CHAPTER 908

EVIDENCE — HEARSAY

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NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

908.01 Definitions. The following definitions apply under this chapter:

(1) STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) DECLARANT. A "declarant" is a person who makes a statement.

(3) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross−examination concerning the statement, and the statement is:

1. Inconsistent with the declarant's testimony, or

2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

3. One of identification of a person made soon after perceiving the person; or

(b) *Admission by party opponent.* The statement is offered against a party and is:

1. The party's own statement, in either the party's individual or a representative capacity, or

2. A statement of which the party has manifested the party's adoption or belief in its truth, or

3. A statement by a person authorized by the party to make a statement concerning the subject, or

4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or

5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

History: Sup. Ct. Order, 59 Wis. 2d R1, R220 (1973); 1991 a. 31.

A witness's claimed nonrecollection of a prior statement may constitute inconsistent testimony under sub. (4) (a) 1. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80.

The admissibility under sub. (4) (a) 2. and 3. of prior consistent statements is discussed. Green v. State, 75 Wis. 2d 631, 250 N.W.2d 305.

When a defendant implied that the plaintiff recently fabricated a professed belief that a contract did not exist, a financial statement that showed the plaintiff's nonbelief in the existence of the contract was admissible under sub. (4) (a) 2. Gerner v. Vasby, 75 Wis. 2d 660, 250 N.W.2d 319.

Under sub. (4) (b) 4., there is no requirement that the statement be authorized by the employer or principal. Mercurdo v. County of Milwaukee, 82 Wis. 2d 781, 264 N.W.2d 258.

Under sub. (4) (b) 1., any prior out−of−court statements by a party, whether or not they are "against interest", are not hearsay. State v. Benoit, 83 Wis. 2d 389, 265 N.W.2d 298 (1978).

Sub. (4) (a) 3. applies to statements of identification made soon after perceiving the suspect or his likeness in the identification process. State v. Williamson, 84 Wis. 2d 370, 267 N.W.2d 337 (1978).

Statements under sub. (4) (b) 5. are discussed. Bergeron v. State, 85 Wis. 2d 595, 271 N.W.2d 386 (1978).

A robber's representation that a bottle contained nitroglycerine was admissible under sub. (4) (b) 1. to prove that the robber was armed with a dangerous weapon. Beamon v. State, 93 Wis. 2d 215, 286 N.W.2d 592 (1980).

A prior inconsistent statement by a witness at a criminal trial is admissible under sub. (4) (a) 1. as substantive evidence. Vogel v. State, 96 Wis. 2d 372, 291 N.W.2d 850 (1980).

The admission of a statement by a deceased co−conspirator did not violate the right of confrontation and was within sub. (4) (b) 5. State v. Dorcey, 103 Wis. 2d 152, 307 N.W.2d 612 (1981).

Testimony as to a conversation in which the defendant was accused of murder and did not deny it was admissible under the adoptive admissions exception under sub. (4) (b) 2. State v. Marshall, 113 Wis. 2d 643, 335 N.W.2d 612 (1983).

The statement of a coconspirator under sub. (4) (b) 5. may be admitted without proof of the declarant's unavailability or a showing of particular indicia of reliability; the court must determine whether circumstances exist warranting exclusion. State v. Webster, 156 Wis. 2d 510, 458 N.W.2d 373 (Ct. App. 1990).

A confession made in Spanish to a detective who took notes and reported in English was admissible under sub. (4) (b). State v. Arroyo, 166 Wis. 2d 74, 479 N.W.2d 549 (Ct. App. 1991).

Rule 901.04 (1) permits an out−of−court declaration by a party's alleged coconspirator to be considered by the trial court in determining whether there was a conspiracy under sub. (4) (b) 5. State v. Whitaker, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992).

When a person relies on a translator for communication the statements of the translator are regraded as the speaker's for hearsay purposes. State v. Patino, 177 Wis. 2d 348, 502 N.W.2d 601 (Ct. App. 1993).

