Evidence 101
Part IV

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Coverage

- Three Major Areas
  - Relevance
    - The first question you should always ask is: How is this evidence relevant?
  - Witnesses: Testimonial evidence including
    - Form of examination
    - Opinions and Experts
    - Credibility and Impeachment
  - Hearsay

Coverage

- Digressions
  - Writings
  - Privileges

Hearsay

- Rule 801: Definitions
  - Statement: A statement is:
    - An oral or written assertion, or
    - Nonverbal conduct of a person, if it is intended by him as an assertion

Hearsay

- Example: D is charged w/ driving while intoxicated. At his booking, a videotape is made showing him to be behaving in an abusive manner and w/ slurred speech. D moves to suppress the use of the videotape. Will this motion be granted or denied? A videotape is not a statement. It was n/ an oral or written assertion nor was it conduct intended by D as an assertion: D didn't stand there at the booking acting abusive and speaking in a slurred fashion to prove that he was intoxicated. His conduct was n/ intended as an assertion. The videotape is n/ a statement therefore it can't be hearsay – an out-of-court statement offered for its truth. Nor can it be an admission – a statement of a party offered against him. Correct answer: motion denied b/c video tape is relevant evidence

Hearsay

- Example: P was injured in a wind-surfing collision w/ a power boat. P is now suing the owner of the power boat. At issue is the wind speed at the time in question. P is offering into evidence a computer printout measuring the wind speed. This computer printout was given to him by another boat owner who was an eyewitness. This other owner has in his boat a sophisticated electronic weathering device that measures wind speed. P has now taken this computer printout of the wind speed and wants to introduce it into evidence.

Hearsay

- Answer: Inadmissible unless there is foundation testimony as to the accuracy and the proper working condition of the weathering device (dealt w/ authentication). Why are business records and hearsay incorrect choices? A computer printout is n/ a statement. A statement must be a human statement, n/ one made by animal or machine. B/c the computer printout is n/ a statement, it cannot be hearsay nor a hearsay exception

Hearsay

- Declarant: A person who makes a statement or assertion. Main issue: Is the declarant the same person as the in-court witness or is the declarant an out-of-court person? Is the declarant the person testifying in court (is she giving into evidence her own statement) or did someone else make the statement that the witness is offering?

Hearsay

- Hearsay: An out-of-court 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

Approach to Hearsay

- Step 1: Analyze the out-of-court statement (801(a))
  - Determine first if there is a statement and then isolate the statement

Approach to Hearsay

- Step 2: Determine who the declarant is (801(b))
  - Who made the statement? Is it the person in court testifying? Is it a party or is it some other witness?

Approach to Hearsay

- Step 3: Determine the purpose for which the evidence is being offered (substantively for its truth or merely to impeach and attack credibility) (801©(d))
  - Two possible purposes
    - If the evidence is being offered for its truth, then it's hearsay. Then and only then, do you go on to the fourth step. Don't randomly apply hearsay exceptions until you have first decided that the evidence being offered is being offered for its truth
    - If the evidence being offered is n/ being offered for its truth, then it is nonhearsay

Approach to Hearsay

- Step 4: Apply hearsay exceptions, if possible (803 and 804)

Forms of Non-Hearsay

- FRE 801(d): Under 801(d), there are four types of statements which by definition are non-hearsay. These are hearsay exemptions
- Verbal acts
- Non-assertive conduct
- State of Mind

Forms of Non-Hearsay

- 801(d)
  - Prior Inconsistent Statements
  - Prior Consistent Statements
  - Prior Identifications
  - Admissions

Prior inconsistent statements

- Declarant must be available and the declarant must be subject to cross-examination regarding the statement
- Rule: Prior sworn inconsistent statements are admissible both (1) substantively and (2) to impeach. Prior inconsistent statements that are n/ sworn are only admissible to impeach. Sworn means subject to penalty of perjury at a trial, hearing, or other proceeding

Prior inconsistent statements

- Example: W testifies that a traffic light was “red” on direct examination. On cross-examination, she is asked about a statement made in a deposition where she stated that the light was “green.” The prior statement was made in a deposition. A deposition is sworn and it is a proceeding. Therefore, W’s prior inconsistent statement that the light was green is admissible both substantively and to impeach b/c it is a prior sworn inconsistent statement

