**EVIDENCE ESSENTIALS PODCAST**

* 1. Hello everyone, welcome to another session of the Good Judge-ment podcast. I am Wade Padgett…
	2. and I am Tain Kell and together, we will be your hosts
	3. The Good Judge-Ment podcast is designed for judges, lawyers and others who are interested in judges, and the law and procedure that occurs in a courtroom. Our focus is on Georgia law and Georgia judges. We normally address issues dealing with substantive law and procedure. Occasionally, we have other topics of interest for judges to consider. For those who have been listening to our podcasts, we want to thank you.
	4. Today’s podcast takes us into a slightly different direction. Many of you have reached out and asked for podcasts on topics dealing with evidence. ANY evidence topics. So we have created a shorter version of our traditional podcasts that we are calling Evidence Essentials.
	5. That’s right. We have heard your cries and are trying to respond. Each time we have a recording session we plan to record a brief podcast on a selected evidence topic. Our idea is that a short, one issue podcast dealing with individual evidence topics is far better and more helpful than trying to address everything in the world of evidence is a single podcast.
	6. Additionally, we have invited a non-judge guest, Mr. Garon Muller, into the studio to help us with the conversation. Garon, tell everyone hello.
	7. [Hello.]
	8. Well, that was rather literal. Garon was my staff attorney in Augusta for several years and is now in private practice. He’s our first guest who is not a judge (or former judge) on the Good Judge-ment Podcast. Garon, tell everyone a little about you.
	9. [Garon-intro]
	10. We want to keep these short and to the point so let’s dive right in. Garon, what exciting evidence topic are we handling today?
	11. [Business Records, Public Records and the related exceptions to the hearsay rule]

**THE HEARSAY RULE**

1. Tain, tell our audience about your thoughts for young lawyers relating to the hearsay rule
2. Tain---
3. During these podcasts, we are frequently going to be discussing the “hearsay rule.”
	1. That rule says that we do not allow hearsay into evidence. But, like all good rules there are exceptions to the rule.
	2. [Garon] First, for a statement to be considered hearsay, the following things have to be true:
		1. Statement;
		2. Made outside of this trial or hearing; and
		3. Offered to prove the truth of the matter asserted. (§24-8-801)
4. [Garon] So if there is evidence in a trial which is made up of a statement, made outside of the courtroom in this hearing, and offered to prove the truth of the matter asserted, that would be inadmissible hearsay unless it falls within an exception
5. There are a lot of details wrapped up in the heading of “hearsay” but we are not going to fully unpack that definition today. Instead, we are going to focus solely on the topic of the business records exception and the public records exception to the hearsay rule.

**803(6) BUSINESS RECORDS**

1. Garon, quick quiz. What is the hearsay exception number for business records?
2. [Garon] [803(6)-the business records exception]
3. Tell the folks what the logic is behind the exception for business records.
4. [Garon] [businesses keep accurate records in the normal course of their business…..]
5. The requirements to admit business records under Rule 803(6) are:
	1. The record is the type routinely made in the regular course of business;
	2. The record was kept in the ordinary course of business;
	3. The record was made at or near the time of the occurrences set forth in the record;
	4. The record was based on sources who were acting in the regular course of business in making the report; and
	5. The sources were basing their reporting on their personal knowledge.
6. You know, podcasts are terrible places to read statutory definitions.
7. [Garon] So one of the most important points to remember when dealing with business records is whether the record was made in the ***normal course of business***.
	1. [Garon] A record made in anticipation of litigation does not qualify as a business record because we are willing to trust the accuracy of records that are made without knowledge that litigation is happening. But once the accuracy of the record could be “tainted” or “shaded” by the pending litigation, the reason for relying on the accuracy of the records evaporates.
	2. If the document was solely made in response to pending or threatened litigation, it does not qualify as a business record.[[1]](#endnote-1)
		1. [*for a case where a detailed analysis of business records was made and it was determined that a record was not a business record.*[[2]](#endnote-2)]
8. [Garon] Under Rule 803(6), ***the record can include opinions and diagnoses***.
	1. [Garon] This portion of the rule is different from Georgia’s prior law and causes some lawyers to hyperventilate.
	2. If the opinion or diagnosis is normally and usually a part of the business record (i.e. hospital records), the record can be admitted as a business record. Medical records usually contain “statements” from nurses, doctors, therapists, phlebotomists, and other medical personnel.
	3. The fact that the record contains “hearsay” from a variety of people who treated the patient does not require the court to exclude the business records.
	4. Provided that the “hearsay” from the various people included in the medical record is a part of what is normally included in a medical record such as the one being offered, Rule 803(6) allows all of that information to be admitted as part of the business record of the hospital.[[3]](#endnote-3)

