

SEEKING ADMISSION OF POLICE REPORTS AND WITNESS STATEMENTS CONTAINED THEREIN: A DUAL LEVEL HEARSAY CHALLENGE

By: Nathan S. Scherbarth, *Jacobs and Diemer, P.C.*¹

In civil litigation, police reports, and the witness statements and other information within them, often constitute extremely valuable and probative information, leading both plaintiffs and defendants to seek their admission into evidence.² However, police reports themselves undisputedly constitute hearsay in most contexts.³ Providing an even bigger challenge to admissibility, witness statements contained within police reports represent second-level hearsay, as they are hearsay statements within hearsay police reports. Nonetheless, the Rules of Evidence and supporting case law provide a solid basis for seeking admission into evidence of police reports, themselves, and in certain cases, witness statements and other materials contained therein. This article seeks to provide a brief analytical and legal framework in support of admission of police reports and statements contained therein, based upon various exceptions to the MRE 802 general rule against hearsay admissibility.

ADMISSIBILITY OF POLICE REPORTS

Generally, there are two potentially applicable hearsay exceptions that can be invoked when seeking admission of a police report: the business records exception, MRE 803(6), and the public records and reports exception, MRE 803(8). MRE 803(6) provides that records of regularly conducted activity are not excluded by the hearsay rule as follows:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, 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 a rule promulgated by the supreme court or a statute permitting certification, unless

the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . .

Significantly, Michigan's Appellate Courts have repeatedly suggested that police reports may constitute business records pursuant to the MRE 803(6) definition, and therefore, that such reports should be admissible under this hearsay exception.⁴ In *Maiden v Rozwood*, the Supreme Court noted that a police report, itself, would be "plausibly admissible under the business record exception, MRE 803(6)."⁵ There, however, the Court held that the witness statement within the police report for which admission was sought did not fall within any of the enumerated hearsay exceptions, and therefore, the Court held that the police report was inadmissible.⁶

The Court of Appeals has subsequently cited *Maiden* in support of the potential admissibility of police reports pursuant to the business record exception, MRE 803(6).⁷ Notably, it is much more likely that a police report will be found to be admissible if the officer or officers who prepared the report is available to testify at trial as to its accuracy and contents, and therefore, it would be prudent for a party seeking admission of a police report to include any officers involved in the production of the police report on the witness list, if possible.⁸

As an additional or alternative ground for admission of a police report, a party should invoke MRE 803(8), the public records and reports exception, which excludes from the hearsay rule the following:

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, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

Again, Michigan's Appellate Courts have not directly held that the MRE 803(8) exclusion applies to police reports in civil cases, but in *In re DMK*, the Court of Appeals noted that "certain police reports may qualify as admissible under MRE 803(8)."⁹ Significantly, interpreting the

federal counterparts to MRE 803(6) and (8), in *Bodman v Dennis*, the Court explained that matters reported in a police report based upon an officer's first-hand observations may be admitted pursuant to the public records or business records exceptions, based upon a host of federal cases so holding.¹⁰

Thus, both the MRE 803(6) business records exception and MRE 803(8) public records exception to the hearsay rule of exclusion represent viable methods for seeking admission of police reports, at least as to the contents of the report that were based upon an officer's first-hand observations.

SEEKING ADMISSION OF WITNESS STATEMENTS CONTAINED WITHIN POLICE REPORTS: DEALING WITH SECOND-LEVEL HEARSAY

While a police report, itself, should be admissible pursuant to either (or both) MRE 803(6) and MRE 803(8), if a party wishes to use a witness statement contained within the report, then this second level of hearsay must also fit within one of the enumerated hearsay exceptions in order to be admissible. As MRE 805 explains, “[h]earsay 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 these rules.”¹¹ The Court in *Maiden v Rozwood* likewise explained that even if a police report, itself, is admissible, witness statements contained within the report also constitute hearsay, and “[w]hen the document to be admitted contains a second level of hearsay, it also must qualify under an exception to the hearsay rule.”¹²

Though any of the multitudinous hearsay exceptions might apply to argue in favor of admissibility of a witness statement in a particular factual situation, it would not be possible to go through each and every exception that might potentially apply, given time and space constraints. Instead, this article will highlight two exceptions that are likely to have the most

wide-ranging applicability for practitioners seeking admission of witness statements contained within police reports: (1) where the witness has either vanished or is deceased, pursuant to the unavailable declarant catch-all exception, MRE 804(b)(7); and (2) regardless of declarant availability, under MRE 803(1) as a present sense impression.