Prior inconsistent statements

- Compare: If that W had made a prior inconsistent statement to a friend that the light was “green,” that prior statement would n/ be sworn and, in that case, the PIS would come in merely to impeach

Prior inconsistent statements

- Example: W testifies that he saw D kill victim. On cross-examination, W is asked about a statement that he made in an affidavit where he said, "I'm not sure who killed the victim." This prior statement was made in an affidavit and an affidavit is sworn, but an affidavit is n/ a proceeding. It was n/ a sworn statement made at a proceeding. Therefore, this prior inconsistent statement that D wasn't sure who killed the victim will be admissible but only for purposes of impeachment, n/ as substantive evidence

Prior Consistent Statements

- Declarant must be available and the declarant must be subject to cross-examination regarding the statement
- Prior consistent statements are non-hearsay where offered to rebut a charge of (1) recent fabrication or (2) improper influence. Prior consistent statements offered to rebut are admitted substantively

Prior Consistent Statements

- Example: W testifies favorably for P on direct examination. On cross, the defense attorney asks W if he is P's ex-husband. W answers, "yes." This is an inference of bias – of course W is going to testify favorably for P b/c at one time he and P were married. On re-direct, W may properly testify that he and P have n/ spoken to each other since their bitter divorce three years ago. That would be a proper form of prior consistent statement on redirect to rebut a charge of bias or favoritism. Where the prior consistent statement is offered in rebuttal, it comes in as substantive evidence

Prior identifications

- Declarant must be available and the declarant must be subject to cross-examination regarding the statement
- A prior identification requires:
  - A prior statement of identification of a person
  - Made after perceiving him
- It is nonhearsay which is offered substantively for its truth.

Prior identifications

- Example: Witnesses testify that a bank robbery was committed by a large man w/ red hair. D shows up at trial w/ a shaven head. Jailer is called to testify that, “when D was first brought to jail he had red hair.” Jailer’s testimony will be: (a) admissible as a prior identification or (b) admissible to explain the discrepancy w/ W’s testimony.

Prior identifications

- (A) is wrong. (B) is right. Witnesses said that the robbery was committed by a large man w/ red hair and D has shown up at trial w/ a shaven head. This testimony is relevant, it will come in, but it is n/ going to come in as a prior identification. Why not? The definition requires a prior statement of identification. Did Jailer – at a prior time – make an identification of D? No, all Jailer has done is merely testify at trial now that, “when D was first brought to jail, he had red hair.” That is Jailer’s present testimony but there was never any prior statement of identification made and for lack of a prior statement of identification, (a) is wrong

Admissions (801(d)(2))

- Direct admission
- Admissions by conduct or silence (adoptive admissions)
- Authorized admission (one type of representative admission)
- Vicarious admission (second type of representative admission)
- Co-conspirator’s admission

Direct Admission

- Direct admission: A statement of a party offered against him by his opponent. An admission is admissible as substantive evidence under 801(d)(2). It is not hearsay

Direct Admission

- Admissions are based on gamesmanship, not based on trustworthiness: You made the statement, you stand by that statement – it can be used against you in court
- Focus on who is the declarant: An admission requires the statement of a party. If the declarant is D, then there is an admission

Direct Admission

- Example: D comes over to P after a car accident and says, “It was my fault.” Statement of a party, D, offered against him by his opponent, P. That is what is meant by “admission of a party-opponent”
- Compare: What would happen if a bystander – a non-party – said to P, “it was D’s fault.” Is that an admission? No, that’s an example of inadmissible hearsay. For an admission, it must be a statement of a party. But if a bystander – a nonparty – was the declarant, in that case, the same statement – “it was D’s fault” – would be viewed as inadmissible hearsay

Admissions by conduct or silence (adoptive admissions)

- Evidence of conduct of a party which reasonably supports an inference inconsistent w/ the party's position is admissible as an admission
- For an adoptive admission, the circumstances must be such that a reasonable person would have denied the statement

Admissions by conduct or silence (adoptive admissions)

- Example: P is suing his former employer – corporation – after long-term exposure to a harmful chemical caused leukemia. D denies both that (1) the chemical was unsafe and that (2) it knew there was any special danger caused by exposure to the chemical. P seeks to offer into evidence a report which was compiled by D to a federal agency detailing the harmful effects of the chemical. Upon objection, the report will be admissible or inadmissible as an adoptive admission by D?

