a witness may testify is measured among one's family (whether by blood, adoption, or marriage), among one's associates, or in the community. This concept, regarding the setting of the reputation, is subject to expansion and may include a neighborhood, workplace, religious group, or a social activity. See Fed.R.Evid. 803(19) advisory committee's note. To qualify as admissible under this exception, a statement must relate to reputation concerning a person's "birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact" related to one's personal or family history.

Alabama law has long recognized the admissibility of general reputation among members of a family when offered to show the family history or pedigree of a member or a claimed member of the family. *Mostilla v. Ash*, 234 Ala. 626, 176 So. 356 (1937) (reputation in family to prove common law marriage); C. Gamble, McElroy's Alabama Evidence § 250.04 (4th ed. 1991). Reputation in the community, as to one's family history, likewise has been admitted under preexisting Alabama law. See C. Gamble, McElroy's Alabama Evidence § 250.04 (4th ed. 1991).

Rule 803(19) does not change those foundation requirements that must precede any witness's testimony as to another's reputation. The witness, for example, must be shown to possess sufficient knowledge of the family, the associates, or the community in order to testify as to a reputation within that group. *Marasso v. State*, 18 Ala.App. 488, 93 So. 226 (1922). See C. Gamble, McElroy's Alabama Evidence § 26.02(10) (4th ed. 1991).

**Paragraph (20). Reputation concerning boundaries or general history.** This paragraph is identical to its federal counterpart. The first portion of this exception exempts from hearsay objection community reputation concerning boundaries of, or customs affecting, lands in the community. Such reputation is inadmissible if it arises subsequent to the controversy to which it is related. This exception to the hearsay rule, at least as it regards reputation concerning boundary lines, is consistent with historic Alabama law. See *Lilly v. Palmer*, 495 So.2d 522 (Ala.1986); C. Gamble, McElroy's Alabama Evidence § 257.01 (4th ed. 1991).

The second portion of this exception authorizes the admission of reputation as to events of general history that are important to the community, the state, or the nation. Unlike that dealt with in the first portion of this exception, this particular reputation evidence is exempt from any requirement that the reputation antedate the controversy with regard to which the reputation is offered. See Fed.R.Evid. 803(20) advisory committee's note.

**Paragraph (21). Reputation as to character.** This paragraph, identical to its federal counterpart, exempts from the hearsay ban proof of character the admissibility of which is authorized elsewhere in these rules. See Ala.R.Evid. 404(a). A criminal defendant, for example, may present evidence of his or her good character, from which the factfinder may infer that the defendant did not commit the crime charged. See Ala.R.Evid. 404(a)(1). The medium through which to prove such good character is reputation. Ala.R.Evid. 405(a). Because a criminal defendant's reputation is composed of what is being said regarding the defendant, a hearsay exception like this one is necessary to accommodate evidence of what is being said.

This exception also allows proof of character for impeachment of witnesses. See

Ala.R.Evid. 404(a)(3). A primary medium for proving lack of credibility is evidence of a general reputation for not telling the truth. Ala.R.Evid. 608(a). This exception allows such proof over a hearsay objection.

Rule 803(21) conforms with preexisting Alabama practice. Use of the phrase “among associates,” for example, makes it clear that this rule is consistent with prior Alabama decisions expanding the definition of the term “community.” See *Steele v. State*, 389 So.2d 591 (Ala.Crim.App.1980) (holding that one’s school may qualify as a community). See also C. Gamble, McElroy’s Alabama Evidence § 26.02(5) (4th ed. 1991).

**Paragraph (22). Judgment of previous conviction.** A recurring issue involves the admissibility of a former judgment of conviction as evidence in proof of a material issue in a present trial. Rule 803(22), with certain limitations, prevents the exclusion of such a judgment based upon a hearsay objection. The basis for this exception lies in the belief that the criminal justice system guarantees the reliability of criminal convictions through the high burden of proof imposed by the criminal law and the tendency of an accused to defend vigorously against a charge of serious criminal conduct. See E. Cleary, McCormick on Evidence § 328, at 739 (3d ed. 1984). Such an exception, with several differences, exists under preexisting Alabama law. See *Cups Coal Co. v. Tennessee River Pulp & Paper Co.*, 519 So.2d 932 (Ala.1988). See also C. Gamble, McElroy’s Alabama Evidence § 269.05 (4th ed. 1991); W. Schroeder, J. Hoffman, & R. Thigpen, Alabama Evidence § 8-15 (1987).

