



BATON ROUGE BAR ASSOCIATION • JULY 27-29, 2017
HILTON SANDESTIN BEACH GOLF RESORT & SPA

EVIDENCE UPDATES AND HEARSAY

SPEAKER:
SHENEQUA L. GREY

FRIDAY, JULY 28, 2017 • 11:45 AM - 12:45 PM

EVIDENCE UPDATES AND HEARSAY

PRESENTED BY:
PROFESSOR SHENQUA L. GREY,
SOUTHERN UNIVERSITY LAW CENTER

IDENTIFYING HEARSAY

“Hearsay” is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted.

HEARSAY REQUIRES:

1. that you have a statement (within the meaning of the rule);
2. that the statement was made outside of the present trial or hearing;
3. the declarant must be a person;
4. the statement must assert something; and
5. the statement is being offered to prove what the statement asserts.

THE HEARSAY FORMULA

1. Identify the statement (oral, written, assertive conduct by a person).
2. Determine what is being asserted in the statement.
3. Determine what the statement is being offered into evidence to prove.

- If "Step 2" and "Step 3" are the same, i.e., "Step 2" = "Step 3", then the statement is hearsay - it's being offered to prove the same thing that it asserts.

["Step 2" = "Step 3" = HEARSAY]

- If "Step 2" and "Step 3" are not the same, i.e., "Step 2" ≠ "Step 3", then the statement is *not* hearsay - it's not being offered to prove the same as it asserts. It's being offered for some other reason.

["Step 2" ≠ "Step 3" ≠ HEARSAY]

WHICH STATEMENT IS HEARSAY? WHICH IS NONHEARSAY?

Morgan is on trial for murder for killing her neighbor Sandra. Sandra is the president of the HOA in their subdivision, Laurel Hill. At trial the prosecution seeks to admit the following statements into evidence against Morgan. Morgan objects that the statements are hearsay. How should the court rule and why? (*Do not address any exceptions/exemptions that may apply.*)

- A. During an HOA meeting in Morgan's presence, Sandra commented that *the neighborhood had gone down since a certain element had been allowed to move* in the quiet neighborhood. It was well known that Sandra was referring to Morgan and her large family, who enjoyed having social events and large gatherings in their front yard that often went late into the night.
- B. That the night after the meeting Morgan was overheard saying that *she was going to get rid of Sandra one way or another.*
- C. That Morgan said she was irritated about what Sandra had been saying about her family to the other neighbors.
- D. That Sandra had written a letter to Morgan saying that her family was low class.

CATEGORIES OF NON-HEARSAY

FOR WHAT PURPOSES OFFERED

EXAMPLES OF STATEMENTS NOT OFFERED FOR TRUTH, AND THEREFORE, NOT HEARSAY.

1. **Verbal acts** – an operative fact that gives rise to legal consequences.
2. **Verbal parts of acts** – words that accompany an ambiguous physical act is not hearsay.
3. **Nonassertive Conduct** – conduct that does not assert a fact is not hearsay.
4. **State of Mind of the hearer/listener/reader** – if statement is offered to show the hearer had a certain emotion, or mental state (bias, etc.) or behaved reasonably, it is not hearsay.
5. **State of mind of the Declarant** – offered to show sanity or emotion, not hearsay.
6. **Notice or knowledge of the hearer/receiver** – offered to show hearer knew something
7. **Notice or knowledge of declarant** – offered to show declarant knew something
8. **Prior inconsistent statement** is not hearsay if offered to impeach the witness' current testimony.
9. **Prior Consistent statement** – a statement is not hearsay if offered only to rebut a claim of recent fabrication or undue influence or motive

HEARSAY/NON-HEARSAY

A. Inadmissible Hearsay B. Non-Hearsay

HEARSAY OR NON-HEARSAY

Evidence of apps that defendant purchased on his stolen AT&T account was offered into evidence to prove the amount that he stole.

Monthly Subscriptions									
To stop a subscription, text STOP to the Short Code using the mobile phone associated with those charges.									
#	Date	Subscription Name	Short Code	Type	Content Provider	ID	Renew Date	Cost	Tax Charge
1	04/29	Pictamotion	n/a	AS	AT&T AppCenter - Cell	n/a	05/28/2012	3.99	0.00 3.99
For assistance contact: 1-800-331-0100									
2	04/30	ATT Navigator	n/a	AS	Telenor Inc	n/a	05/29/2012	9.99	0.00 9.99
For assistance contact: 1-800-331-0100									
3	05/11	AttSport GPS	n/a	AS	AT&T AppCenter - Tel	n/a	06/10/2012	5.99	0.00 5.99
For assistance contact: 1-800-331-0100									
4	05/15	Yimble Outdoors	n/a	AS	AT&T AppCenter - Tel	n/a	06/14/2012	5.99	0.00 5.99
For assistance contact: 1-800-331-0100									
5	05/18	AttSport GPS	n/a	AS	AT&T AppCenter - Tel	n/a	06/17/2012	5.99	0.00 5.99
For assistance contact: 1-800-331-0100									
6	05/20	Plycall	n/a	RT	Blango	n/a	06/19/2012	19.99	0.00 19.99
For assistance contact: 1-800-331-0100									
7	05/20	Yimble Outdoors	n/a	AS	AT&T AppCenter - Tel	n/a	06/19/2012	5.99	0.00 5.99
For assistance contact: 1-800-331-0100									
Totals									\$7.93
ATTN: MGR. Backhouse & Download Charges									

A. Inadmissible Hearsay B. Non-Hearsay

HEARSAY/NON-HEARSAY

Module 5.A.5 Hearsay/Non-Hearsay

In a criminal trial for solicitation of a prostitute, the arresting officer testifies to the events leading up to the arrest of the defendant. [Arts. 801, 802]




A. Inadmissible Hearsay B. Non-Hearsay

HEARSAY/NON-HEARSAY

Module 5.A.7 Hearsay/Non-Hearsay

The plaintiff brings a civil action for wrongful termination. The employer explains the information upon which the decision to terminate her was made on direct examination in the defendant's case-in-chief. [Arts. 801, 802]



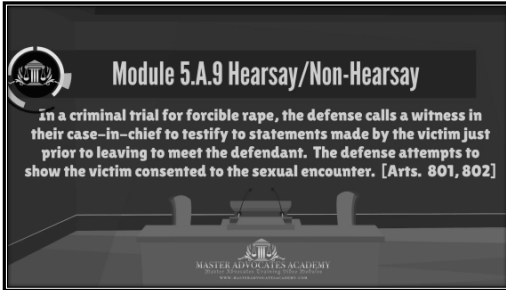
A. Inadmissible Hearsay B. Non-Hearsay

HEARSAY or NON-HEARSAY
Katie Holmes offers evidence of the pages from Star magazine in her lawsuit for defamation against the magazine for an article that claimed she was addicted to drugs.