The admissibility of one inconsistent sentence under sub. (4) (a) 1. does not bring the declarant's entire statement within the scope of that rule. Wikrent v. Toys "R" Us, 179 Wis. 2d 297, 507 N.W.2d 130 (Ct. App. 1993).

While polygraph tests are inadmissible, post−polygraph interviews, found distinct both as to time and content from the examination that preceded them and the statements made therein, are admissible. State v. Johnson, 193 Wis. 2d 382, 535 Wis. 2d 441 (Ct. App. 1995).

There must be facts that support a reasonable conclusion that a defendant has "embraced the truth" of someone else's statement as a condition precedent to finding an adoptive admission under sub. (4) (b) 2. State v. Rogers, 199 Wis. 2d 817, 539 N.W.2d 897 (Ct. App. 1995).

Statements made by a prosecutor, not under oath, in a prior proceeding may be considered admissions if: (1) the court is convinced the prior statement is inconsistent with the statement at the later trial, (2) the statements are the equivalent of testimonial statements, and (3) the inconsistency is a fair one and an innocent explanation does not exist. State v. Cardenas−Hernandez, 214 Wis. 2d 71, 571 N.W.2d 406 (Ct. App. 1997).

A party's use of an out−of−court statement to show an inconsistency does not automatically give the opposing party the right to introduce the whole statement. Under the rule of completeness, the court has discretion to admit only those statements necessary to provide context and prevent distortion. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

To use a prior consistent statement under sub. (4) (a) 2., the proponent must show that the statement predated the alleged recent fabrication and that there was an express or implied charge of fabrication at trial. Arsine v. Cascade Mountain, Inc. 223 Wis. 2d 39, 588 N.W.2d 321 (Ct. App. 1998).

Although s. 907.03 allows an expert to base an opinion on hearsay, it does not transform the testimony into admissible evidence. The court must determine when the underlying hearsay may reach the trier of fact through examination of the expert, with cautioning instructions, and when it must be excluded altogether. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999).

When a criminal defendant objects to testimony of his or her out of court statement as incomplete or attempts to cross−examine the witness on additional parts of the statement, the court must make a discretionary determination regarding completeness required by *Eugenio*. Additional portions of the defendant's statement are not inadmissible solely because the defendant chooses not to testify. State v. Anderson, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999).

The existence of a conspiracy under sub. (4) (b) 5. must be shown by a preponderance of the evidence by the party offering the statement. Bourjaily v. United States, 483 U.S. 171 (1987).

Under sub. (4) (b) 4., a party introducing the statement of an agent as the admission of a principal need not show that the agent had authority to speak for the principal. The rule only requires that the agent's statement concern "a matter within the scope of his agency or employment." Perzinski v. Chevron Chemical Co. 503 F. 2d 654.

Bourjaily v. United States: New rule for admitting coconspirator hearsay statements. 1988 WLR 577 (1988).

908.02 Hearsay rule. Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

History: Sup. Ct. Order, 59 Wis. 2d R1, R248 (1973).

The rule of completeness requires that a statement, including otherwise inadmissible evidence including hearsay, be admitted in its entirety when necessary to explain an admissible portion of the statement. The rule is not restricted to writings or recorded statements. State v. Sharp, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993).

Prisoner disciplinary hearings are governed by administrative rules that permit consideration of hearsay evidence. State ex rel. Ortega v. McCaughtry, 221 Wis. 2d 376, 585 N.W.2d 640 (Ct. App. 1998).

908.03 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 when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

(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, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

(6m) HEALTH CARE PROVIDER RECORDS. (a) *Definition.* In this subsection, "health care provider" means a massage therapist or bodyworker issued a license of registration under subch. XI of ch. 440, a chiropractor licensed under ch. 446, a dentist licensed under ch. 447, a physician assistant licensed under ch. 448 or a health care provider as defined in s. 655.001 (8).

(b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer health care provider records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian.

