COMMON EVIDENTIARY ISSUES

I. HEARSAY

Most evidence that is necessary and useful in mental health hearings is potentially against the rules of evidence regarding hearsay. However, there are some hearsay exceptions that may permit the hearsay evidence to be admitted.

A. DOCTOR'S REPORTS/STATEMENTS MADE TO A DOCTOR OR OTHER EXAMINER (PSYCHOLOGIST, SOCIAL WORKER, LIAISON, ETC.)

These are used to determine whether a defendant is now competent to stand trial or was insane at the time of the criminal act in question.

1. Rule 803(4): Hearsay exception for statements made for the purpose of medical diagnosis or treatment.

Generally, Rule 803(4) assumes that the person to whom the hearsay statements were made is in the courtroom to testify. Therefore, it does not permit the introduction of out-of-court statements by physicians about the treatment prescribed or the diagnosis reached. See, Holman v. Grandview Hospital (1987), 37 Ohio App. 3d 151 (Two letters being out-of-court statements from doctor evaluating patient's condition held inadmissible). Therefore, a doctor's written report of what a patient/defendant said to him/her is itself hearsay and must fit a separate hearsay exception. It *may* fit the business record exception, *supra* at Section E. **However, in-court testimony about out-of-court statements made for the purpose of medical treatment or diagnosis *are* admissible:**

a) Statement needs not be to a testifying physician. Statements made to ambulance drivers, ER personnel, nurses, etc. are admissible.
b) Intent of a defendant/declarant when making the out-of-court statement must have been to receive treatment or diagnosis.
c) *An out-of-court statement made to a doctor just for the purpose of a hearing or trial is admissible because it was made for diagnostic purposes.*
d) An out-of-court statement made by someone other than a defendant for the purpose of that defendant's medical treatment or diagnosis may also be admissible as an exception to the hearsay rules. For example, the mother's out-of-court statements to a nurse about defendant's sexual abuse held admissible when defendant was unable to speak for herself.

2. **Rule 703: Hearsay statements which form the basis of an expert's opinion.**

Generally, a physician or other expert may base his/her opinion only on his/her personal observations or a hypothetical question based on admissible evidence. (If a doctor's report is admissible evidence, it may be used as a basis for an expert's opinion. This may occur if the expert testifying did not personally treat or diagnose the defendant.)

B. MEDICAL HISTORY/RECORDS.

These are used to determine whether the defendant has a mental disease or defect. They are useful for treatment and sentencing purposes. (Medical records may indicate that defendant is unresponsive to treatment, unable to tolerate certain medications or developmentally disabled, etc.) Medical records are also used to determine whether the defendant is malingering.

1. Rule 803(4): Hearsay exception for medical histories/records.

Generally, medical records consist almost entirely of statements made for the purpose of treatment or diagnosis. However, portions may not fall under this hearsay exception i.e. statements *not* related to treatment or diagnosis. Furthermore, if the physician is unable to appear and testify in court, medical records will only be admissible if they fit the business record exception of Ohio Rule of Evidence 803(6), *supra*.

a) Excise those statements that are not related to treatment or diagnosis, but not the whole record.

b) If the physician or custodian of the medical records cannot appear to testify, the medical record must fit within the business records exception of Ohio Rule of Evidence 803(6), *supra*. That section was amended to add the language, "as provided by Rule 901(B) (10)" following the requirement that the custodian of that record testify in court. This language was added to permit the admission of records which qualify as "self-authenticating" pursuant to a statute, such as hospital records under O.R.C. 2317.422. However, it is still unclear under Ohio law whether a medical report containing an "opinion or diagnosis" is admissible because Rule 803(6) specifically excludes opinions or diagnoses. The leading case on the topic is Hytha v. Schwendeman (1974), 40 Ohio App. 2d 478. In Hytha, the Franklin County Court of Appeals set forth seven criteria which must be satisfied for a diagnosis to be admissible when contained in a hospital record:

i. The record must have been a systematic entry kept in the records of the hospital or physician and made in the regular course of business;
ii. The diagnosis must have been the result of well-known and accepted objective testing and examining practices and procedures which are not of such technical nature as to require cross-examination;
iii. The diagnosis must not have rested solely upon the subjective complaints of the patient;
iv. The diagnosis must have been made by a qualified person;
v. The evidence sought to be introduced must be competent and relevant;
vi. If the use of the record is for the purpose of proving the truth of the matter asserted at trial, it must be the product of the party seeking its admission; and
vii. It must be properly authenticated.