A. Inadmissible Hearsay B. Non-Hearsay

HEARSAY/NON-HEARSAY



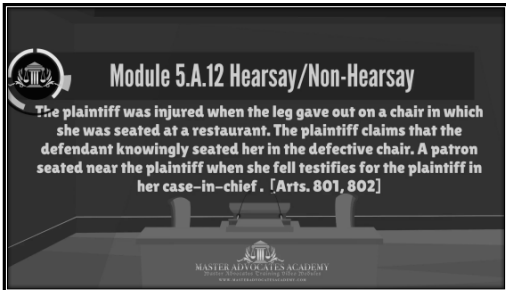
Module 5.A.9 Hearsay/Non-Hearsay

In a criminal trial for forcible rape, the defense calls a witness in their case-in-chief to testify to statements made by the victim just prior to leaving to meet the defendant. The defense attempts to show the victim consented to the sexual encounter. [Arts. 801, 802]

MASTER ADVOCATES ACADEMY
www.masteradvocatesacademy.com

A. Inadmissible Hearsay B. Non-Hearsay

HEARSAY/NON-HEARSAY



Module 5.A.12 Hearsay/Non-Hearsay

The plaintiff was injured when the leg gave out on a chair in which she was seated at a restaurant. The plaintiff claims that the defendant knowingly seated her in the defective chair. A patron seated near the plaintiff when she fell testifies for the plaintiff in her case-in-chief. [Arts. 801, 802]

MASTER ADVOCATES ACADEMY
www.masteradvocatesacademy.com

A. Inadmissible Hearsay B. Non-Hearsay

EXCEPTIONS & EXEMPTIONS TO HEARSAY RULE

ARTICLE 803 AVAILABILITY OF DECLARANT IMMATERIAL

- | | |
|---|--|
| 1. Present Sense Impression | 14. Records of documents affecting interest in property |
| 2. Excited Utterance | 15. Records of or statements in documents affecting interest in property |
| 3. Then Existing Mental, Emotional, or Physical Condition | 16. Statements in ancient documents |
| 4. Statement for Purpose of Medical Treatment | 17. Market reports, commercial publications |
| 5. Recorded Recollection | 18. Learned Treatises |
| 6. Records of Regularly Conducted Activity | 19. Reputation concerning personal or family history |
| 7. Absence of Records Kept | 20. Reputation concerning boundaries or general history |
| 8. Public Records and Reports | 21. Reputation as to character |
| 9. Records of Vital Statistics | 22. Judge of previous conviction |
| 10. Absence of Public Record | 23. Judgment personal family or general history or boundaries |
| 11. Records of Religious org. | 24. Testimony as to age |
| 12. Marriage, Baptismal certificates | |
| 13. Family Records | |

ART. 804 EXCEPTIONS WHERE DECLARANT UNAVAILABLE

1. Former Testimony
2. Dying Declaration
3. Statement against Interest
4. State of personal/Family History
5. Complaint of Sexually Assault
6. Residual Catchall
7. Forfeiture By Wrongdoing



Preliminary requirements for this group of exceptions:

All of these exceptions require the declarant to be unavailable.

ART. 801(D) STATUTORY NON-HEARSAY

1. Prior Inconsistent Statement
2. Prior Consistent Statement
3. Identification
4. Complaint of Sexually Assaultive Behavior
5. Admissions (personal, adoptive, authorized)
6. Agent/Employee
7. Co-conspirator
8. Things Said and Done



Preliminary requirements for each group of exemptions:

These exemptions require the declarant be present at trial and capable of being cross-examined on the prior statement.

These exemptions are statements 1) made by the declarant; 2) offered against the declarant.

<p>EXCITED UTTERANCE</p> <p>A statement relating to a startling event or condition made while the declarant is still under the stress of excitement caused by the event or condition.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. the statement describes or explains (an event or condition; 2. while (or immediately after) perceiving the event or condition
--	--

<p>PRESENT SENSE IMPRESSION</p> <p>A statement describing or explaining an event or condition made while perceiving it or immediately thereafter.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. Startling event or condition 2. Statement "relating to" startling event or condition 3. Made while still under stress of startling event
--	--

Module 5.B.1 Hearsay/Hearsay Exceptions

AVAILABILITY OF DECLARANT IMMATERIAL

In a criminal trial for forcible rape, the prosecution calls a nurse in its case-in-chief who was on duty when the victim was brought to the hospital for an examination following the incident. The witness testifies to a conversation with the victim shortly after her arrival. [Arts. 801, 803]

MASTER ADVOCATES ACADEMY

A. Inadmissible Hearsay B. Excited Utterance C. Not Hearsay

PROBLEM

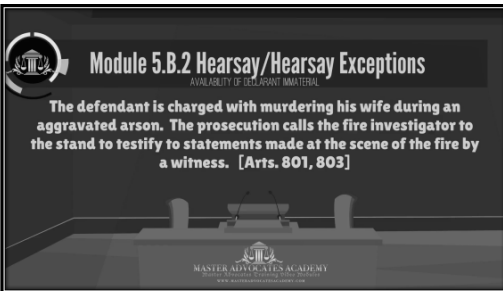
Following a major car accident, Judd was left unconscious and immediately rushed to the hospital where he remained unconscious for six weeks. Immediately upon coming out of the coma, Judd asked the nurse, "Where's Mark? Is he okay? He was driving." Everyone was shocked because Judd was believed to have been driving the vehicle during the accident. It was later discovered that Mark had in fact been driving and had run away from the scene of the accident. In Mark's trial, the prosecution seeks to offer Judd's statement through the nurse to help prove that Mark was driving the vehicle during an accident and left the scene. The defense objects that the statement is hearsay. How should the court rule?

A. Inadmissible Hearsay B. Excited Utterance C. Not Hearsay

PROBLEM

Keira saw a guy in a local park approach a young girl playing alone. The girl didn't appear to recognize him. After talking a few minutes, the girl's mother came over and got her and they left. As Keira continued observing the guy, about 20 minutes later, the guy approached another little girl with a ball and began talking to her. Concerned about the guy's intentions, Keira called 911 and stated, "I'm over here at Sakura Park on North Pine Street. And a guy over here just approached a young girl with a ball and seems to be trying to talk to her, even though she doesn't seem to know him." After a brief pause, she stated, "He's a tall guy, with a beard. He's wearing khaki pants, and a blue polo shirt. He has a big blue beach ball in his hand." The guy was arrested and at his trial, when the 911 call is played after being authenticated by the 911 operator who took the call, the defense objected that the statement was hearsay. How should the court rule and why?

A. Inadmissible Hearsay B. Excited Utterance C. Present Sense Impression



Module 5.B.2 Hearsay/Hearsay Exceptions
AVAILABILITY OF ELLERBEY MATERIAL



The defendant is charged with murdering his wife during an aggravated arson. The prosecution calls the fire investigator to the stand to testify to statements made at the scene of the fire by a witness. [Arts. 801, 803]

MASTER ADVOCATES ACADEMY
 www.masteradvocatesacademy.com

A. Inadmissible Hearsay B. Excited Utterance C. Present Sense Impression

<p>THEN-EXISTING MENTAL CONDITION</p> <p>A statement of a declarant's then-existing mental condition (<i>emotion, intent, plan, motive, design, mental feeling, etc.</i>) offered to prove his then existing mental condition or future action.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. Must be statement of the declarant's then-existing mental condition 2. Offered to prove the then-existing mental condition or future action
--	--

<p>FIVE KEY ISSUES OF STATE OF MIND EXCEPTION</p> <ol style="list-style-type: none"> 1. Must be "then" existing mental condition, not statement of memory (a past mental state) 2. May be offered to prove declarant's "future" action, not past action 3. May not be offered to prove future action of third party 4. Statement of belief/memory is not admissible to prove thing believed 5. A statement of memory/belief can be offered to prove thing remembered or believed as it pertains to testaments 	
---	--

<p>HEARSAY STATE OF MIND VS. NON-HEARSAY STATE OF MIND</p> <p>State of mind should be a direct statement of a person's mental state – no inference necessary. Non-hearsay state of mind requires an inference of mental state.</p> <p>Hearsay state of mind. A direct expression of the declarant's state of mind.</p>  <p>Non-hearsay state of mind. Requires an inference of the declarant's state of mind.</p> 	
---	--

PROBLEM

Bo and Cynthia's house was burglarized. Someone stole the safe that had over \$30,000 in jewelry in it, some rare expensive coins and family heirlooms, and about \$25,000 in cash. About a week later, Bo went over to his best friend Chuck's house to talk with him about problems he was having in his marriage. Bo told Chuck that he really didn't trust his wife and said he was pretty sure he was going to have to divorce her. In later divorce proceedings, Cynthia accused Bo of staging the burglary to keep the valuables for himself. In support of her accusation, she offers the testimony of Chuck that shortly after the burglary, Bo told Chuck that he didn't trust Cynthia and that he was planning a divorce. Cynthia claims this helps to show that Bo likely staged the burglary. Does this statement conform to the then existing mental condition exception? Why or why not?