**LAYING THE FOUNDATION (OLD WAY AND NEW WAY)**

1. So Garon, judges are not typically involved with the mechanics of how lawyers give notice that they intend to use business records. Why don’t you discuss that process a bit.
2. [Garon] The foundation must be laid by the party seeking to admit a business record under Rule 803(6).
	1. [Garon] The party can meet that foundational obligation in one of two different ways:
		1. **(“*OLD WAY”*)**
			1. call a witness who can establish that the record is made a kept in the ordinary course of business by testifying to all of the elements of a business record are established by the records that are being tendered (“***the old fashioned way***”); or
		2. [Garon] **(“*NEW WAY”*)**
			1. by filing a written declaration with advance notice to the other party
3. [Garon] Under “***the new way***,” a party can offer a business record by way of a written declaration instead of calling a live witness.
	1. [Garon] O.C.G.A. §24-9-902(11) and (12) describe the procedure for offering a business record “the new way.”
4. The party wanting to introduce a business record by written certification must provide pretrial notice of their intentions that gives the other party a fair opportunity to consider the records and respond.[[4]](#endnote-4)
5. While it is best for such a certification to be sworn, it does not have to be sworn.
6. We are going to add a sample notice for business records under “the new way” of laying the foundation on our website, **goodjudgepod.com**
7. So, Garon. What if the other party objects to you using the written certification instead of calling a live witness? Can they prevent you from using the affidavit under 902(11) and (12)?
8. [Garon…]

***CRAWFORD* PROBLEMS**

1. Not to get off the topic, but in a criminal case, the judge also has to be aware of a potential objection under *Crawford*.
	1. You will recall that *Crawford* says that a defendant has the right to confront witnesses called against him. So allowing hearsay poses a 6th Amendment problem
2. Business records are not subject to a *Crawford* objection unless the content of the statement is “testimonial.”[[5]](#endnote-5)
3. *Crawford* only applies to criminal cases
	1. A drug test prepared for this particular probation revocation hearing or similar hearing is testimonial.[[6]](#endnote-6)

**PUBLIC RECORDS EXCEPTION-803(8)**

1. Public records are different than business records and have a different exception (§24-8-803(8))
2. There are 3 types of public records:
	1. activities of public office [Garon] (mundane, record-keeping)
	2. matters observed pursuant to duty [Garon] (i.e. entries in GCIC; Police report if offered by defendant or in a civil case; Intoxilyzer reports; speed detection certificates)
		1. [Garon] except in criminal case against the accused (ok in a civil case)
	3. factual findings resulting from investigation unless.., Garon [Garon] information supporting the investigation lacks trustworthiness
3. [Garon] §24-9-920 is the authentication provision

**HEARSAY MUST BE OBJECTED TO**

1. This is different than the old rules
	1. Old rules said hearsay was illegal evidence and had no evidentiary value
	2. New rules say that hearsay comes in unless timely objection made (§24-8-802)

**CONCLUSION**

1. Garon, give everyone a conclusion on this session.
2. [Garon] The focus of business records is that they be “made in normal course of business” and not “in anticipation of litigation”
3. [Garon] 803(6) (business records) and 803(8) (public records) are different and have different rules
4. [Garon] As the judge, even if the evidence qualifies as a business record, if the surrounding circumstances call that evidence’s reliability into question, you can rule it out
5. [Garon] Business records are authenticated under §902(11) and (12)
6. [Garon] Public records are authenticated under §920

[ending script]

1. *Stewart v. State*, 246 Ga. 70, 74 (1980). [↑](#endnote-ref-1)
2. *D'Agnese v. Wells Fargo Bank, N.A.*, 335 Ga. App. 659 (2019). [↑](#endnote-ref-2)
3. *Stephens v. Howard*, 221 Ga. App. 469 (1996). [↑](#endnote-ref-3)
4. *Chase v. State*, 337 Ga. App. 449 (2016). [↑](#endnote-ref-4)
5. *Legree v. State*, 344 Ga. App. 793, 795-796 (2018). [↑](#endnote-ref-5)
6. See, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 2538, 2540, 174 L. Ed. 2d 314 (2009) (“Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.” … “Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.”). [↑](#endnote-ref-6)