C. POLICE REPORTS/POLICE TESTIMONY.

These are used to determine whether the defendant's behavior and/or statements at the time of arrest indicated that the defendant has a mental disease or defect. Police reports and police testimony may also be used to determine whether the defendant understood what he/she was doing at the time of the act. The arresting officer might be the only person who observed the defendant's behavior at the time of a criminal act and it is likely that those observations might be included in the officer's report. (Even observations as to whether the defendant tried to run away or what the defendant was wearing may be used to determine if the defendant is NGRI.)

1. Rule 803(3) Hearsay Exception for State of Mind

a) **Police Testimony:** This testimony is generally from the arresting officer or those officers who responded to the call. It is admissible as long as the officer has firsthand knowledge of the defendant's actions i.e. if the defendant fled or resisted, for what crime was defendant arrested/detained, etc. Police can testify to anything the defendant said (as long as it is not offered to prove the truth of the matter asserted) as well as to any actions or behaviors observed. (If defendant tells the victim, "I'll kill you" and it is heard by the officer, the officer can testify to the statement because it is being offered to prove mental condition/state of mind. It is not being offered to prove the defendant will kill the victim but that he/she was violent or mentally ill at the time.)

Rule 803(3) also provides an exception to the inadmissibility of hearsay for state of mind. Statements the defendant made while in the vicinity of the police may come in under this exception in a mental health hearing. Further, police testimony, or any witnesses' testimony as to what

the defendant said, if offered against the defendant constitutes an admission against interest under Ohio Rule of Evidence 801(D)(2)(a) and need not fit within the parameters of Rule 803(4).

A police officer, or any other witness including a party, may testify about out-of-court statements made by persons other than the party against whom the evidence is offered if statements:

i. are not offered for their truth; or
ii. if offered for their truth, fit a hearsay exception such as an excited utterance under 803(2), present sense impression under 803(1), state of mind under 803(3), etc.

b) **Police Reports:** Generally, police reports are not admissible. If the officer who made the report is unavailable/can't/won't testify, Ohio Rule of Evidence 803(8), the public records exception, specifically **excludes the police report in criminal cases.** However, not all police reports must be excluded. If the report is a police record of nonadversarial/routine matters, it may be admitted. See Section (2), *supra.* Rule 803(8) (b) provides that matters observed by police officers and other law enforcement personnel may be admitted if offered by the defendant. Furthermore, police reports can be used to impeach a police officer if in-court testimony is inconsistent with the officer's report about the matter.

If a police officer testifies in court, the officer may use the report to refresh his/her recollection. The report may also be used if he has no recollection of the events under the hearsay exception called Past Recollection Recorded (Rule 803(5).

i. Insanity is an affirmative defense. The defendant must raise that he/she seeks to prove his/her insanity. Once raised, the standard of proof is a preponderance of the evidence. Insanity is distinct from the issue of competency, which can be raised by either party if it appears that the defendant is or might be incompetent to stand trial.
ii. If the state is trying to introduce a police report in a criminal case, the report must pertain to routine, nonadversarial matters because Rule 803 prohibits the "…introduction of reports which recite an officer's observations of criminal activities or observations made as part of an investigation of criminal activities…" State v. Ward, 15 Ohio St. 3d 355, 358.
iii. If police reports are excluded under Rule 803(8), they *may* be admissible under the Business Records Exception of Rule 803(6) if the statement is of matters observed by police or law enforcement. However, a majority of courts consider that if a police report is inadmissible under Rule 803(8), it is also inadmissible under Rule 803(6).
iv. Police report as present sense impression: If a police officer witnesses an event involving the defendant and writes down or states what is happening as the event occurs (i.e. radios for help because defendant is ranting and raving, fleeing or engaging in bizarre, described behaviors), the officer's report may be admissible under Rule 803(1) as a present sense impression. However, only that portion of the report that records the present sense impressions as they are being created is admissible.