The present rule recognizes only the admissibility of convictions for felony-grade crimes -- i.e., those crimes punishable by death or imprisonment in excess of one year. See Ala.R.Evid. 609(a)(1) (establishing the same felony-grade requirement as one of the two tests determining which criminal convictions may be used to impeach a witness). This is inconsistent with some authority in Alabama that calls for the admissibility of even misdemeanor convictions. See *Durham v. Farabee*, 481 So.2d 885 (Ala.1985). The theory underlying this exclusion of convictions for misdemeanor offenses is that the motivation to defend against misdemeanor charges is minimal. See Fed.R.Evid. 803(22) advisory committee’s note; W. Shipley, Annotation, *Conviction or Acquittal as Evidence of the Facts on Which it Was Based in Civil Action*, 18 A.L.R.2d 1287, 1295-97 (1951).

Only convictions based upon a trial or a guilty plea will qualify under this hearsay exception. This necessarily means, consistent with former Alabama practice, that a judgment based upon a nolo contendere plea will not qualify. See *May v. Lingo*, 277 Ala. 92, 167 So.2d 267 (1964). Compare Ala.R.Evid. 410.

Rule 803(22) provides that the fact that a conviction is pending on appeal goes to the weight of the evidence but not to its admissibility. Stated differently, the conviction is admissible under this rule even though it is on appeal. The fact that it is on appeal may be shown by the party against whom the evidence of the conviction is offered. Historic Alabama law, on the other hand, has excluded such a conviction offered while it is on appeal. See, e.g., *Cups Coal Co. v. Tennessee River Pulp & Paper Co*., 519 So.2d 932 (Ala.1988); *Fidelity-Phenix Fire Ins. Co. v. Murphy*, 226 Ala. 226, 146 So. 387 (1933). Even though the fact that the conviction is on appeal does not preclude admission, the party against whom the conviction is admitted may explain the circumstances of the conviction as going to the weight to be given to the conviction. See *Durham v. Farabee*, 481 So.2d 885 (Ala.1985); *North River Ins. Co. v. Militello*, 104 Colo. 28, 88 P.2d 567 (1939).

As with other hearsay exceptions, Rule 803(22) generally does not undertake to resolve constitutional issues. To avoid conflict with constitutional rights, however, this exception does not make admissible the convictions of persons other than the accused when such convictions are offered by the state or other governmental authority in a criminal prosecution as evidence of any fact essential to sustain the judgment. See Fed.R.Evid. 803(22) advisory committee's note. Such convictions would be admissible, however, if offered to impeach. Compare Ala.R.Evid. 609.

**Paragraph (23). Judgment as to personal, family, or general history, or boundaries.** At common law, and now under Ala.R.Evid. 803(19) or (20), reputation evidence is admissible over a hearsay objection when related to personal or family history, boundaries, or general history. As a corollary to this hearsay exception, judgments as to these same matters were admitted at common law as manifestations of such reputation. See 5 J. Wigmore, Wigmore on Evidence § 1593 (Chadbourn Rev. 1974). Such judgments are now given their own exception to the hearsay rule. However, these judgments are admissible only in those instances where evidence of reputation would be admitted under Rule 803(19) or Rule 803(20). See *Grant Bros. Constr. Co. v. United States*, 232 U.S. 647 (1914); *Patterson v. Gaines*, 47 U.S. (6 How.) 550, 599 (1848).

**Paragraph (24). Absence of residual or catchall exception.** It should be noted that these rules do not include what is known as a "residual" or "catchall" exception to the hearsay rule. See Fed.R.Evid. 803(24). The committee expresses no position as to whether the Alabama Supreme Court may expand the number of hearsay exceptions by decision. See *Dallas County v. Commercial Union Assurance Co*., 286 F.2d 388 (5th Cir. 1961). However, the committee believes that any expansion in the number of hearsay exceptions generally should be accomplished, rather than on a case-by-case basis, by the Alabama Supreme Court's acting under its authority to prescribe rules of practice and procedure. Nothing in these rules, of course, limits any authority in the Alabama Legislature to enact exceptions to the hearsay rule. See Ala.R.Evid. 802.

[Advisory Committee's Notes amended, eff. 1-30-2020]

**Advisory Committee's Notes to Amendment to Rule 803(6) Effective October 1, 2013**

Rule 803(6) has been amended to keep this rule consistent with its federal counterpart, which was amended in 2000. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. This represents a change from pre-rules caselaw and the former Rule 803(6), in which Alabama courts generally required foundation witnesses to testify. Protections are provided by the authentication requirements of Rule 902(11) for domestic records and Rule 902(12) for foreign records.