2. Notifies all appearing parties that an accurate, legible and complete duplicate of the health care provider records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

(c) *Subpoena limitations.* Health care provider records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.

2. The subpoena is authorized by an ex parte order of a judge for cause shown and upon terms.

3. If upon a properly authorized request of an attorney, the health care provider refuses, fails or neglects to supply within 2 business days a legible certified duplicate of its records for the fees established under par. (d).

(d) *Fees.* The department of health and family services shall, by rule, prescribe uniform fees based on an approximation of the actual costs that a health care provider may charge under par. (c) 3. for certified duplicate health care records. The rule shall also allow the health care provider to charge for postage or other delivery costs.

(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances 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, or (c) in civil cases and against the state 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 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 s. 909.02, 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, whether a child is marital or nonmarital, ancestry, relationship by blood, marriage or adoption, 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 member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and 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 authorized 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 in existence 20 years or more whose authenticity 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. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross−examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

(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, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this 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 the person's 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 no contest, adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62 (3) (b), to prove any fact essential to sustain the judgment, but not including, when offered by the state 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.

(24) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Sup. Ct. Order, 59 Wis. 2d R250; Sup. Ct. Order, 67 Wis. 2d vii (1975); 1983 a. 447; Sup. Ct. Order, 158 Wis. 20d xxv (1990); 1991 a. 32, 269; 1993 a. 105; 1995 a. 27 s. 9126 (19); 1997 a. 67, 156; 1999 a. 32, 85, 162.

Judicial Council Note, 1990: Sub. (6m) is repealed and recreated to extend the self−authentication provision to other health care providers in addition to hospitals. That such records may be authenticated without the testimony of their custodian does not obviate other proper objections to their admissibility. The revision changes the basic self−authentication procedure for all health care provider records (including hospitals) by requiring the records to be served on all parties or made reasonably available to them at least 40 days before the trial or hearing. The additional 30 days facilitates responsive discovery, while elimination of the filing requirement reduces courthouse records management impacts. [Re Order eff. 1−1−91]

The *res gestae* exception is given a broader view when assertions of a young child are involved an will allow admitting statements by a child victim of a sexual assault to a parent 2 days later. Bertrang v. State, 50 Wis. 2d 702, 184 N.W.2d 867.

Hearsay in a juvenile court worker's report was not admissible under sub. (6) or (8) at a delinquency hearing. Rusecki v. State, 56 Wis. 2d 299, 201 N.W.2d 832.

A medical record containing a diagnosis or opinion is admissible, but may be excluded if the entry requires explanation or a detailed statement of judgmental factors. Noland v. Mutual of Omaha Ins. Co. 57 Wis. 2d 633, 205 N.W.2d 388.

The statement of the operator that the press had repeated 3 times, which was made 5 minutes after the malfunction causing his injury, was admissible under the excited utterance exception to the hearsay rule. Nelson v. L. & J. Press Corp. 65 Wis. 2d 770, 223 N.W.2d 607.

Under the *res gestae* exception to the hearsay rule (described as the "excited utterance" exception under sub. (2)), testimony by the victim's former husband that his daughter called him at 5 a.m. the morning after the murder and told him, "daddy, daddy, Wilbur killed mommy," was admissible. State v. Davis, 66 Wis. 2d 636, 225 N.W.2d 505.

The official minutes of a highway committee were admissible under sub. (6) as "records of regularly conducted activity." State v. Nowakowski, 67 Wis. 2d 545, 227 N.W.2d 697.

A public document, filed under oath, notarized by the defendant, is one having "circumstantial guarantees of trustworthiness" under sub. (24). State v. Nowakowski, 67 Wis. 2d 545, 227 N.W.2d 697.

Statements made by a 5−year −old child to his mother one day after an alleged sexual assault by the defendant were admissible under the excited utterance exception to the hearsay rule, since a more liberal interpretation is provided for that exception in the case of a young child alleged to have been the victim of a sexual assault. State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W.2d 890.