D. WITNESSES *OTHER THAN* POLICE OR MEDICAL PERSONNEL.

Out-of-court statements by victims, spouses, or others who have witnessed an act are used to determine the defendant's mental state at the time of the act. They are generally **not admissible**. However, there are exceptions:

1. Rule 803(1) Present Sense Impression

This rule provides an exception to the inadmissibility of out-of-court statements if the declarant made the statements while perceiving the event or immediately thereafter (i.e. content of a 911 call or statements made to an officer while crying out for help, unless circumstances indicate lack of trustworthiness.)

2. Rule 803(2) Excited Utterance

This rule provides an exception to the inadmissibility of out-of-court statements where (1) there was a startling event and (2) the declarant was under the stress of the excitement caused by the event. It is similar to the present sense impressions exception but the time requirements are not quite as stringent.

3. Rule 803(3) Then Existing Mental Condition

This rule provides an exception to the inadmissibility of out-of-court statements where the out-of-court statements show the defendant's mind at the time of the act. Such statements are admissible because they are not offered to prove the truth of the matter asserted. (Defendant makes statements that show he is mentally ill, having hallucinations, or delusions, is incompetent, suffering from mental disease/defect, etc.)

4. "Testimonial Statements"

In a criminal case, an out-of-court statement offered for its truth and admissible under one of the hearsay exceptions may nonetheless be inadmissible pursuant to the confrontation clause of the 6th Amendment of the Constitution. In Crawford v. Washington (2004), 541 U.S. 36, the U.S. Supreme Court held that "testimonial" statements fitting a hearsay exception are still barred under the 6th and 14th Amendments. The Court defined what constitutes a "testimonial statement" in two 2006 cases involving domestic violence: Davis v. Washington and Hammon v. Indiana (citations omitted).

Statements are "non-testimonial" and may come into evidence under a hearsay rule exception when they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Statements are "testimonial" and inadmissible when the circumstances objectively indicate that there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events relevant to later criminal prosecution. Thus, a 911 call requesting help to prevent a continuing assault was held not testimonial while an interview with the victim following officer's response to a 911 call was testimonial, even if the victim's statement was an excited utterance.

5. Nonassertive Conduct

A witness can testify about non-assertive conduct that was witnessed out of court; i.e., bizarre actions, falling down, swaying, running away, etc. Thus, a witness can testify as to what the defendant was seen doing which might be evidence of the defendant's mental illness as long as the defendant's conduct was non-assertive i.e., not intended to substitute as an affirmation by the nodding of one's head.

6. Spousal Interviews

Spousal interviews and testimony are used because the spouse might be the only person who has seen the defendant in a vast array of situations and would notice if the defendant's condition has changed over time. **Spousal testimony about the defendant's actions - i.e., non-assertive conduct or behaviors is generally not considered hearsay.** Assertive communications and conversations are covered by a spousal privilege (which can be waived by either spouse.) Two rules prohibit spousal testimony:

a) **Rule 601(B) Competency.**
A spouse is not competent to testify against the other spouse unless:
   i. the crime charged is a crime against the testifying spouse or the children of either spouse, or
   ii. the testifying spouse elects to testify.
   Since this rule deals with competency, the spouse cannot testify to even nonprivileged information unless one of the exceptions applies.