The intent behind this amendment, combined with the addition of Rule 902(11) and (12), is to provide a means to satisfy the foundational elements of this hearsay exception without a live witness. The amendment is not intended to give these records *carte blanche* admissibility. With the addition of this amendment, the adoption of Rule 902(11) and (12), and previously

existing Rule 1001(2) and (3), the proponent of the evidence may now overcome authentication, hearsay, and best-evidence-rule objections with a properly certified copy of a record of regularly conducted activity, but all other valid objections remain. Thus, even if the proponent of the evidence satisfies the requirements of this amendment, the evidence may still be excluded under applicable general rules of evidence. See 2 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 254.01(7)(a) (6th ed. 2009) (recognizing that "successfully satisfying all the elements of the business records exception does not guarantee what the courts term *'carte blanche'* admissibility"). By way of example, a record of regularly conducted activity that contains multiple levels of hearsay may still properly be excluded if the proponent does not overcome objections for each level of hearsay. See 2 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 254.01(7)(d) (6th ed. 2009).

**Advisory Committee’s Notes to Amendment to**
**Advisory Committee's Notes to Rule 803**
**Effective January 30, 2020**

The original Advisory Committee’s Notes to Rule 803(7), upon the adoption of Rule 803 in 1996, included a sentence that read: "This paragraph, like Rule 803(6), recognizes the trial court’s power to exclude evidence otherwise permitted if a lack of trustworthiness is indicated by 'the sources of information or other circumstances.'" Similarly, the 1996 Notes to Rule 803(8) included a sentence that read: "While admissibility is assumed if the requirements of Rule 803(8)(C) are met, the trial judge is vested with discretion, as under Rule 803(6), to exclude factual findings if 'the sources of information or other circumstances indicate lack of trustworthiness.'" Those two sentences have been deleted and replaced by this sentence and citation: "The party objecting to the admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. *In re Japanese Electronic Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), reversed, *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986)." The sentence referencing *Matsushita* is identical to a sentence contained in the Advisory Committee's Notes to Paragraph (6) of Rule 803, upon its adoption in 1996.

Paragraphs (6), (7), and (8) of Federal Rule of Evidence 803 were amended in 2014 to make it more plain that the intent of these paragraphs is that, if the proponent has established the requirements of the exception, then the burden of proving a lack of trustworthiness is on the opponent of the evidence. The Advisory Committee’s Notes to paragraphs (7) and (8) of Rule 803 are amended to acknowledge agreement with the 2014 Federal amendments, i.e., that the opponent of the evidence has the burden of proving a lack of trustworthiness.

**Advisory Committee’s Notes to Amendment to Rule 803(16)**
**Effective January 30, 2020**

Rule 803(16), Federal Rules of Evidence, was amended in 2017 to provide: "A statement in a document that was prepared before January 1, 1998, and whose authenticity is established." The corresponding Alabama Rule is amended to be consistent with the Federal amendment.

The ancient-documents exception to hearsay is now limited to statements in documents prepared before January 1, 1998, because of the risk that the former 30-year rule could, in the

near future, be used to admit vast amounts of unreliable electronically stored information ("ESI") published on the Internet or in other unreliable electronic archives.

The ancient-documents exception remains available for hard-copy documents "prepared" before 1998. A document is "prepared" when the statement was recorded in the hard-copy document. For example, if a hard-copy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995, even though the scan was made after 1998. The relevant point is the date on which the information is recorded, not when the information is prepared in a certain format for presentation at trial. However, if the content of the document is itself altered after the 1998 cutoff date, then the hearsay exception will not apply to statements that were added in the post-1998 alteration.

Going forward, it is anticipated that any need to admit old hard-copy documents produced after January 1, 1998, will decrease, e.g., because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. For example, Rule 803(6) may be used for many of these ESI documents. Also, many old documents can be admitted for the nonhearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient-documents hearsay exception is not intended to have any effect on authentication of ancient documents. The methods of authenticating old documents remain unchanged.

**Note from reporter of decisions:** The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from 118 So. 3d.

**Note from the reporter of decisions:** The order amending the Advisory Committee's Notes to Rule 503A and Rule 803 and amending Rule 803(16), and adopting Advisory Committee's Notes to those amendments, and adopting Rule 902(13) and Rule 902(14) and Advisory Committee's Notes to those rules, effective January 30, 2020, are published in that volume of *Alabama Reporter* that contains Alabama cases from __ So. 3d.