Admissions by conduct or silence (adoptive admissions)

- A situation where a party conducts itself inconsistently w/ its trial contentions is a basis for an admission by conduct. Here, the situation is the report. The situation of the report (where D detailed the harmful effects of the chemical) is such that D is conducting itself inconsistently in that report w/ its denials at trial. At trial, D said that it didn't know the chemical was unsafe and that it didn't know there was any special danger. But the report is inconsistent w/ D's denials b/c it detailed the harmful effects of that chemical

Admissions by conduct or silence (adoptive admissions)

- An incorrect answer is: “admissible to prove notice.” Yes, this report would come in to show SOM and to show notice that D did know there was a danger (otherwise D wouldn’t have written the report) but that is n/ as good an answer as an adoptive admission.

Admissions by conduct or silence (adoptive admissions)

- An adoptive admission comes in substantively – n/ just to show SOM or to show notice. "Substantively" means that it comes in for its truth. This evidence would come in not only to show notice that D knew but also to show that the chemical was unsafe which comprised the two denials in the suit. By coming in as an adoptive admission, we are refuting both of D's denials. This is a more complete answer than merely coming in to prove notice

Admissions by conduct or silence (adoptive admissions)

- Example of another adoptive admission: In a post-arrest situation, the silence of an accused may n/ be used against her. Why? At this point, the accused is relying upon her Miranda's rights of silence. A RP in this situation would remain silent relying on Miranda. If one of two accused parties says, "I didn't do it, the other guy did it." And the other guy just sits there and says nothing. Is that an adoptive admission? No, in a post-arrest situation, a RP would rely on the M rights of silence

Authorized admission (one type of representative admission)

- A statement of any person (not necessarily an employee) specifically authorized by a party to speak which may be offered against the party as an authorized admission
- For an authorized admission, authority to speak is required

Vicarious admission (second type of representative admission)

- A statement of an agent or employee made (1) during the existence of the relationship and (2) concerning a matter w/in the scope of employment
- Such a statement is a vicarious admission and may offered against a party
- No authority to speak is required

Vicarious admission (second type of representative admission)

- Example: A truck driver has an accident while making a routine business delivery. At the scene of the accident he says to the police officer, “I guess that I had too many beers at lunch.” This is (1) a statement of a party’s employee, (2) made during the existence of the relationship, and (3) it’s w/in the scope of employment b/c he was carrying out a business delivery at the time. This statement would be deemed proper as a statement being made w/in the scope of employment

Co-conspirator's admission

- A statement of a co-conspirator of a party made (1) during the course of the conspiracy and (2) in furtherance of the conspiracy is admissible against the party
- Rationale: Each co-conspirator is viewed as an agent of all the other conspirators that is why the co-conspirator's admission may be admissible against the party
- Proof of the existence of the underlying conspiracy must be established by a preponderance of independent evidence

Verbal Acts

- Verbal acts or operative acts are statements whose relevance is independently significant of their truth. Two types:
  - Transactional words
    - Example: The actual words of a K, a will, or a deed. Those are transactional words which, by themselves, have independent significance and they are nonhearsay
  - Tortious words
    - Actual words of libel or slander in a defamation action. Those actual words have independent significance and, by definition, are nonhearsay as verbal acts

Verbal Acts

- The actual defamatory words in a defamation action have independent legal significance and are admissible as nonhearsay.
- Example: In a defamation action, P offers W's testimony that, "D told a group of friends (publication) P regularly turns in his employee's work as his own b/c he's so incompetent." That's the defamatory statement.

Verbal Acts

- This statement is admissible as nonhearsay b/c it's being offered as a verbal act. It's being offered to prove that D made the statement and not to prove that P, in fact, was so incompetent that he regularly turned in his employee's work. It would be preposterous to think that P was introducing this self-deprecating statement into evidence for its truth when the statement is the source of P's defamation action against D. By introducing the statement as proof that these words were uttered by D, it has independent significance and will be admissible as nonhearsay in the form of a verbal act.