b) **Rule 501 Privilege.**

Communications and actions which occur during marriage are privileged and stay privileged indefinitely even if the marriage is later terminated. However, the communications and actions are not privileged if they occur in the *known presence or hearing distance of a third person who is competent to be a witness* (The spouse must know the third party is present. That person cannot be concealed in a closet and unknown to the spouse.) Therefore, communications and actions which are unknowingly overheard or seen by a third person remain privileged. Also, *communications or actions which occur in the presence, known or unknown, of one of unsound mind or of less than 10 years of age who is unable to comprehend the situation are still privileged.*

c) **O.R.C. Section 2945.42**

This statute also governs spousal privilege and provides that testimony by either spouse may not be precluded by the spousal privilege in criminal proceedings involving violence against the other spouse or the children of either spouse.

E. DEFENDANT'S TESTIMONY.

A defendant can testify as to his own state of mind, his understanding of why he is in trouble and his understanding of what was happening at the time of the act or during a trial..

1. Rule 803(3). If the defendant is available, he/she may offer statements to prove that he/she did not have the requisite mens rea, if state of mind is a material element (especially important for NGRI).

2. Rule 804(A). If the defendant is "unavailable," his/her out-of-court statements/testimony may not be excluded**.** A defendant is unavailable if:

a) the testimony is barred by privilege;
b) the defendant persistently refuses to testify;
c) the defendant testifies he/she has no memory of the statement;
d) he/she is unable to be present to testify in court because of death or then-existing physical or mental illness or infirmity;
e) he/she is absent from the proceeding and the proponent of the statement sought to be admitted cannot find the defendant.

3. Rule 804(B). If the defendant is unavailable, his/her out-of-court statements are not excluded by the rules governing hearsay if:

a) The statement is in former testimony. The testimony can be from a prior hearing, deposition, under cross, or direct examination and, if from a preliminary hearing, the proceeding must satisfy the confrontation clause and exhibit indicia of reliability. Rule 804(B)(1).
b) The statement is made under belief of impending death. Rule 804(B)(2).
c) The statement is against defendant's interest. This is "a statement that, at the time of its making, was 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, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true.." Rule 804(B)(3).

d) The statement is of personal or family history. Rule 804(B)(4).

e) The statement was made by a deceased or incompetent person because the statement was made before the death or the development of the incompetency. (Rule 804(B)(5).

e) Forfeiture by wrongdoing. Rule 804(B)(6).

F. FAMILY HISTORY/FAMILY RECORDS.

Family records are used to determine whether the defendant has a disorder, because many disorders have genetic components. It may be more likely the defendant suffers under a certain disorder if other family members have been similarly afflicted. Family history or records are admissible under the family records exception of Rule 803(13). If it is more likely that defendant is bi-polar due to genetics, the family records could be admitted for that purpose.

G. PREVIOUS CONVICTIONS.

Previous convictions may be used to determine whether the defendant is violent or has exhibited a pattern of violence due to his/her illness. They are also used to determine whether the defendant can be released back into the community, or to establish patterns of behavior that are necessary for determining the treatment/sentence for him/her i.e. the defendant has multiple violent offense convictions all of which occurred while off medication or during an episode caused by mental illness.

1. **Rule 803(22).** Past convictions are admissible where the defendant did not plead no contest (or the equivalent of no contest in another jurisdiction). In criminal cases the prosecution may only use records of criminal convictions against third parties as evidence to impeach. Furthermore, the previous convictions may only be used if they relate to a crime punishable by death or imprisonment in excess of one year.

2. **Rule 609.** This rule only permits evidence of past convictions for the purpose of impeaching a witness.

3. **Rule 404(B).** Evidence of prior bad acts cannot be used to prove that the defendant committed the crime with which he/she is presently charged. However, evidence of past bad acts may be used to prove other things such as a propensity to act in a violent manner due to mental illness or that

defendant's illness necessitates confinement or hospitalization as evidenced by the fact that the defendant had been convicted of violent crimes before, perhaps when off his/her meds.