Frequently, a party's desire to use a witness statement contained within a police report may be based upon the unavailability of the declarant to testify live at trial, whether because of death, illness, or other absence. In such circumstances, provided that the declarant's death or illness can be shown, pursuant to MRE 804(a)(4), the declarant will be deemed unavailable and the MRE 804 hearsay exceptions may apply.¹³ Alternatively, if the declarant is absent from the hearing despite the proponent of the statement's attempts to procure attendance by process or other reasonable means, the declarant may also be considered unavailable pursuant to MRE 804(a)(5).

Where a declarant is "unavailable" as defined in MRE 804(a), Courts have repeatedly held such statements contained within police reports to be admissible pursuant to the "catch-all" hearsay exception, MRE 804(b)(7).¹⁴ Pursuant to MRE 804(b)(7):

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Notably, it is crucial that a proponent of such a statement give notice prior to trial of intent to introduce the evidence, in order to comply with dictates of MRE 804(b)(7) and to allow the opposing party ample opportunity to prepare to meet it.

When interpreting MRE 804(b)(7), “[t]he first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions.”¹⁵ Further, the Court “should consider the ‘totality of circumstances’ surrounding each statement to determine whether equivalent guarantees of trustworthiness exist.”¹⁶ A non-exhaustive list of factors to consider in this regard includes:

(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made, e.g., a police officer who was likely to investigate further, and (8) the time frame within which the statements were made.¹⁷

Of course, if the officer involved in procuring the witness statement sought to be introduced and involved in preparing the police report, itself, is available to testify at trial, her or his testimony regarding interactions with the declarant and how the statement was given can greatly help to bolster the circumstantial guarantees of trustworthiness auguring in favor of the statement’s admissibility under MRE 804(b)(7).

Alternatively, irrespective of the declarant’s availability at trial, another hearsay exception that will frequently have potential application to witness statements within police reports is MRE 803(1), the “present sense impression” exception, which is defined as “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” Thus, if the declarant gave the witness statement in the immediate aftermath of the incident, it may qualify under the exception.

To qualify as a present sense impression, three conditions must be satisfied: “(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be substantially contemporaneous with the event.”¹⁸

Most witness statements will easily satisfy the first two conditions, but whether the statement is “substantially contemporaneous” may be a more nettlesome inquiry. According to Justice Kelly, MRE 803(1) “recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable.”¹⁹ The difficulty in such circumstances will frequently be determining how long the time lapse was between the incident and the giving of the statement. Again, the testimony of the officer who recorded the statement and prepared the police report can be very helpful in this regard. Moreover, the length of time lapse cannot be particularly long if the party hopes to comply with the “substantially contemporaneous” requirement. The Court of Appeals recently held that a written victim’s statement given to police within approximately 15 minutes of the incident was “substantially contemporaneous”.²⁰ Similarly, in *People v Hendrickson*, the Court noted that previous courts have found that both a four and sixteen minute interval satisfied the contemporaneity requirement.²¹ Thus, if there is evidence that the statement was recorded within minutes of the incident, it stands a far better chance of satisfying the requirements for admissibility as a “present sense impression” pursuant to MRE 803(1).

CONCLUSION

For civil litigants seeking to introduce police reports and witness statements contained therein into evidence, there are a number of possible avenues available to achieving the desired

result. Under any circumstances, having the police officer or officers who prepared the report and took any witness statements available to testify at trial is likely to greatly increase the chances of successfully achieving admission into evidence. A police report, itself, may qualify as a business record under MRE 803(6) or a public record pursuant to MRE 803(8). Moreover, though the witness statements must also fall within a hearsay exception as they constitute second level hearsay, a number of hearsay exceptions are potentially applicable, and previous courts have admitted such statements, particularly where the declarant is unavailable. Thus, while there is no iron-clad rule of admissibility in all circumstances, there are a number of tools available to practitioners seeking to get police reports and witness statements into evidence.