A. Inadmissible Hearsay B. Then Existing Mental Condition Exception C. Not Hearsay

PROBLEM

Assume that each of the following statements are being offered to prove the truth of the matter asserted. Which of the statements conforms to the "then existing mental condition" exception to the hearsay rule?

1. I didn't love John when I married him.
2. I hated school.
3. I wanted to be a nurse when I was a kid.
4. I intended to send her some flowers.
5. I think my husband wants to kill me.
6. I think that is poison in that can.
7. Marie and I are going to Disneyland over the Christmas break to prove that I went to Disneyland.
8. Marie and I are going to Disneyland over the Christmas break, to prove that Marie went to Disneyland.

A. Inadmissible Hearsay B. Then Existing Mental Condition Exception C. Not Hearsay

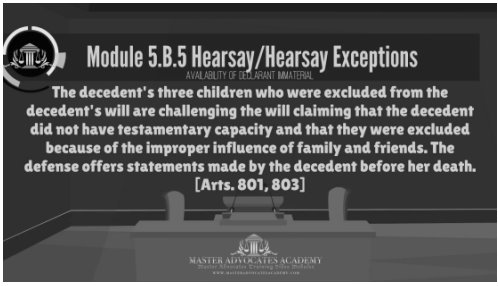
DISTINCTION FROM FEDERAL RULES

Under the federal rule, a statement of a person's intent may also be offered to prove the future action of a third person.

For example, the statement, "John and I are going to California," may be offered to prove that both John and the declarant went to California.



HEARSAY EXCEPTIONS/EXEMPTIONS



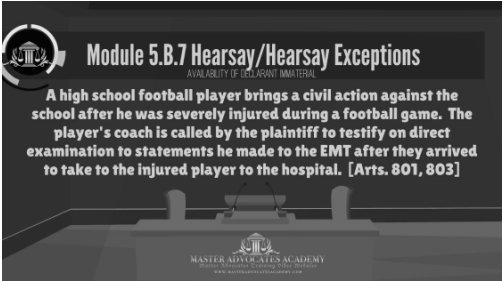
Module 5.B.5 Hearsay/Hearsay Exceptions
AVAILABILITY OF DECLARANT MATERIAL
The decedent's three children who were excluded from the decedent's will are challenging the will claiming that the decedent did not have testamentary capacity and that they were excluded because of the improper influence of family and friends. The defense offers statements made by the decedent before her death.
[Arts. 801, 803]

A. Inadmissible Hearsay B. Not Hearsay C. Then-Existing Mental Condition

<p>THEN-EXISTING PHYSICAL CONDITION <small>EXEMPTION FOR PHYSICAL CONDITION</small> A statement of a declarant's then-existing physical condition (pain, bodily health, sensation, etc.), offered to prove his then existing physical condition.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. Must be statement of the declarant's then-existing physical condition 2. Offered to prove the then-existing physical condition.
---	--

<p>STATEMENT FOR MEDICAL TREATMENT/DIAGNOSIS IN CONNECTION W/TREATMENT Statements made for purposes of medical diagnosis and treatment in connection with treatment.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. statements describing a person's medical history, past or present symptoms, pain, or sensations and/or statements regarding the cause and circumstances of injury(if reasonably pertinent to treatment/diagnosis in connection with treatment) 2. made to a healthcare provider 3. for purposes of medical diagnosis and treatment in connection with treatment
--	---

Hearsay Exceptions/Exemptions



Module 5.B.7 Hearsay/Hearsay Exceptions

AVAILABILITY OF EVIDENTIARY MATERIAL

A high school football player brings a civil action against the school after he was severely injured during a football game. The player's coach is called by the plaintiff to testify on direct examination to statements he made to the EMT after they arrived to take to the injured player to the hospital. [Arts. 801, 803]


MASTER ADVOCATES ACADEMY
2017-2018 ACADEMIC YEAR

A. Inadmissible Hearsay B. Statements Medical Treatment/Diagnosis

C. Then-Existing Physical Condition D. Not Hearsay

DISTINCTION FROM FEDERAL RULES

Under the Federal Rules, a statement may be made merely for diagnosis, even if no treatment will be received. For example, if a person goes to a chiropractor to be diagnosed with severe back pain to use in a lawsuit.



REFRESHING MEMORY	RECORDED RECOLLECTION
<ol style="list-style-type: none"> 1. Establish that the witness has first-hand knowledge of the incident/matter 2. Counsel should show the writing to the witness and allow him to read it silently to himself. 3. Writing should be taken away from the witness 4. If the witness testifies that he now recalls the matter independently of the writing, he may testify to that independent recollection 5. If after reviewing the writing doesn't refresh, counsel should 1) move on, 2) dismiss the witness; or 3) try to admit under recorded recollection 	<ol style="list-style-type: none"> 1. Establish that the witness once had personal knowledge of the matter in the record 2. Establish that despite the attempt to refresh the witness's memory, she still cannot testify fully and accurately 3. Establish that the record was made or adopted/verified by the witness 4. Show that the record was made/adopted/verified while the matter was fresh in her memory 5. Show that the record correctly reflects the witness' memory of the matter

PROBLEM

Mason was involved in an accident and Cantrell was a passenger. Following the accident the police came to the scene and asked both drivers to write down what happened. Mason and the other driver wrote down what occurred and gave their statements to the officer. Cantrell never got out of the vehicle and didn't speak to anyone during the ordeal. At the trial, Mason calls Cantrell to the stand to testify to how the accident occurred. Cantrell has difficulty remembering what happened. The attorney attempts to use Mason's statement to refresh Cantrell's memory. Can the attorney offer Mason's statement into evidence as a recorded recollection if the statement doesn't refresh Cantrell's memory?

A. Inadmissible Hearsay B. Admissible Not Hearsay C. Admissible Recorded Recollection

BUSINESS RECORDS EXCEPTION

Requirements:

1. **Must be business:** any business, institution, association, profession, occupation, calling, including those that are not for profit
2. **Records must be in the form of:** memorandum, report, record, data compilation in any form
3. **Record must concern:** acts, events, conditions, opinions, diagnosis
4. **Foundational requirements through a competent witness:**
 - i. that the record was made at or near the time of the event it records;
 - ii. that the record was made by: a) a person with personal knowledge; or b) based on information transmitted to him by a person with personal knowledge;
 - iii. that the recorded information was furnished to the business by either: a) a person who routinely acts for the business in reporting the information; or b) in circumstances in which the statement would not be excluded by the hearsay rule;
 - iv. that the record was made and kept in the course of a regularly conducted business activity; and
 - v. that it was the regular practice of that business activity to make and to keep the record
5. The source of information or the method or circumstances of preparation must not indicate lack of trustworthiness.
6. Does not include public records and reports which are specifically excluded from the public records exception by Article 803(8)(b).

