Evidence Hearsay Outline
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I. Hearsay Rule
   A. R.802 Hearsay is inadmissible unless an exception applies
      1. R. 801 Definitions
         a. hearsay is composed of two elements
            i. it must be an out of court statement AND
               a. statements = oral and written assertions, non-verbal conduct of a
                  person if intended as an assertion
               ii. being offered to prove the TRUTH of matter asserted in the statement
                  a. thus MUST ALWAYS ASK WHY IT IS BEING OFFERED
                  b. if an inference that the statement is true is required for the
                     statement to be relevant → it is being offered to prove its truth
                    i. only look to truth about factual proposition not ultimate issue
         2. Other points
            a. witnesses testifying in court about her own statements made out of court
               or making an assertion based on what somebody else said → still hearsay
               if out of court statement being offered to prove truth
               i. need to look at substance being relayed: if police report based solely
                  on what other ppl. said → hearsay
            b. nonhuman evid. – if its not human, its not hearsay (ex. radar gun, camera)
            c. R. 805 Multiple hearsay – hearsay that involves other hearsay assertions
               i. must be an exception to each hearsay component to be admiss.
   B. Rationale
      1. testimonial qualities/ hearsay dangers – whenever a person makes a statement
         a. narration danger – inadvertently used wrong word
         b. ambiguity danger – words subject to more than one interpretation and
            listener unsure
         c. sincerity danger – speaker was trying to deceive the listener
            i. the above 3 must be relied on when making an inference from
               declarant’s statement to declarant’s belief
         d. perception danger – inaccurate reflection of the event
         e. memory danger – when made statements speaker had forgot details about
            the events perceived
            i. the above 2 must be relied on when making an inference from
               declarant’s belief to the occurrence of the event that caused the belief
      2. factors which reduce the hearsay dangers (not present in out of court
         statements)
         a. opportunity to cross examine
         b. making statement under oath
         c. jury having opportunity to observe declarant’s demeanor
      3. hearsay is excluded b/c none of the factors above which reduce hearsay
         dangers are present
   C. R.801(c) - Statements not offered for their truth (non hearsay uses)
1. must show that not being offered for its truth but just fact words spoken
   a. b/c declarant’s belief not implicated, no hearsay dangers
2. ex. of non hearsay uses
   a. effect on listener – notice
   b. legally operative facts (the statement is an element) – words of defamation, offers to sell drugs, acknowledging debts, threats, warnings (to prove standard of care)
3. thus if trying to admit hearsay – need to find nonhearsay use
   a. visual triangle, if words relevant even if don’t need jury to believe speaker believed their content → not hearsay b/c skip middle step of triangle.
   b. then go through 403 balancing
D. R.801(a)(2) What constitutes a statement
1. Assertive/Nonassertive conduct
   a. depends on declarant’s intent → declarant must intend to communicate a belief and use his conduct to do so. If so then qualifies as statement
      i. if intended to be assertive then hearsay dangers are implicated, if not intending an assertion then at least one hearsay danger eliminated
      ii. assertive conduct (pointing) is not different than just stating the belief
   b. test for determining intend – 104(a) question
      i. nature of the conduct
      ii. surrounding circumstances
   c. rationale
      i. absence of sincerity risk – can’t lie if not asserting a belief
      ii. necessity – we rely on nonassertive conduct in our everyday lives
         a. ex. wear a parka when cold (believe its cold but not asserting that)
         iii. NOTE: but with lower intent to assert = higher ambiguity danger
   d. disguised assertions – conduct that appears nonassertive but based on somebody else’s belief → this is hearsay
      i. ex. cops executing arrest warrant, judgment based on jury verdict
2. Implied assertions – statements offered to prove the truth of declarant’s unstated assertion
   a. requires a literal trip around the triangle, but words offered to prove something other than truth of matter asserted
      i. ex. “at least I never stole from my employer” offered to prove the implied assertion that another employee stole, not that the speaker never stole.
   b. approaches to admissibility
      i. common law: statements offered not for their literal truth but for truth of implied assertion is still hearsay
         a. b/c requires trip around the triangle and
         b. opponent still not given an opportunity to cross examine declarant
      ii. A.C.: same rule as nonassertive nonverbal conduct = not hearsay
         a. sincerity risk eliminated, b/c like non assertive verbal conduct, can’t lie about something that not being asserted
         b. this is strange though b/c how can a statement not be an assertion?
iii. Good test in majority ct.s: look at intent of statement. If intended as an assertion (belief intentionally implied) of the proposition being offered to prove = hearsay. If not, not hearsay.
   a. objective test(104(a)) → solves problem of uncertainty of intent
   b. if there was intent then sincerity risk still involved
iv. argue by analogy b/t case at hand and a more clear cut scenario
   a. place implied assertions on spectrum, example about employer is clear cut implied assertion whereas calling a house and placing a bet probably isn’t a meant to imply that house if used for betting
   b. then take case before you and analogize it to clear cases