4. **Rule 404(A)(1).** The defendant may introduce evidence about his/her own character in order to prove that it is inconsistent with the offense charged. The defendant can introduce his/her character to illustrate that if not for his mental disorder, he is not the type of person who would commit the offense charged i.e. the defendant's character was manipulated by the disorder which then caused him/her to commit the offense.

However, the use of previous convictions to prove propensity toward violence or other criminal activity can be problematic. While Rule 803(22) generally recognizes a felony conviction as a hearsay exception, use of it to prove a propensity towards violence would ordinarily violate Rule 404(A)'s prohibition against character evidence. Therefore, in order to use previous convictions to prove propensity, the defendant's mentally disordered state of mind must not be considered a component of the defendant's character, or the defendant's character must be the ultimate issue in the case and, thus, "provable" under Rule 405(B). However, if the defendant's propensity is so strong that it constitutes evidence of the defendant's identity or shows a distinct "modus operandi", it may be admissible under Rule 404(B), but this is very rare.

H. TEMPORARY RESTRAINING/PROTECTION ORDERS.

Such orders are used to determine various issues in a current matter. They may be relevant because if the defendant has had a TRO issued against him/her, it may be an indication that the defendant is violent. It may also indicate whether medication is effective depending on whether the defendant was compliant with treatment at the time of the TRO.

The introduction of a temporary restraining/protection order is subject to the hearsay analyses presented above.

II. PHYSICIAN-PATIENT & PSYCHOTHERAPIST-PATIENT PRIVILEGE

Sometimes a defendant is not willing to release medical information for a mental health hearing. The medical information regarding the patient's health and mental status at the time of the offense, or before the offense, is extremely important for making determinations in virtually

all mental health hearings. Therefore, it is extremely helpful for the court when relevant medical records and testimony are admitted into evidence.

There are three primary ways for a defendant's medical information to be admitted into evidence: defendant waives his/her privilege, laws may permit admission of relevant evidence and public policy dictates that disclosure of the information is in the best public interest.

A. WAIVER OF PRIVILEGE BETWEEN PATIENT AND PHYSICIAN OR PSYCHOTHERAPIST

1. Rule 501: Privilege exception when waived by the patient.

A patient may waive the privilege between him/her and a doctor concerning the patient's examination and treatment. When waived, those communications are admissible evidence where relevant to the proceedings.

Physician-patient communications are only privileged when the patient consulted the doctor looking for treatment or for examination for the purpose of determining appropriate treatment. Therefore, when a patient is examined for purposes *other than treatment* i.e. a doctor hired to render an opinion for the purposes of civil or criminal litigation, the privilege does not apply. See also, State v. Hall (2001), 141 Ohio App. 3d 561 (psychiatric evaluation prepared to determine Defendant's competency to stand trial was not covered by the physician-patient privilege because the records were prepared to determine competency, not to treat the defendant).

2. Ohio Revised Code Section 4732.19: Psychologist – Client Privilege

This section provides that psychologist-patient communications are privileged to the same extent as provided under the physician-patient privilege laws contained in R.C. 2317.02. See Rule 501, *supra.*

3. Public Policy Exception to Physician-Patient Privilege

In Biddle v. Warren General Hospital (1999), 86 Ohio St. 3d 395, the Ohio Supreme Court recognized an exception to the physician-patient privilege. Under this public policy exception, a physician or hospital may disclose otherwise privileged medical information "where disclosure is necessary to protect or further a countervailing interest which outweighs

the patient's interest in confidentiality." The case recognized that a special situation exists "…where the interest of the public, the patient or the physician, or a third person are of sufficient importance to justify the creation of a conditional or qualified privilege to disclose in the absence of any statutory mandate or common law duty."

In cases where the defendant is mentally ill and potentially dangerous or already proven to be dangerous (including suicidal), the state will have a countervailing interest in protecting the public and the patient himself. Otherwise privileged medical information may be disclosed without defendant's consent to the disclosure or waiver of the privilege.