Hearsay Exceptions/Exemptions

Module 5.B.10 Hearsay/Hearsay Exceptions
AVAILABILITY OF DECLARANT MATERIAL

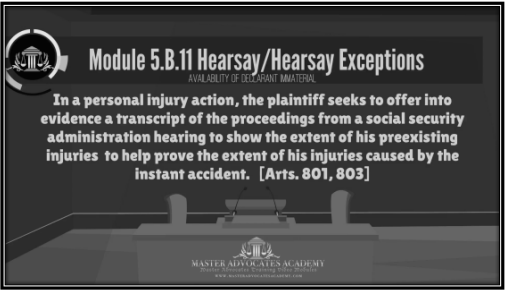
The owner of a store sues a customer for unpaid bills for merchandise received on a line of credit. He is testifying on direct examination and attempting to prove the amount owed.
[Arts. 801, 803]

MASTER ADVOCATES ACADEMY
THE ADVOCATE'S TRAINING CENTER

A. Inadmissible Hearsay B. Admissible Business Records Exception C. Not Hearsay

<p>PUBLIC RECORDS EXCEPTION</p> <p>Excludes records from hearsay ban that are records, reports, statements, or data compilations, in any form, of a public office or agency setting forth: (i) Its regularly conducted and regularly recorded activities; (ii) Matters observed pursuant to duty imposed by law and as to which there was a duty to report; or (iii) Factual findings resulting from an investigation made pursuant to authority granted by law</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. Must be a record, report, or data compilation; 2. Of a state or federal public agency or public office; and 3. Must set forth: (i) Its regularly conducted and regularly recorded activities; (ii) matters observed pursuant to duty imposed by law and as to which there was a duty to report; or (iii) factual findings resulting from an investigation made pursuant to authority granted by law. 4. Not excluded under LCE 800(b)(3)-(5): <ol style="list-style-type: none"> 1. Investigative reports by police and other law enforcement personnel; 2. Investigative reports prepared by or for any government, public office, or public agency when offered by that or any other government, public office, or public agency in a case in which it is a party; 3. Factual findings offered by the prosecution in a criminal case; and 4. Factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.
--	---

Hearsay Exceptions/Exemptions



Module 5.B.11 Hearsay/Hearsay Exceptions
AVAILABILITY OF DECLARANT MATTERS

In a personal injury action, the plaintiff seeks to offer into evidence a transcript of the proceedings from a social security administration hearing to show the extent of his preexisting injuries to help prove the extent of his injuries caused by the instant accident. [Arts. 801, 803]

A. Inadmissible Hearsay B. Admissible Public Records Exception C. Not Hearsay

<p>DYING DECLARATION</p> <p>Statements under belief of impending death excludes statements from the hearsay rule if made by a declarant while believing that his death was imminent, when the statements are concerning the cause or circumstances of what he believed to be his impending death</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. declarant is unavailable; 2. the declarant believes his death is imminent, (<i>whether or not he actually dies</i>); and 3. the statement concerns the cause or circumstances of what he believed to be his impending death.
---	--

<p>FORMER TESTIMONY</p> <p>Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a party with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.</p>	<p>REQUIREMENTS <i>(criminal case)</i></p> <ol style="list-style-type: none"> 1. declarant is unavailable; 2. the party against whom testimony is now offered must have <i>(himself)</i> had a prior <u>opportunity</u> and <u>similar motive</u> to develop testimony through direct, cross-examination, redirect examination; <u>and</u> 3. if offered against an accused, at time of prior testimony: <ol style="list-style-type: none"> a. accused must have had counsel; b. witness under oath; c. witness was cross examined or defendant validly waived; d. witness is currently unavailable; and e. state made a good faith effort to locate the witness.
--	---

<p>FORMER TESTIMONY</p> <p>Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a party with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.</p>	<p>REQUIREMENTS <i>(civil case)</i></p> <ol style="list-style-type: none"> 1. declarant is unavailable; and 2. the party against whom testimony is now offered or <i>(a party with similar interest,)</i> must have had a prior <u>opportunity</u> and <u>similar motive</u> to develop testimony through direct, cross-examination, redirect examination.
--	---

<p>PROBLEM</p> <p>Carl is accused of burning his house down, and is charged with arson. The insurance company refuses to pay. Carl sues the insurance company to recover under the insurance policy at which he cross-examines the police officer. By the time the case goes to trial, the officer has died, and the prosecution wants to use testimony given by the police officer in the action brought by Carl in the civil case. Carl objects that the statement is hearsay. Does the officer's testimony conform to the former testimony exception? Why or why not?</p> <p>II: Would your answer change if it was later discovered that Carl's brother Fred was an accomplice in the starting the fire and he was subsequently tried for the arson as well. Could they use the police officer's former testimony in his trial? Why or why not? Explain.</p> <p>III: Would your answer change if instead of trying Fred for the arson, Fred was civilly liable for the damages he caused in setting the fire. Why or why not? Explain.</p> <p>A. Inadmissible Hearsay B. Admissible Former Testimony C. Not Hearsay</p>	
--	--

HEARSAY EXCEPTIONS

Module 5.C.1 Hearsay/Hearsay Exceptions

(Lecture Available)

The defendant is charged with murdering his wife during an aggravated arson. The prosecution calls the fire investigator to the stand to testify to statements made by the wife at the scene of the fire, just before she passed away. [Art. 804]

MASTER ADVOCATES ACADEMY
EST. 2012 • 1000 N. 10th St., Suite 100 • Phoenix, AZ 85006
www.masteradvocatesacademy.com

A. Inadmissible Hearsay B. Admissible Dying Declaration C. Not Hearsay

HEARSAY EXCEPTIONS

Module 5.C.2 Hearsay/Hearsay Exceptions

(Lecture Available)

In a criminal trial, the prosecution seeks to offer the victim's former testimony given at a preliminary examination into evidence. [Arts. 804]

MASTER ADVOCATES ACADEMY
EST. 2012 • 1000 N. 10th St., Suite 100 • Phoenix, AZ 85006
www.masteradvocatesacademy.com

A. Inadmissible Hearsay B. Former Testimony C. Not Hearsay


DISTINCTION FROM FEDERAL RULES


Under the Federal Rules, dying declarations are only admissible in homicide trials, or in a civil case.

<p>FAMILY HISTORY</p> <p>A statement, made before the controversy, concerning the declarant's own birth, adoption, marriage, divorce, filiation, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, (and death also, of another person, if the declarant was related to the other or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared).</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. declarant unavailable; <u>and</u> 2. statement made <i>before</i> the controversy began; <u>and</u> 3. <u>Either</u> <ol style="list-style-type: none"> 1. regarding the declarant's own personal or family history-ancestry, or other personal or family history; <u>or</u> 2. regarding the personal or family history (including death) of another person, related to the declarant; <u>or</u> 3. regarding the personal or family history (including death) of another person who was close enough to family to have accurate information.
--	--

COMPARISON OF FAMILY HISTORY EXCEPTIONS		
Family Records	Family Reputation	Family History
<ol style="list-style-type: none"> 1. record of family history (contained in Bibles, inscriptions, engravings, charts, genealogies, family portraits, urns, crypts, or tombstones, or the like) 2. Availability of declarant immaterial 3. Immaterial as to when record made 	<ol style="list-style-type: none"> 1. Statement regarding the reputation in the community as to a person's family history arising <i>before</i> the controversy 3. Availability of declarant immaterial 	<ol style="list-style-type: none"> 1. Declarant unavailable 2. Statement made before controversy began; and 3. <u>Either</u>: <ol style="list-style-type: none"> a) regarding the declarant's own personal or family history-ancestry, or other personal or family history; <u>or</u> b) regarding the personal or family history (including death) of another person, related to the declarant; <u>or</u> c) regarding the personal or family history (including death) of another person who was close enough to family to have accurate information.