§Nathan S. Scherbarth is an Associate in the Appellate Practice of Jacobs and Diemer, P.C. Mr. Scherbarth can be reached at 313-965-1900 or nss@jacobsdiemer.com.

§Notably, in the criminal context, police reports are often deemed to be inadmissible as untrustworthy, because the reports are essentially prepared in anticipation of litigation, i.e., criminal proceedings. See, e.g., *People v McDaniel*, 469 Mich 409, 412-413, 670 NW2d 659 (2003); *Solomon v Shuell*, 435 Mich 104, 457 NW2d 669 (1990) (police report created during homicide investigation held untrustworthy because of investigating officer’s motivations to misrepresent).

§Pursuant to MRE 801(c), “‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.”

§See, for example, *Maiden v Rozwood*, 461 Mich 109, 124-125, 597 NW2d 817 (1999); *Latits v Phillips*, 298 Mich App 109, 113-114, 826 NW2d 190 (2012); *Calderon v Auto-Owners Ins Co*, 2014 WL 1679130 (Mich App 2014).

§*Maiden v Rozwood*, 461 Mich 109, 124-125, 597 NW2d 817 (1999).

§*Id.*

§See *Latits v Phillips*, 298 Mich App 109, 113-114, 826 NW2d 190 (2012) (defendants’ reliance on police reports proper in reference to officers’ personal observations, where officers could testify at trial as to substance of the reports; reports themselves might also be admissible pursuant to MRE 803(6) regardless of officer availability); see also *Calderon v Auto-Owners Ins*

Co, 2014 WL 1679130 (Mich App 2014) (“The trial court erred as a matter of law when it held that the police reports were per se inadmissible. Neither the trial court nor plaintiff identified a statute that precludes admission of police reports. Instead, the reports were admissible as business records under MRE 803(6) . . .”).

See *Latits*, 298 Mich App at 113-114 (“defendant's reliance on those reports was in reference to the officers' personal observations, and those officers could have testified at trial to the substance of the material in the reports. That evidence would be admissible.”).

In re DMK, 289 Mich App 246, 258, n 6, 796 NW2d 129 (2010). See also *Latits*, 298 Mich App at 114 (police reports “might also be admissible under MRE 803(8)).

Bodman v Dennis, U.S Dist. Ct., W.D. Mich., 2013 WL 2458383 (June 6, 2013).

See also *Merrow v Bofferding*, 458 Mich 617, 581 NW2d 696 (1998).

461 Mich at 125.

MRE 804(a)(4) provides that unavailability of a witness includes situations in which the declarant “is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.”

This often comes up in the criminal context. See, for example, *People v Anderson*, 2000 WL 33529727 (Mich App 2000); *People v Brownell*, 2008 WL 2514186 (Mich App 2008).

People v Katt, 468 Mich 272, 290, 662 NW2d 12 (2003).

Id. at 291.

People v Lee, 243 Mich App 163, 178, 622 NW2d 71 (2000) (internal citations omitted).

People v Hendrickson, 459 Mich 229, 236, 586 NW2d 906 (1998) (opinion by Kelly, J); see also *People v Chelmicki*, 305 Mich App 58, 63, 850 NW2d 612 (2014), *lv den* 497 Mich 960, 858 NW2d 469 (2015).

Hendrickson, 459 Mich at 236 (Opinion by Kelly, J).

People v Chelmicki, 305 Mich App 58, 63, 850 NW2d 612 (2014).

459 Mich at 236-237, citing *Johnson v White*, 430 Mich 47, 56, 420 NW2d 87 (1988) and *United States v Mejia-Velez*, 855 F Supp 607 (E.D. N.Y. 1994).