Probation files and records are public records and admissible as such at a probation revocation hearing. State ex rel. Prellwitz v. Schmidt, 73 Wis. 2d 35, 242 N.W.2d 227.

A statement by a victim within minutes after a stabbing that the defendant "did this to me" was admissible under sub. (2). La Barge v. State, 74 Wis. 2d 327, 246 N.W.2d 794.

Personal observation of a startling event is not required under sub. (2). State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80.

Admission of hospital records did not deprive the defendant of the right to confrontation. State v. Olson, 75 Wis. 2d 575, 250 N.W.2d 12.

Observations made by a prior trial judge in a decision approving the jury's award of damages were properly excluded as hearsay in a later trial. Johnson v. American Family Mut. Ins. Co. 93 Wis. 2d 633, 287 N.W.2d 729 (1980).

Medical records as explained to the jury by a medical student were sufficient to support a conviction; the right to confrontation was not denied. Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421 (1981).

A chiropractor could testify as to a patient's self−serving statements when those statements were used to form his medical opinion under sub. (4). Klingman v. Kruschke, 115 Wis. 2d 124, 339 N.W.2d 603 (Ct. App. 1983).

An interrogator's account of a child witness's out of court statements made four days after a murder, where notes of the conversation were available although not introduced, was admissible under sub. (24). State v. Jenkins, 168 Wis. 2d 175, 483 N.W.2d 262 (1992).

A defendant has a burden of production to come forward with some evidence of a negative defense to warrant jury consideration. State v. Pettit, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).

For a statement to be an excited utterance there must be a "startling event or condition" and the declarant must have made the statement "while under the stress of excitement caused by the event or condition". State v. Boshcka, 173 Wis. 2d 387 reprinted at 178 Wis. 2d 628, 496 N.W.2d 627 (Ct. App. 1992).

Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception, the confrontation clause is satisfied. State v. Patino, 177 Wis. 2d 348, 502 N.W.2d 601 (Ct. App. 1993).

In applying the excited utterance exception in child sexual assault cases, a court must consider factors including the child's age and the contemporaneousness and spontaneity of the assertions in relation to the alleged assault. In applying the sub. (24) residual exception in such a case, the court must consider the attributes of the child, the person to whom the statement was made, the circumstances under which the statement was made, the content of the statement and corroborating evidence. State v. Gerald L.C. 194 Wis. 2d 549, 535 N.W.2d 777 (Ct. App. 1995).

The sub. (2) excited utterance and the sub. (24) residual exceptions are discussed in relation to child sexual assault cases. State v. Huntington, 216 Wis. 2d 671, 575 N.W.2d 268 (1998).

The hearsay exception for medical diagnosis or treatment under sub. (4) does not apply to statements made to counselors or social workers. State v. Huntington, 216 Wis. 2d 671, 575 N.W.2d 268 (1998).

The requirement in sub. (18) that the writer of a statement in a treatise be recognized as an expert is not met by finding that the periodical containing the article was authoritative and reliable. Broadhead v. State Farm Mutual Insurance Co. 217 Wis. 2d 231, 579 N.W.2d 761 (Ct. App. 1998).

The description of the effects of alcohol on a person contained in the Wisconsin Motorists Handbook produced by the Department of Transportation was admissible under sub. (8). Sullivan v. Waukesha County, 218 Wis. 2d 458, 578 N.W.2d 596 (1998).

Evidence of 911 calls, including tapes and transcripts of the calls, is not inadmissible hearsay. Admission does not violate the right to confront witnesses. State v. Ballos, 230 Wis. 2d 495, 602 N.W.2d 117 (Ct. App. 1999).

Portions of investigatory reports containing opinions or conclusions are admissible under the sub. (8) exception. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 102 LEd 2d 445 (1988).

Convictions through hearsay in child sexual abuse cases. Tuerkheimer. 72 MLR 47 (1988).

Children's out−of−court statements. Anderson, 1974 WBB No. 5.

Evidence review: Past recollections refreshed v. past recollection recorded. Fine. WBB March 1984.