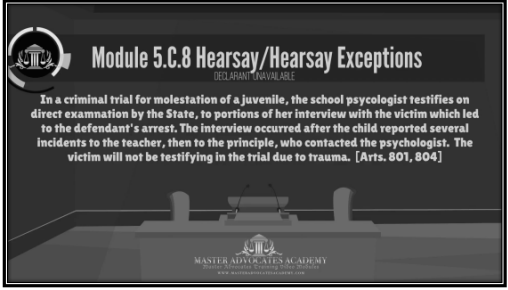
<p>PROBLEM</p> <p>Is the following an example of family history, family reputation, or family records:</p> <ol style="list-style-type: none"> 1. The date of birth and death on a headstone 2. A mother's statement before she dies that her daughter was adopted 3. The family doctor's statement in a medical record that a girl was adopted by her parents. The doctor has passed on. 4. A woman's testimony that it was widely believed around town that Bill and Mary were married. 5. Engraving of date of marriage on grandpa's wedding ring <p>A. Family History B. Family Reputation C. Family History D. Not Hearsay</p>
--

<p>COMPLAINT OF SEXUALLY ASSAULTIVE BEHAVIOR</p> <p>Excludes statements from the hearsay rules made by a person under the age of twelve years and is a statement of initial or otherwise trustworthy complaint of sexually assaultive behavior.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. the declarant must be unavailable; and 2. the statement must be either: a) one of initial complaint of sexually assaultive behavior or a trustworthy complaint of sexually assaultive behavior; and 3. the declarant must be a person under the age of twelve. 
--	---

<p>INITIAL COMPLAINT OF SEXUALLY ASSAULTIVE BEHAVIOR</p> <p>Exempts a statement from the hearsay rule that is an initial complaint of sexual assaultive behavior that is consistent the declarant's testimony at trial.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. the declarant testifies at the trial or hearing and 2. is subject to cross-examination concerning the statement; 3. the statement is consistent with the declarant's testimony; and 4. is one of <i>initial</i> complaint of sexually assaultive behavior. 
--	---

COMPARISON OF SEXUAL ASSAULT COMPLAINT PROVISIONS		
	INITIAL COMPLAINT SEXUAL ASSAULT LCE 804(D)(1)(4)	COMPLAINT OF SEXUAL ASSAULT LCE 804(D)(5)
Availability	Declarant cannot be unavailable. Declarant must testify at trial, and be subject to cross-examination on prior statement.	Declarant must be unavailable
Substance of statement	Must be <i>initial</i> complaint only of sexual assault to first friendly adult.	May be initial complaint of sexual assault or other trustworthy complaint of sexually assaultive behavior
Age of Complainant	There is no age requirement	The declarant must be under the age of 12 when complaint made
Other requirement	Prior statement must be consistent with declarant's testimony at trial.	

HEARSAY EXCEPTIONS



Module 5.C.8 Hearsay/Hearsay Exceptions
DEEL ARHAM / UNAVAILABLE

In a criminal trial for molestation of a juvenile, the school psychologist testifies on direct examination by the State, to portions of her interview with the victim which led to the defendant's arrest. The interview occurred after the child reported several incidents to the teacher, then to the principle, who contacted the psychologist. The victim will not be testifying in the trial due to trauma. [Arts. 801, 804]

MASTER ADVOCATES ACADEMY

A. Inadmissible Hearsay B. Not Hearsay C. Admissible


<p>RESIDUAL CATCHALL</p> <p>Extraordinary and rare circumstances a statement that does not fit into any other hearsay exception may be excluded from the hearsay ban on an ad hoc case-by-case basis if compelling circumstances justify it.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. unavailability of the declarant; 2. trustworthiness of the statement; 3. showing that the proponent has done all she can do to get admissible evidence on the issue; and 4. written notice to the opponent/court (intent to offer statement; particulars of statement; and name and address of declarant);
---	---

<p>FORFEITURE BY WRONGDOING</p> <p>Allows a statement of an unavailable declarant to be offered against a party if that person is shown to be responsible for procuring the unavailability of the witness for the specific purpose of preventing the witness from testifying against him.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. declarant is unavailable; and 2. proponent must prove by a preponderance of the evidence, that the party against whom the statement is now offered, procured the unavailability of witness for <i>purpose of</i> preventing the witness from testifying.
--	---

<p>PRIOR INCONSISTENT STATEMENT</p> <p>exempts a witness's prior statement from the hearsay rule that is <i>inconsistent</i> with the witness's testimony at trial. The statement may be offered for its substantive value as well as for impeachment purposes.</p>	<p>REQUIREMENTS</p> <ol style="list-style-type: none"> 1. the declarant testifies 2. and is subject to cross examination about the prior statement; 3. applies to criminal cases; 4. the prior statement is inconsistent with his current testimony; 5. witness first given opportunity to admit the fact of the prior statement; and 6. additional evidence corroborates the prior statement.
--	---

<p>PROBLEM</p> <p>Chance is on trial for holding up a liquor store. When police arrived at Chance's house with the arrest warrant, his friend James was there. After Chance was taken to the patrol car in handcuffs, James immediately told the police that Chance had told him that he'd robbed the liquor store and had showed him the stash of liquor in the basement. The officers found the liquor in the basement and confirmed other details of James' statement. Chance also matched the description given by the clerk at the store. At the trial, James changed his story. James testified that Chance had not told him anything and that he had not seen or drank any liquor. The prosecution asked James about the statement he made to police, but James adamantly denied making a statement to police. The police officer was called to the stand who detailed James' statement that he'd made when Chance was arrested. The defense objects that the statement should be excluded because it is hearsay. The statement should be:</p> <p>A. Prior Inconsistent Statement B. Prior Consistent Statement C. Inadmissible Hearsay</p>	
---	--

<p>PROBLEM</p> <p>Kaleb is on trial for armed robbery for robbing an old man. At the time of Kaleb's arrest Tristan was a passenger in Kaleb's vehicle. Tristan was also taken to the station for questioning and stated to the police that Kaleb told him that he had in fact robbed the old man and that Kaleb had showed him the ring that the old man had on his pinky finger. He also identified Kaleb in a photo lineup as the person who had made the statements. The police subsequently got a warrant for Kaleb's house and car and found the pinky ring in the car. Kaleb also matched the description given by the victim. At the trial, two years later, Tristan recanted and changed his whole story. Tristan said that Kaleb had not told him anything and that he had not seen a ring. The prosecution confronted Tristan about the statement he made to police. He adamantly denied it. The police officer was called to the stand who detailed the statement and the identification by Tristan. The defense objects that the statement and identification are hearsay. How should the prosecution respond? Will the statement and identification be admitted? If they are admitted, for what purposes can the prosecution use the statement?</p> <p>A. Prior Inconsistent Statement B. Prior Consistent Statement C. Inadmissible Hearsay</p>	
---	--



PRIOR CONSISTENT STATEMENT	REQUIREMENTS
<p>Exempts a witness's prior statement from the hearsay rule that is <i>consistent</i> with the witness's testimony at the present trial, when offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.</p>	<ol style="list-style-type: none"> 1. The declarant testifies at the trial or hearing; 2. the declarant is subject to cross-examination concerning the prior statement; 3. the statement is consistent with his current testimony; 4. and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; and 5. the statement was made prior to the motive or influence to lie. 

PROBLEM
<p>Chloe's mom and dad always got along very well and enjoyed joint custody of Chloe for many years with no problems. One day, Chloe told her mother (Mom) and stepdad (Stepdad) that she didn't like going to her dad's (Dad) house because his friend touched her inappropriately. Chloe's mom began avoiding Dad on his custody weekends. Upset with dealing with this for over six months, Dad filed for sole custody of Chloe. Chloe hasn't mentioned the accusations again since she initially told Mom and Stepdad about it, and refuses to say anything about it at the trial. During cross-examination of Mom, Dad's lawyer asked her if she had told Chloe to make up the story about being molested at Dad's house to keep Dad from winning custody of Chloe. Mom adamantly denied the accusation and offered Chloe's statement through her husband that Chloe made about Dad's friend six months before the custody proceedings began. Dad objected that the statement is inadmissible hearsay. Chloe's prior statement should be:</p> <p>A. Prior Inconsistent Statement B. Prior Consistent Statement C. Inadmissible Hearsay</p>

IDENTIFICATIONS	REQUIREMENTS
<p>Exempts a statement of identification of a person from the hearsay rule that was made outside of the present trial by a witness after perceiving the person.</p>	<ol style="list-style-type: none"> 1. the declarant testifies at the trial; 2. is subject to cross-examination concerning the statement; 3. the statement is one identification of a person made after perceiving the person; or

ADMISSIONS	VERSUS	STATEMENT AGAINST INTEREST
-------------------	--------	-----------------------------------

COMPARISON OF STATEMENT AGAINST INTEREST AND ADMISSIONS		
	Statement Against Interest	Admission
Party to Action	Need not be a party to the action.	Must be a party to the action.
Substance of statement	Must be against the declarant's interest when made	May be anything. Need not be against interest. May also include opinions, conclusions and no first-hand knowledge requirement.
Availability	Must be unavailable at trial.	Need not be unavailable. Here the declarant is a party.
Who may offer	May be offered by either party.	Must be offered by the opponent of the party making the statement.