Nonassertive conduct

- Under the FRE, nonassertive conduct is nohearsay
- Behavior which the actor does n/ intend to operate as a communicative statement but which may, in fact, be so interpreted. As such, a nonassertive statement is admissible as nonhearsay

Nonassertive conduct

- Example: Ship captain prepares and inspects his vessel. After he is finished doing this, he takes his family, brings them on board, and sales away. This is the classic example of non-assertive conduct. The captain is n/ putting his family on board to prove that the vessel is safe – he's putting them on board so he can sale away. His conduct was n/ intended as an assertion: he didn't bring his family on board to prove the seaworthiness of the vessel

Nonassertive conduct

- Example: People opening umbrellas as it starts to rain. These people are n/ opening their umbrellas to show all the people up in the office buildings that it's raining – they're opening their umbrellas so they won't get wet. A statement requires conduct intended as an assertion. This conduct of opening the umbrella is nonassertive conduct and nonassertive conduct is defined as nonhearsay

Nonassertive conduct

- Compare: Assertive conduct is *hearsay*. Examples:
  - Pointing a finger to give directions,
  - Nodding one's head yes or no,
  - A football referee signaling a touchdown by raising both hands over his head
  - These are examples of assertive conduct – conduct intended as an assertion and assertive conduct is hearsay

State of Mind

- Rule: Independently relevant circumstantial evidence may be used as nonhearsay to prove the following things:
  - Knowledge,
  - Intent,
  - Attitude, or
  - Belief
  - Of either:
    - the declarant, or
    - the listener

State of Mind

- Remember: When dealing w/ SOM, always look to see the purpose for which the evidence is being offered.

State of Mind

- Example: P sues D for negligence after a car accident where D's brakes failed. D denies knowledge of any existing problem. P calls W, who is D's brother-in-law. W testifies that he drove the car a week before the accident and after he drove it, he then told D, "Your brakes need repair." The testimony of W is that he told D that the brakes were faulty. This evidence is being offered to show knowledge or notice b/c D has denied any existing problems. It's coming in for purposes of SOM to show knowledge of the listener – here, D, the one who heard W's statement.

Hearsay exceptions (803 and 804)

- Two areas under which hearsay exceptions lie
  - Under 803 if unavailability is not required
    - 803 exceptions do n/ require unavailability
    - See below
  - Under 804 if unavailability is required
    - 804 exceptions do require unavailability
    - See below

Present sense impression (803(a))

- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter
- The event or condition itself need n/ be startling. In other words, a PSI is really an unexcited utterance

Present sense impression (803(a))

- Time frame is the most highly tested aspect on the MBE. It's a very strict time frame: "while perceiving … or immediately thereafter." This is usually a question of moments, sometimes minutes. Ten minutes is too long b/c there is time for reflection and deliberation so the statement would lack trustworthiness. Courts are very strict on this matter. It's usually a matter of moments, seconds, or a minute or two – but n/ as much as ten minutes

Present sense impression (803(a))

- Example: The weather conditions on the night of a burglary are at issue. V, who had been sleeping in his home, offers testimony that just after the prowler fled, his teenage son returned home from a date and said, “what a great night, it’s so clear you can see a million stars.” That evidence is going to be admissible as a PSI. It’s n/ a startling event but it describes or explains a condition – the weather condition at the time. And it was made just after the prowler fled so it is “while” or “immediately after” perceiving the event or condition

Present sense impression (803(a))

- Declarant of the PSI or the declarant of the excited utterance need n/ be available or even known (Applies both for PSI as well as excited utterance)

Present sense impression (803(a))

- Example: P sues D after a car accident which occurred near Times Square. At the trial, P's witness testified that when it happened (satisfies while or immediately thereafter is satisfied), someone in the crowd yelled, "that red car did it!" Who's the declarant? Someone. W is testifying as to what *someone* said – we don't know who that person is. That person is not available and need n/ be available. Such a statement would come in as a PSI or more likely, as an excited utterance

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

Excited utterance

- Main Points
  - Statement need only relate to the startling event: Don't have to look for exclamation marks or for "the declarant excitedly exclaimed."

Excited utterance

- Time frame: Statement must be made while the declarant was “under the stress.” It’s n/ quite as strict as for PSI. It could be a matter of minutes, sometimes even longer. An excited utterance will not encompass a statement made at the police station after the accident. There is time while driving from the accident scene to the police station for reflection and deliberation. The purpose of an excited utterance is based on spontaneity – that addresses the issues of trustworthiness. A statement which is made later, at the police station, after the accident is not while under the stress

Excited utterance

- Judge decides if there was the necessary state of excitement to qualify a declaration as an excited utterance

Excited utterance

- Example: State has accused D, a 18-year-old, of throwing a rock towards a crowd of students which hit a girl causing her permanent injuries. To prove that it was D who threw the rock, the prosecutor called Mrs. S to testify. Mrs. S is the mother of Tim, D's best friend. Mrs. S confronted Tim when he arrived home and demanded to know what happened. At first Tim said nothing, but finally said: "D threw a rock and hit some girl. I heard her head crack real loud and she went down hard. Mom, I think she's dead." Tim burst into tears and said, "We ran to D's house and hid for a while." He made me promise n/ to tell."