Evidence review − Business records and government reports: Hearsay Trojan horses? Fine. WBB April 1984.

Medical records discovery in Wisconsin personal injury litigation. 1974 WLR 524.

908.04 Hearsay exceptions; declarant unavailable; definition of unavailability. (1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

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

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

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

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

History: Sup. Ct. Order, 59 Wis. 2d R1, R302 (1973); 1991 a. 32.

Adequate medical evidence of probable psychological trauma is required to support an unavailability finding based on trauma, absent an emotional breakdown on the witness stand. State v. Sorenson, 152 Wis. 2d 471, 449 N.W.2d 280 (Ct. App. 1989).

The state must show by a preponderance of the evidence that the declarant's absence is due to the defendant's misconduct under sub. (2). State v. Frambs, 157 Wis. 2d 700, 460 N.W.2d 811 (Ct. App. 1990).

See note to Art. I, sec. 7, citing Burns v. Clusen, 599 F. Supp. 1438 (1984).

908.045 Hearsay exceptions; declarant unavailable. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross−, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(2) STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

(3) STATEMENT UNDER BELIEF OF IMPENDING DEATH. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(4) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

(5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT. A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

(5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT. A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Sup. Ct. Order, 59 Wis. 2d R1, R308 (1973); 1975 c. 94 s. 91 (12); 1975 c. 199; 1983 a. 447; 1991 a. 32; 1999 a. 85.

Sub. (2) is cited. State v. Dean, 67 Wis. 2d 513, 227 N.W.2d 712.

A good−faith effort to obtain a witness's presence at trial is a prerequisite to finding that the witness is "unavailable" for purposes of invoking the hearsay exception respecting former testimony. La Barge v. State, 74 Wis. 2d 327, 246 N.W.2d 794.

The defendant's right of confrontation was not violated where preliminary examination testimony of a deceased witness was admitted at trial, since the defendant had an unlimited opportunity to cross−examine the witness and the testimony involved the same issues and parties as at trial. Nabbefeld v. State, 83 Wis. 2d 515, 266 N.W.2d 292 (1978).

Statement against penal interest may be admissible under sub. (4) if 4 factors indicating trustworthiness of the statement are present. Ryan v. State, 95 Wis. 2d 83, 289 N.W.2d 349 (Ct. App. 1980).

A finding of unavailability of a witness due to mental illness, made on the basis of a confused and stale record, deprived the defendant of the right to confront the witness. State v. Zellmer, 100 Wis. 2d 136, 301 N.W.2d 209 (1981).

Corroboration under sub. (4) must be sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true. State v. Anderson, 141 Wis. 2d 653, 416 N.W.2d 276 (1987).

Under the "totality of factors" test, statements by a 7−year−old sexual abuse victim to a social worker possessed sufficient guarantees of trustworthiness to be admissible under sub. (6) at a preliminary hearing. State v. Sorenson, 143 Wis. 2d 226, 421 N.W.2d 77 (1988).

The exception for a statement of recent perception under sub. (2) does not apply to the aural perception of an oral statement privately told to a person. State v. Stevens, 171 Wis. 2d 106, 490 N.W.2d 753 (Ct. App. 1992).

The exception under sub. (4) for a statement that makes the declarant an object of hatred, ridicule or disgrace requires that the declarant have a personal interest in keeping the statement secret. State v. Stevens, 171 Wis. 2d 106, 490 N.W.2d 753 (Ct. App. 1992).

The similar motive and interest requirement of sub. (1) is discussed. State v. Hickman, 182 Wis. 2d 318, 513 N.W.2d 657 (Ct. App. 1994).

The sub. (6) residual exception should be applied only to novel or unanticipated categories of hearsay. The testimony of a 5−year−old girl against her mother fell within the sub. (6) exception when there were adequate assurances of trustworthiness. Requiring the girl to incriminate her mother at trial presented an exigency similar to the psychological scarring of a child victim. State v. Petrovic, 224 Wis. 2d 477, 592 N.W.2d 238 (Ct. App. 1999).