ADMISSIONS Exempts statements from the hearsay rule that made by a party offered against he party. 	REQUIREMENTS 1. they are statements by a party to the action or are attributed to him; and 1. His own personal statement (in his individual or representative capacity) [801D(2)(a)] 2. A statement in which <i>headopted</i> [801D(2)(b)] 3. A statement <i>authorized</i> by him [801D(2)(c)] 4. A statement of an agent/employee in course/scope of employment/agency [801D(3)(a)] 5. Statements of co-conspirators in furtherance of conspiracy [801D(3)(b)] 2. the statement is being offered against the party ; 
---	--

ADMISSION (CO-CONSPIRATORS)	REQUIREMENTS
<p>Exempts statements from the hearsay rule that made during a conspiracy, in furtherance of the conspiracy, when offered against any of the coconspirators. 🗑️</p>	<ol style="list-style-type: none"> 1. existence of conspiracy; 2. made during the conspiracy; and 3. in furtherance of the conspiracy; 4. offered against any of the co-conspirators

ADMISSION (AGENT/EMPLOYEE)	REQUIREMENTS
<p>Requirements for a statement of an agent/employee in course/scope of employment/agency. 🗑️</p>	<ol style="list-style-type: none"> 1. made by an employee or agent of the party; 2. concerning a matter within the scope of his agency or employment; 3. made during the existence of the relationship; and 4. offered against the principle/employer.

STATEMENT AGAINST INTEREST	REQUIREMENTS
<p>Excludes statements that are from the hearsay ban that are so contrary to the person's pecuniary interests, propriety interests, or that might subject him to civil or criminal liability, or render a claim invalid he has against another, that a reasonable person would not have made the statement unless the statement were true.</p>	<ol style="list-style-type: none"> 1. unavailable declarant; and 2. against the declarant's interest (when made); and in some instances 3. declarant makes an incriminating statement, that exculpates a third party, there must be corroborating circumstances that indicate the statement is trustworthy

PROBLEM

Sisters Zondra and Zanetta were headed home from a late night of partying when they were stopped by police. Zondra was driving. Both got out of the car and went to the rear of the car to speak to the officer. The officer asked Zondra for the vehicle's registration. When Zondra returned to the vehicle and was just out of earshot of Zanetta and the police officer, Zanetta said to the officer, "Ya know we're really both wasted and were just trying to make it to our house just down the street." At Zondra's trial, the prosecution wishes to use Zanetta's statement to the police officer in its case in chief to help prove that Zondra was guilty of DWI. The defense objects that the statement is hearsay. The prosecution claims the statement is both an admission and a statement against interest. How should the court rule and why on the admissibility of Zanetta's statement against Zondra at her trial and why?

A. Admission B. Statement Against Interest C. Inadmissible Hearsay

HEARSAY EXCEPTIONS

Module 5.D.4 Hearsay Exemptions
STATUTORY NON-HEARSAY
 A police officer testifies in a civil case for the plaintiff regarding an accident she investigated where the driver of an 18-wheeler hit the plaintiff while delivering goods for his employer. The plaintiff is suing the truck driver's employer. [Arts. 801]
 MASTER ADVOCATES ACADEMY
www.masteradvocatesacademy.com

A. Admission B. Statement Against Interest C. Inadmissible Hearsay

PROBLEM

A few days after Ben and Carter robbed the Kilgore Bank, Carter was stopped for an expired inspection sticker by police. Carter immediately jumped out of the car and stated that Ben had forced him to commit the robbery. At Ben's trial for robbery, the prosecution would like to use Carter's statement against Ben. The defense objects that the statement is hearsay. Should the statement be admitted into evidence? Assume that following Carter's statement, police immediately went to Ben's residence and arrested him. After taking him to the stationhouse, police read him his *Miranda* rights and proceeded to question him about the incident, repeatedly stating, "You did it didn't you? Carter told us everything. In fact, it was your idea wasn't it. You coerced Carter into helping you, didn't you?" Ben never said a thing. Eventually Ben was taken to his cell. At Ben's trial, the police would also like to use Ben's silence against him as an admission claiming he never denied their allegations. Can Ben's silence be admitted against him at trial? Why or why not?

A. Admission B. Statement Against Interest C. Inadmissible Hearsay

PROBLEM

Brothers Bates and Dow have a plan whereby they sell cheap products to schools as fundraising supplies for extremely high prices. They take pictures of nice items to put in the catalogs, once customers place the orders through the young kids and their parents, they ship very cheap merchandise to the customers once they receive payment. They are arrested and charged with conspiracy to defraud. The prosecutor seeks to enter a statement against Bates, the testimony of the superintendent of schools that Dow said to him, "We're making a killing off the kids. How about you get us a couple contracts at some schools?" Will Dow's statement likely be admitted against Bates? Why or why not?

A. Admission B. Statement Against Interest C. Inadmissible Hearsay

THINGS SAID AND DONE

Things said and done ("res gestae") exempts from the hearsay ban the things that are "said and done" during a criminal act

REQUIREMENTS

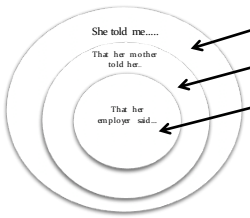


1. applies in criminal cases;
2. made by participants of the crime;
3. made during the crime, both before and after the crime that forms a continuous transaction with it; and
4. statements are instructive, impulsive and spontaneous words and acts that are necessary incidents of the criminal act, or immediate concomitants of it,

MULTIPLE HEARSAY

MULTIPLE HEARSAY

Each statement must conform to an exception/exemption non-hearsay.



Exception or exemptions

Exception or exemptions

Exception or exemptions

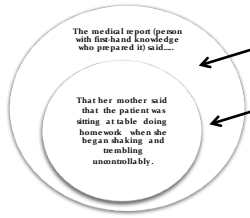
STATE HOSPITAL MEDICAL RECORD Emergency Department

<p>PREVIOUS COMPLAINT: Reported seizure, unconsciousness</p> <p>ARRIVED BY: Ambulance TIME: 8:45 P.M.</p> <p>COMPLAINING PERSON: FATHER, MOTHER, SISTER</p> <p>ALLERGIES: YES, NO, S, OTHER: YES</p> <p>TEMP: 98.6 F, PULSE: 110, RESP: 20, BP: 140/90, TEND: 9/10</p> <p>NOTES: On arrival patient mother reports that patient was doing homework at table when she began shaking and vomiting uncontrollably. Patient lasted six minutes when patient was brought to emergency department. Initial WBC: 12,000/mm³ (Normal 4,000-11,000/mm³)</p> <p>PHYSICIAN: L.C. Perry, Jr.</p>	<p>Patient: Minnie Lee Williams</p> <p>117 Blackburn Street</p> <p>Lake Providence, LA 71254</p> <p>AGE: 16 YRS SEX: F</p> <p>PHYSICIAN: L.C. Perry, Jr.</p> <p>PHYSICIAN: L.C. Perry, Jr.</p> <p>PATIENT: Minnie L. Williams</p>
--	---

Problem


The parents of Minnie Williams is suing the defendant, Irish Simpson, and her insurance company for damages their daughter sustained in a car accident after they claim Irish intentionally rammed her vehicle into their daughter's car causing a severe head injury that the defendant's assert has resulted in a brain disorder in their daughter that causes her to have periodic seizures. In support of their case, the Williams' would like to offer the medical record below into evidence from the first incident in which Minnie suffered a seizure just five days after the accident occurred in support of their claim for damages. Upon opening the evidence, the defense has objected that the medical record is hearsay. They further assert that even if the medical record is admitted into evidence, that portions of the record should be excluded as inadmissible multiple hearsay. Will any portion of the medical record be admissible? If so, under what exception will it be admissible? Are there multiple exceptions in which the medical record might be admissible? Explain each if portions of the record are multiple hearsay. What exceptions would apply to these statements? Will portions have to be excluded out of the record completely? Fully explain your answer.