Excited utterance

- Is Mrs. Smith's statement admissible as an excited utterance?

Analysis

- Point 1: Statement relates to a startling event. Occurrence must be startling enough to produce shock and excitement in the observer and the statement must pertain to the exciting event.
  - Reasoning: First, T's out of court statement is hearsay b/c it's being used to prove the truth of the matter asserted. The facts state: "In order to prove that D threw the rock…" The loud "crack" when the rock hit the victim and the fact that she "went down hard" emphasizes how startling this event actually was. Also, the declarant was only 18 and he thought he just witness his best friend kill a girl.

Analysis

- Point 2: The statement was made while the declarant was under the stress of excitement caused by the event.
  - Reasoning: Tim's conduct after the startling event was extraordinary. He acted out of character and that is evidence that he was still in shock and suffering from the stress of the event.

Analysis

- Point 3: It must be spontaneous w/ no time for deliberation. Focus is on whether the declarant was still under the sway of excitement to such an extent that he lacked the reflective capacity to fabricate.

Analysis

- Reasoning: T's behavior represented a continuing level of stress arising from the incident which eliminated the possibility of fabrication. Defense would emphasize the passage of time. Six hours passed from the time of the incident to the statement. That T locked himself in his room and said "leave me alone" shows a boy deep in thought, reflecting on the awful events of the night. In addition, T's statement was made in response to *persistent* questioning by his mother so an argument could be made that it was *not* spontaneous.

Statement of present mental or physical condition

- Statements of *intent*
  - Example from *Hillman* case: Declarant says, "I'm going to Colorado." This is a statement of present mental intent and this will come in substantively under this hearsay exception. Therefore, the statement, "I'm going to CO" will be admissible to prove its truth as substantive evidence
  - Examiners use the term, "Going" to trigger a statement of present mental intent

Statement of present mental or physical condition

- The present mental state must be a "then existing" mental or physical condition. Look for the present tense. Example: If declarant says, "I hurt my leg yesterday" – that won't do it. But if she says, "My leg is broken," that would be a statement of present physical condition which comes in under this hearsay exception
- Statements of present physical condition may be made to ANY person, not necessarily to a physician

Statement of present mental or physical condition

- There is an exception made for past mental state regarding a declarant's will. Past mental state regarding a declarant's will is permitted. Example: "I revoked my last week." That would be admissible

Statement of present mental or physical condition

- Statements of *pain*
- Statements of *bodily health*

Statements of past physical conditions

- Statements describing medical history or past or present symptoms and these statements may be admissible if they are made for the purpose of medical diagnosis or treatment
- Statement may be made to any person, n/ necessarily a physician

Statements of past physical conditions

- Declarant need n/ be the person seeking the treatment herself: Example: Parent could make a statement about the child's physical condition and that would be permissible
- Severance: Example: Declarant says, "that speeding car hit me and broke my leg." Can you sever the speeding aspect from the statement of physical condition – "that the car hit me and broke my leg?" Yes, the statement that the car hit declarant and broke her leg would be admissible but the fact that the car was speeding would n/ be admissible

Past Recollection Recorded

- Where a witness's memory has failed to have been refreshed, the witness may read into evidence statements from a writing provided:
  - The witness once had knowledge about the matter, and
  - The memorandum or the writing was made by the witness or adopted by her at a time when the matter was fresh in her memory

Past Recollection Recorded

- The memorandum is read into evidence but the writing, itself is n/ admitted. The relevant passages are read into evidence but the writing, itself is not admitted unless it is offered by the adverse party. The adverse party has a right to offer the writing into evidence and any portions which are admitted by the adverse party will also come in substantively, n/ just to impeach

Past Recollection Recorded

- As a prerequisite to PRR, refreshing must have been attempted and failed. Remember, must first attempt to refresh the recollection of the witness. When we're refreshing, we hand a writing to the witness, witness looks at, then the examiner takes it back, and the witness testifies from her own memory. If that fails, then, and only then, does the examiner hand the writing back a second time and let the witness read into evidence the words of the writing