Corroboration requirement for statements against penal interest. 1989 WLR 403 (1989).

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

History: Sup. Ct. Order, 59 Wis. 2d R1, R323 (1973).

The admission of double hearsay did not violate the defendant's right to confront witnesses. State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80.

Evidence of 911 calls, including tapes and transcripts of the calls, is not inadmissible hearsay. Admission does not violate the right to confront witnesses. State v. Ballos, 230 Wis. 2d 495, 602 N.W.2d 117 (Ct. App. 1999).

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

History: Sup. Ct. Order, 59 Wis. 2d R1, R325 (1973); 1991 a. 32.

908.07 Preliminary examination; hearsay allowable. A statement which is hearsay, and which is not otherwise excluded from the hearsay rule under ss. 908.02 to 908.045, may be allowed in a preliminary examination as specified in s. 970.03 (11).

History: 1979 c. 332.

908.08 Videotaped statements of children. (1) In any criminal trial or hearing, juvenile fact−finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 304.06 (3) or 973.10 (2), the court or hearing examiner may admit into evidence the videotaped oral statement of a child who is available to testify, as provided in this section.

(2) (a) Not less than 10 days prior to the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the videotape camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the videotape prior to the hearing under par. (b).

(b) Prior to the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or prior to the hearing, the court shall view the videotape. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

(3) The court or hearing examiner shall admit the videotape statement upon finding all of the following:

(a) That the trial or hearing in which the videotape statement is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the videotape is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of a videotape statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self−esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the videotape statement would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5) (a) If the court or hearing examiner admits a videotape statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the videotape statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the videotape statement to the trier of fact for cross−examination.

(am) The testimony of a child under par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.

(b) If a videotape statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross−examination at the preliminary examination.

(6) Videotaped oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence a videotape oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

History: 1985 a. 262; 1989 a. 31; 1993 a. 98; 1995 a. 77, 387; 1997 a. 319.

Judicial Council Note, 1985: See the legislative purpose clause in Section 1 of this act.

Sub. (1) limits this hearsay exception to criminal trials and hearings in criminal, juvenile and probation or parole revocation cases at which the child is available to testify. Other exceptions may apply when the child is unavailable. See ss. 908.04 and 908.045, stats. Sub. (5) allows the proponent to call the child to testify and other parties to have the child called for cross−examination. The right of a criminal defendant to cross−examine the declarant at the trial or hearing in which the statement is admitted satisfies constitutional confrontation requirements. California v. Green, 399 U.S. 149, 166 and 167 (1970); State v. Burns, 112 Wis. 2d 131, 144, 332 N.W. 2d 757 (1983). A defendant who exercises this right is not precluded from calling the child as a defense witness.

Sub. (2) requires a pretrial offer of proof and a hearing at which the court or hearing examiner must rule upon objections to the admissibility of the statement in whole or in part. These objections may be based upon evidentiary grounds or upon the requirements of sub. (3). If the trial is to be to a jury, the videotape must be edited under one of the alternatives provided in s. 885.44 (12), stats.

Sub. (3) (a) limits the applicability of this hearsay exception to trials and hearings which commence prior to the child's 16th birthday. If the trial or hearing commences after the child's 12th birthday, the court or hearing examiner must also find that the interests of justice warrant admission of the statement. A nonexhaustive list of factors to be considered in making this determination is provided in sub. (4).

Sub. (6) refers to the statutes making videotaped oral statements of children discoverable prior to trial or hearing. [85 Act 262]

Sub. (5) does not violate due process. State v. Tarantino, 157 Wis. 2d 199, 458 N.W.2d 582 (Ct. App. 1990).

Interviewers need not extract the exact understanding that "false statements are punishable" in order to meet the requirement of sub. (3) (c), if the tape, assessed in its totality, satisfies the requirement. State v. Jimmie R.R. 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196.