MULTIPLE HEARSAY



Exception or exemptions

Exception or exemptions

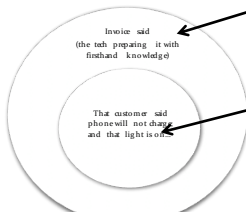
ATV Cellphone Repair Co. 111 Window World Ln Little City, La. 70817 September 17, 2013				Customer: Billy Coston 55943 Country Winding Rd. Grey City, La. 61973			
ITEM	QUANTITY/HR	HR RATE	Line Price				
Customer complaint: Says phone will not charge. Customer plugs in power cord and points out that charge light not on and phone not charging even though plugged in.							
Tech notes: Tested battery, tested powercord, tested power input. Replaced defective phone.							
	4	\$75	\$300.00				
		Tax	\$ 27.00				
		Total	\$327.00				
Billy Coston CUSTOMER SIGNATURE				 TECHNICIAN SIGNATURE			

Problem

Billy is suing his cellphone insurance provider to reimburse him for charges he incurred attempting to have his defective cellphone repaired. The insurance company has failed to pay claiming that the bill surpasses the value of the phone and only wants to pay the amount of the defective phone. Billy is suing for the entire bill under his insurance agreement. In support of his claim Billy offers the invoice from the certified cellphone repair company who replaced the phone after they attempted to repair it. Assuming the evidence has been properly authenticated, ATV objects that the invoice is hearsay and/or multiple hearsay. What response(s) would you make to attempt to overcome the hearsay objections?

MULTIPLE HEARSAY

Each statement must conform to an exception/exemption non-hearsay.



Exception or exemptions

Exception or exemptions

<p>Dear Peter,</p> <p>Things have not been good for a while now. I don't think that staying together is in the best interest of the kids. It might be best that we formally part ways. So I'm leaving. I talked to the kids and they said they'd rather live with you. I'm sure this doesn't come as a surprise. Last week when I said I had plans in the works, you just smiled. I knew that you knew. We both have been so miserable over the last 5 years. We've argued and fought constantly. Remember that time I told you I wanted you dead? Well, I'm tired now. I'm sad. I want a brighter future for all of us. Don't look for me. Don't try to contact me. I do not want to be found. I appreciate all that you've done for me. I think you're a great father and husband. You're just not for me. I will always love you and the kids. Don't let them forget me. Goodbye!</p> <p style="text-align: right;">Lynette</p>		<h2>Problem</h2> <p>Landon is on trial for killing his wife. He claims she ran away from home. In Landon's defense he offers the note below that he claims his wife left on the kitchen table on the day that she disappeared. Landon plans to take the stand and authenticate the letter as being his wife's handwriting. The prosecution objects that the letter is hearsay. How should Landon's attorney respond to attempt to get the letter into evidence?</p>
--	--	---

SIXTH AMENDMENT CONFRONTATION CLAUSE

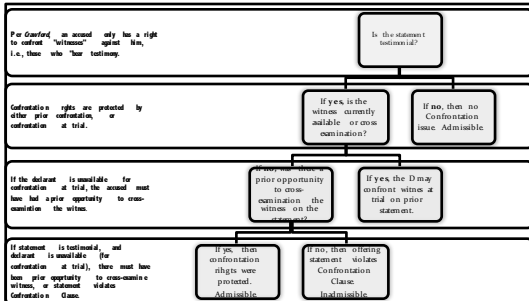
CRAWFORD V. WASHINGTON CONFRONTATION CLAUSE

Crawford provides that the Confrontation Clause requires that a statement be excluded unless:

- 1) the witness is currently unavailable; and
- 2) there was a prior opportunity for cross-examination.

ADMISSIBLE UNDER CRAWFORD

1. The statement is non-testimonial, even if never crossed and witness is currently unavailable
2. The statement is a) testimonial and b) witness is currently *available* for cross examination
3. The statement is a) testimonial, and b) witness is unavailable; and c) prior opportunity to cross examine the witness



PROBLEM 35

Bowen is on trial for murder of a man he killed in a car accident. Kip testified at the grand jury proceedings for the prosecution that he saw Bowen speeding down the interstate driving east in the westbound lane when he struck the victim's vehicle in a head-on collision, immediately causing the victim to be ejected from his vehicle. He died immediately upon striking the ground headfirst. Prior to the trial, Kip is diagnosed with lung cancer and dies just four months later. At Bowen's trial, the prosecution seeks to admit Kip's testimony given before the grand jury. Bowen objects on Sixth Amendment confrontation grounds.

A) Will Kip's grand jury testimony be admissible against Bowen in his trial? Why or why not?

B) Would your answer change if Kip had lived, but was unable to speak (i.e., testify) as a result of the chemotherapy for his cancer? Why or why not?

C) Would your answer change (regarding Sixth Amendment Confrontation Clause only) if Kip had miraculously recovered from the cancer, and was willing to show up and take the stand to testify? Why or why not?

A. Violates Sixth Amendment Confrontation Clause B. Admissible

PROBLEM (CONTINUED)

Part II: Assume instead that rather than a grand jury proceeding, Kip had testified at Bowen's preliminary examination, where Bowen's attorney cross-examined him. Kip actually does die from the cancer prior to trial. The prosecution would like to offer Kip's preliminary examination testimony at the trial. Bowen objects on both Sixth Amendment Confrontation grounds as well as hearsay grounds. How would you respond to the hearsay objection as well as the Sixth Amendment Confrontation grounds?

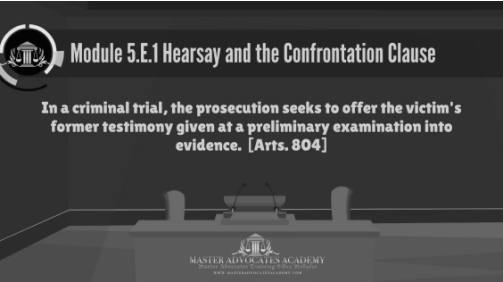
A. Violates Sixth Amendment Confrontation Clause B. Admissible

PROBLEM

Part I: Kaine is being tried for murdering his lawn guy, Omar. The week before the murder, Omar had called 911 one afternoon immediately after completing Kaine's lawn and desperately reported that Kaine had just confronted him at knife point about possibly sleeping with Kaine's wife and had threatened to kill Omar if he ever came back around their home again. Unbeknownst to Kaine, the night before the murder, the police called Omar down to the substation to make a more detailed statement about Kaine's threats to him so that they could get a warrant for Kaine's arrest on assault charges. The next day, Omar was found dead. The prosecution would like to admit Omar's 911 call to the police and the statement Omar made to the police the night before he was killed. Kaine objects to the admissibility of both statements on Sixth Amendment confrontation grounds. (No hearsay objections were raised) The prosecution claims Kaine "forfeited" his right to confront Omar when he killed him. Will either statement be admissible? Fully explain whether either statement may be offered against Kaine without violating the Confrontation Clause.