Past Recollection Recorded

- The writing itself must be property authenticated – either by the witness who is testifying or any other qualified person – so that it satisfies the BER. BER prefers the original writing. BER does apply to PRR but BER does n/ apply to refreshing recollection

Business records (Records of regularly conducted business activity (803(6)))

- A record or report of acts or events which are kept in the ordinary course of a regularly conducted business may be admissible as a hearsay exception subject to the following limitations:

Business records (Records of regularly conducted business activity (803(6)))

- Circumstances must not indicate lack of trustworthiness: Any documents or records that are prepared in anticipation of litigation are inherently untrustworthy and are *inadmissible*
  - Example: Accidents reports prepared by RR personnel, even though required by company rules, are n/ admissible under the BRE
  - Rationale: Such reports are prepared in anticipation of possible litigation and railroading – not litigating – is the primary business of the railroad. Unlike payrolls, these reports are calculated for use in court, n/ in the business of transporting goods.

Business records (Records of regularly conducted business activity (803(6)))

- The record, itself, must have been prepared by either the custodian or another qualified person w/ knowledge: Any other qualified witness may testify as to the record.
- The record, itself, must have been prepared at or near the time of the event – it must be fresh
  - Example: Here, the records regularly and routinely recorded each call as it happened.

Business records (Records of regularly conducted business activity (803(6)))

- The record must have been prepared by someone w/ a business duty to record
  - Example: An accident report is not admissible as a business record if, for a slip and fall injury, the accident report was prepared by a check out clerk in a supermarket. If the check out clerk writes an accident report, that is not a report made by someone w/ a business duty to record. The check out clerk's job is to check out the people going through the line w/ groceries – not to write accident reports – so that would not satisfy the business records requirement

Business records (Records of regularly conducted business activity (803(6)))

- The absence of business records may also be admissible as a hearsay exception. An absence of a business entry may be used to prove:
  - The nonoccurrence of an event or

Business records (Records of regularly conducted business activity (803(6)))

- The nonexistence of a record
  - Example: North was charged w/ violating the Boland Amendments by illegally selling armaments to Iraq w/o a governmental license. During the trial, North admitted selling the weapons to agents of Saddam. In his defense, North testified that he did n/ sell the armaments as a private citizen, but rather he was working for the CIA. In rebutting North's testimony, the gov't called Casey, a high ranking CIA official, to the stand. Casey testified that if North were in fact a CIA agent, that information would ordinarily be contained in the CIA's employment records. Asked whether North's employment records were on file w/ the CIA, Casey then testified, "I have searched the CIA employment records but I haven't found any documentation that North was employed by the agency."

Public Records

- Three areas are included which are admissible as a hearsay exception
  - Records of public office or agency activities
  - Records of “matters observed” pursuant to a legal duty
    - The weather bureau’s observations of weather conditions
    - Note: Police reports in criminal cases are not included as official records, public records, or business records. B/c of their inherent lack of trustworthiness, police reports are inadmissible as hearsay. For example, recorded observations made by the police at the scene of an arrest would n/ come w/in the public records exception. If the police observations recorded in the public record are to be introduced, they must be presented by the observing officer, n/ be offering the public records as a substitute for the officer’s testimony

Public Records

- Factual findings of official investigation
  - These findings may be used in civil proceedings or in criminal cases against the government

Public Records

- Main points
  - The reporter of the official record must be under an official duty to record (similar to business records)
  - The court has discretion to exclude evidence due to lack of trustworthiness (similar to business records)
  - Absence of a public record is admissible as a hearsay exception (similar to business records)

Examples of hearsay exceptions dealing w/ records

- Records of vital statistics: Vital statistic form hearsay exceptions to such things as birth, death, marriage
- Records of religious organizations: Marriage certificates, baptismal certificates

Examples of hearsay exceptions dealing w/ records

- Family records: Family records including statements made in family bibles are admissible under hearsay exception. Engravings on tomb stones also come in under this family record exception. Genealogy charts are included. Inscriptions on family portraits

Examples of hearsay exceptions dealing w/ records

- Statements made in ancient documents: An ancient document is one that is more than 20 years old. A document more than 20 years old may be admissible as a hearsay exception if (1) it is found in the place where it ought to be and if (2) there is some form of authentication.
- Example: A map to show that a certain road was in existence across a person's property more than 20 years ago to prove that the road ran across the person's property 20 years ago

Learned Treatises

- Learned treatises
  - Statements contained in published treatises and periodicals are admissible as hearsay exceptions if:

Learned Treatises

- They are found to be authoritative
  - Authoritativeness for a learned treatises can be established by (1) expert testimony or (2) by judicial notice
- The learned treatises must have been (1) called to the expert witness's attention on cross-examination or (2) relied upon by the expert on direct examination
  - Just as we had w/ PRR, under the learned treatises exception, the statements in the learned treatises are read into evidence and they are admissible as substantive evidence but the treatises itself – the writing itself – is not admitted UNLESS offered by the adverse party

Learned Treatises

– The adverse party may admit portions of the treatises and, once admitted, those portions are also admissible – not just to impeach – but substantively to prove their truth

Final Judgments

- Evidence of a final judgment entered after a trial or upon a plea of guilty to a felony, is admissible as a hearsay exception

Final Judgments

- Example: After a car accident, D is charged w/ driving while intoxicated, a felony. D pleads guilty to the DWI and serves six months in jail. Subsequently, P sues D in a civil action for damages resulting from the car accident. P offers into evidence a certified copy of D's conviction. This record of the conviction will be (a) admissible as proof of D's character or (b) admissible as proof of D's intoxication.

Final Judgments

- It's admissible as proof of D's intoxication under the exception for final judgments. (A) is wrong. If this conviction came in as proof of D's character, that means that it would be coming in to impeach her character. But that's not the purpose for which the evidence is being offered. The evidence is not coming in as impeachment evidence. It's coming in substantively – to prove its truth. What is the truth of a DWI charge? Intoxication. It's coming in as substantive evidence to prove intoxication

Final Judgments

- Remember: When dealing w/ a hearsay exception, that exception is admissible to prove its truth. Hearsay exceptions always come in substantively

Catch-all exception (equivalency exception)

- In order for the exception to work, the following limitations must be satisfied:
  - The evidence being offered must be MORE probative than any other evidence on point,
  - The court must find circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions,
  - Admission of the statement must best serve the interest of justice, and
  - Advance written notice must be given to the opposing party

Hearsay Exceptions Under 804

- Requires unavailability. There are five forms of "unavailability":
  - Assertion of a privilege,
  - Refusal to testify,
  - Lack of memory,
  - Absence due to death, illness, or injury
  - Absence from the court's jurisdiction

Former Testimony

- Former testimony (804(b)(1))
  - Testimony given at an earlier proceeding by a now unavailable witness is admissible if the party against whom the testimony is being offered (or her predecessor in interest):
    - Had an opportunity to examine the person at the earlier proceeding, and
    - Had a motive to examine similar to the reasons now presented

Former Testimony

- Identity of the parties is not required
- Opportunity at the prior examination could have been (1) direct examination, (2) cross-examination, or (3) re-direct examination
- The party whom the evidence is now being offered against must have been a party at the earlier proceeding

Former Testimony

- Example of former testimony: In a suit for negligence, P is offering against D a deposition which was taken by D of a now deceased eye witness. This eye witness observed a skiing accident in which P was injured. P is offering against D a deposition, which the defense attorney took of a now deceased witness. Will this deposition be admissible? Yes, it's admissible as former testimony. First, D, at the time of deposition, is the same D now at trial. Second, D's motive in taking W's deposition directly bears on the issues that have been raised in P's negligence action. Indeed, it's the same COA. Third, there was an opportunity for direct examination at the time of the deposition. At the time of the deposition – which was taken by the defense attorney – there was an opportunity for direct examination so that would satisfy the requirement for former testimony and the deposition would be admissible

Dying Declaration

- Elements
  - A declaration (statement) made by an unavailable declarant
  - While under an imminent belief of death
    - Declarant need not actually die, but still must be unavailable
  - The statement must concern the cause or circumstances of the purportedly imminent death
  - In a criminal homicide prosecution or in any civil action
    - A dying declaration does not apply to non-homicide criminal cases such as theft crimes, assault and battery, and <u>attempted murder</u>

Dying Declaration

- Facts are usually camouflaged: D gets shot and he says, “I know I’m dying, X shot me.” Right away you think dying declaration. But somewhere at the top of the fact pattern they tell you that D is presently at trial. Be sure to look for unavailability!