A. Violates Sixth Amendment Confrontation Clause B. Admissible

HEARSAY EXCEPTIONS



Module 5.E.1 Hearsay and the Confrontation Clause

In a criminal trial, the prosecution seeks to offer the victim's former testimony given at a preliminary examination into evidence. [Arts. 804]

A. Violates Sixth Amendment Confrontation Clause B. Admissible

PROBLEM (CONTINUED)

Part II: Assume that Omar's helper Ray was with him when Kaine made the threat, and had also made a statement to the police the night before Omar was killed. Upon hearing of it, Kaine went over and threatened to do to him what he did to Omar, if he didn't stay out of his business. Ray left town. The prosecution would like to use Ray's statement he made to the police in the interrogation. Kaine objects on Sixth Amendment Confrontation and hearsay grounds. Should the statement be admitted over Kaine's objection? Why or why not?

Part III: Would your answer change if instead of threatening Ray, Kaine had called him up and asked him not to testify and explained to him that he and Omar had just had a misunderstanding between men. Still afraid, Ray ran away. Does use of Ray's statement against Kaine violate his Sixth Amendment confrontation rights? Why or why not?

A. Violates Sixth Amendment Confrontation Clause B. Admissible

**OTHER EXCEPTIONS
WHERE AVAILABILITY
IMMATERIAL**

PROBLEM

In order to prove that Randy did not kill himself so that she (wife) could recover the insurance proceeds (which excludes suicides), his wife offers his death certificate, which was filled out and signed by his doctor listing the cause of death as a "brain tumor" Is the evidence hearsay? Why or why not?

LCE ART. 803 (9) RECORDS OF VITAL STATISTICS

Records or data compilations, in any form, of birth, filiation, adoption, or death, including fetal death, still birth, and abortion, or of marital status, including divorce and annulment, if the report thereof was made to a public office pursuant to requirements of law, and any record included within the Louisiana Vital Statistics Laws.

PROBLEM

The Hansen family owns over 250 acres of land in St. Francisville, La. that was purchased by their great-great-grandfather Simon Hansen around 1880. The property is currently owned by over 150 heirs, Hansen's great-great-grandchildren. In order to partition the property, the attorney will have to prove the dates of death and birth of various heirs along the way to determine each person's interest in the of Hansen property. The attorney is unable to obtain death certificates of all the heirs so she must prove when they died in various ways. Can the attorney use a) an urn where an heirs ashes are kept, which is engraved with his date of birth and date of death; b) a picture of a tombstone with date of death and birth on it; c) a page from a family bible that lists the dates of death of one heirs close family members; d) records from the family church in St. Francisville, La where the pastor from 1905-1915 kept a record of every eulogy he gave. Are the items hearsay? Does any exception(s) apply? Explain.

LCE ART. 803 (11)
RECORDS OF RELIGIOUS ORGANIZATIONS

Statements of births, marriages, divorces, deaths, filiation, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

LCE ART. 803 (12)
MARRIAGE, BAPTISMAL, AND SIMILAR CERTS.

Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

PROBLEM

Henry is involved in a legal battle over his brother's will. Henry is an illegitimate child and his siblings do not believe he is their brother. In order to prove that he is the brother of the testator, Henry offers a deed executed by his brother that was properly recorded and authenticated by the custodian of Parish Records. The deed contains the statement, "*I hereby transfer to my brother, Henry, my property located at 117 Blackburn St.*" Is the statement hearsay?

PROBLEM

In a succession, the plaintiff claimed that the decedent only had a $\frac{1}{2}$ interest in a certain piece of property listed in the succession, and that her deceased mother owned the other $\frac{1}{2}$ interest of the property because the property was purchased while the decedent was married to her mother and is therefore community property. The decedent's other heirs, who are children by a different woman, claim that the property is the decedent's separate property. They claim he was never married to the plaintiff's mother and therefore the property cannot be community property. In plaintiff's case, she would like to offer into evidence, a notarial act of sale, executed by decedent on an unrelated piece of property where he stated that *"he had been married to the plaintiff's mother until her death."* Should that document be admitted into evidence in the dispute of the relative interests in property in the succession?

LCE ART. 803 (15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

PROBLEM

Carrie Wallace died two weeks ago. In her safe deposit box that hadn't been opened since some time in the 80's, her family found a document entitled, "My Will" and dated December 10, 1985 leaving everything to her maid, Kendyl. There is no other evidence surrounding the making of the will. When the will is offered into evidence, the opponent objects that it is hearsay. What ruling and why?

LCE ART. 803 (16)
STATEMENTS IN ANCIENT DOCUMENTS

Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established, or statements in a recorded document as provided by other legislation.

PROBLEM

Jamie has brought an action for conversion against her ex-boyfriend for burning up her two year old vehicle in a jealous rage. At the trial, she would like to offer the listing in the NADA Blue Book of the value of her car to prove the value of her car and the damages to which she claims she is entitled. The defendant objects that the listing is hearsay. What ruling?

LCE ART. 803 (17)
MARKET REPORTS, COMMERCIAL PUBLICATIONS

Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

PROBLEM

Brandon is qualified as an expert at trial in civil engineering with a specialization in structural engineering which includes the construction and maintenance of bridges. In a lawsuit against the City after a bridge gave way during a storm killing hundreds of commuters traversing the bridge and injuring thousands more, Brandon testifies for the plaintiffs that the bridge was not properly constructed to handle the estimated capacity the bridge would have to support on the major thoroughfare it covered. During cross-examination, Brandon is asked if he is familiar with the *Treatise on Structural Engineering Technology*. He states that every engineer worth a grain of salt is familiar with the publication because it is the most noted authority in the field. The attorney then cross-examines him from the publication, asking him to explain various statements made in the publication for the jury. He reads what the publication states, then asks Brandon if it is a true statement, and to reconcile his testimony with the treatise. Opposing counsel objects that the statements in the book are hearsay. What ruling and why?

LCE ART. 803 (18) LEARNED TREATISES

Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or, in a civil case, relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, such a statement may be read into evidence and received as an exhibit but may not be taken into the jury room.

PROBLEM

Ivan is on trial for first-degree murder. In his defense, he would like to call two character witnesses pursuant to Article 405 (A), who will testify as to his reputation in the community for being a kind, gentle man. The prosecution objects that the testimony is hearsay. How should the court rule and why?

LCE ART. 803 (21)
REPUTATION AS TO CHARACTER

Reputation as to character. Reputation of a person's character among his associates or in the community.

PROBLEM

Blade is on trial for possession of a firearm by a convicted felon. To prove that the defendant has in fact been convicted of the underlying felony, the prosecution offers a certified copy of a judgment of conviction for the underlying felony. The defense objects that the judgment is hearsay. What ruling?

LCE ART. 803 (22)
JUDGMENT OF PREVIOUS CONVICTION

Evidence of a final judgment, entered after a trial or upon a plea of guilty (*but not upon a plea of nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of six months, to prove any fact essential to sustain the judgment. This exception does not permit the prosecutor in a criminal prosecution to offer as evidence the judgment of conviction of a person other than the accused, except for the purpose of attacking the credibility of a witness. The pendency of an appeal may be shown but does not affect admissibility.

PROBLEM

In a rape trial the prosecution calls the victim to the stand, and after asking her to state and spell her name, the prosecution then asks the witness what is her age. The defense stands up and objects that the question calls for hearsay because the witness does not remember being born and cannot testify from first-hand knowledge as to her age. How should the court rule and why?

LCE ART. 803 (24)

(24) Testimony as to age. A witness' testimony as to his own age.

PROBLEM

In a succession, the plaintiff claimed that the decedent only had a $\frac{1}{2}$ interest in a certain piece of property listed in the succession, and that her deceased mother owned the other $\frac{1}{2}$ interest of the property because the property was purchased while the decedent was married to her mother and is therefore community property. The decedent's other heirs, who are children by a different woman, claim that the property is the decedent's separate property. They claim he was never married to the plaintiff's mother and therefore the property cannot be community property. In plaintiff's case, she would like to offer into evidence, a notarial act of sale, executed by decedent on an unrelated piece of property where he stated that "*he had been married to the plaintiff's mother until her death.*" Should that document be admitted into evidence in the dispute of the relative interests in property in the succession?