Dying Declaration

- The judge decides if a dying declarant had a sense of impending death or if a witness is unavailable. Preliminary questions of fact are ordinarily resolved in criminal and civil trials by using a preponderance of the evidence standard.

Dying Declaration

- Example: Q lived next door to E. Late one night Q overheard E scream, “S, please don’t do it!” The next day E was found dead in her bedroom. S was arrested and charged w/ murdering E. The court should rule Q’s testimony regarding E’s statement admissible, as a dying declaration if the judge by a preponderance of the evidence determines that E believed that her death was imminent. The judge not only decides factual issues, but also determines the applicability of any technical evidentiary rules

Declaration against interest (804(b)(3))

- Elements
  - A statement of an unavailable
  - Non-party
  - Which is against interest when made
    - What kind of an interest must the statement be made against? A pecuniary or financial interest, a penal interest, or a property interest
    - A declaration against a penal interest which is offered to exculpate the excused requires that there be corroborating circumstances clearly shown (which clearly indicate the trustworthiness of the statement)

Comparison of declarations against interest v. admissions

ADMISSION	DECLARATION AGAINST INTEREST
An admission is always a statement of a party	A DAI is always a statement of a non-party
An admission does not require unavailability	A DAI does require unavailability
An admission need not be against interest when made	A DAI must be against an interest – pecuniary, penal, or proprietary – at the time it was made
Declarant need not have personal knowledge of the facts stated	Personal knowledge by the declarant is required

Comparison of declarations against interest v. admissions

- General rule: The same statement cannot be used as both an admission and a declaration against interest. Why? An admission is a statement of a party and a declaration against interest is a statement of a non-party

Comparison of Declarations Against Interest v. Admissions

- Example of a situation where the same statement is used as both an admission and a DAI: Delivery truck driver had an accident and he said to officer, “I guess I had too many beers at lunch.”

Comparison of Declarations Against Interest v. Admissions

- That statement could be used as a vicarious admission – a statement of a party's employee made during the existence of the relationship and made w/in the scope of employment offered against the party. The employee's statement was offered against D, the employer.

Comparison of Declarations Against Interest v. Admissions

- How can that statement also come in as a declaration against interest? The fact pattern said that the employee who made the statement, “I guess I had too many beers at lunch,” died in a car accident two months after the first accident. The employee is dead and thus unavailable. The employee is n/ a party to the action. P is suing the employer. The employee is a non-party and the statement, “I had too many beers at lunch” was against interest at the time he made it. Had he lived, the statement could have been used against him for purposes of tort liability. So it was against a pecuniary interest when made. The employee is unavailable b/c he is dead and the statement was against interest at the time it was made.

Comparison of Declarations Against Interest v. Admissions

- The same statement, “I guess I had too many beers at lunch” could be used both as a vicarious admission and as a declaration against interest. This is one exception where the same statement can come in as both. Remember, for the most part, a statement that is an admission cannot be a declaration against interest b/c admissions are statements of parties and declarations against interest are statements of nonparties.

Hearsay within hearsay (805)

- Refers to two or more layers of hearsay in the declarant's testimony.
- Approach: Deal w/ each layer of hearsay separately and start w/ the first statement made.

Hearsay within hearsay (805)

- For multiple hearsay to be admissible, each layer must be separately admissible either under a hearsay exception or as some form of nonhearsay (PIS, SOM, admission, verbal act).
- Each layer must be separately admissible or else the whole statement is excluded

Hearsay within hearsay (805)

- Example: P is in the hospital and P's mother is testifying as to a nurse's statement of what the doctor told her about P's condition
  - Mother is the witness testifying as to (1) what the nurse said about (nurse's statement) (2) what the doctor told her (doctor's statement)

Hearsay within hearsay (805)

- Analysis: The first statement made was the statement from the doctor to the nurse. What the doctor said might come in as a business record if what he said was made in the ordinary course of business (i.e. if he was reading to the nurse from a chart which he had a business duty to record). How about the nurse's statement? Deal w/ that second. The nurse's statement is most likely hearsay and the WHOLE thing is inadmissible. But possibly, the doctor made the statement to the nurse in such a way that the nurse's statement can be used for purposes of SOM – to show knowledge, notice. If you can argue that that's a possible way you can get each of the two layers of the multiple hearsay admitted

Crawford and the Sixth Amendment Right to Confrontation

Please see handout.

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