3. See also 803(3) state of mind declarations exception below

II. Hearsay Exemptions
   A. 801(d) – Evid. that is not considered hearsay under the rule. Analytically treated the same way as the hearsay exceptions.
   B. Two types of exempted evid
      1. (d)(1)Prior statements by testifying witness
         a. Foundational facts
            i. W at trial is the declarant (the one who made the out of ct. statement)
               a. W’s acknowledgement or other W testifying that W made the statement is sufficient
            ii. W is subject to cross examination concerning the statement
               a. subject to redirect is okay
               b. 3d pty can introduce the statement if W is subject to recall
               c. Owens Case - even if denies making the statement/can’t remember, cross exam requirement met if W on stand, under oath, responds to questions
                  i. b/c can still cross exam about the lack of memory, bias
                  ii. but if in state ct. can argue D in effect no subject to cross exam in can’t remember or denies statement
            iii. W must have personal knowledge about content of the statement
         b. Justification
            i. delayed opportunity to cross exam
            ii. W’s memory fresher when making the out of court statement
            iii. statement likely admitted anyway for impeachment/rehab purposes
         c. Types – must be one of these types of prior statements
            i. (1)(A) Prior Inconsistent Statements
               a. foundational facts
                  i. prior statement inconsistent w/ testimony at trial
                     a. substantive divergence b/t the two statements, inconsistency (evasive answers), reluctance to testify
                  ii. prior statement made under oath
                  iii. statement made at a trial, deposition or similar proceeding
                     a. must meet the formalities (interview’s not okay)
                  iv. NOTE: even if foundational facts not met, may still be admiss. for impeachment
               b. justification
i. under oath reduces sincerity risk
ii. formal hearing increases narration and sincerity

ii. (1)(B) Prior Consistent Statement
   a. foundational facts
      i. prior statement consistent w/ testimony at trial
      ii. offered to rebut charge of fabrication, improper influence, or motive
         a. must rebut an express or implied motive, can’t just bolster
         b. prior statement made b/f motive to fabricate – 104(a) quest as to when motive arose
            i. split as to whether motive arises at time of arrest or offer of formal immunity
      iii. NOTE: even if foundational facts not met, may still be admiss. to bolster credibility on other grounds
   b. justification
      a. only prior statements b/f motive to fabricate rebut charge.

iii. (1)(C) Statements of Identification
   a. foundational facts
      i. prior statement is one of identification
         a. intended for statements of identification at police line-ups
            i. but interp. broadly to include sketches, photographs
         b. split whether can just describe the person w/out “re-perception” – Kuhns thinks should need to point person out
      ii. made after declarant perceived the person
         a. declarant does not need to perceive the disputed even, only know who the person subject to identification is
         b. gray area whether applies to non-persons (ex. vehicles driven, clothing worn)
            i. need to argue by analogy and justifications for rule
   b. justifications
      i. necessity b/c of fading memory, intimidation at trial
         a. arg. strongest w/ identification made soon after perception
      ii. b/c of necessity rule interp. broadly unlike (1)(A), (B)

2. (d)(2) Admissions by your opponent (the most common exemption)
   a. The statement must be offered against the pty (your opponent) AND BE
   b. Types
      i. (2)(A) A party’s own admission
         a. foundational facts
            i. statement made by a pty
               a. includes nonverbal assertions
               b. includes statements made when the pty was speaking in her capacity as a representative for somebody else
                  i. but if pty is a corp., statements of its agents not admiss.
               c. identity of speaker
                  i. if statement not relevant unless pty made it → 104(b)
ii. if statement relevant even if pty didn’t make it b/c contains harmful info → 104(a) determines whether identity proved for authentication purposes

ii. statement offered against that pty

iii. ONLY EXEMPTION/EXCEPTION W/ NO REQUIREMENT OF FIRST HAND KNOWLEDGE

b. the simplest rule – any statement made by any pty in any context can be offered against them

c. justification

i. reliability - admissions are usually something important to the pty that they would have informed themselves on

ii. necessity – often difficult for opponent to prove what the pty knows

iii. pty has opportunity to explain the admission

a. becomes a problem in criminal cases where puts pressure on D’s 5th A. right not to testify

i. but most ct.’s say tough luck

b. Burton Rule: if a D’s admission is harmful to more than one D → excluded unless other D is there to explain

i. can get around by redacting or otherwise neutralizing portion harmful to absent D

iv. fairness – ptsys should be responsible for their statements

a. like estoppel from switching positions

ii. (2)(B) Adoptive Admissions

a. foundational facts

i. a statement must be made

a. doesn’t matter who made it

ii. pty has done something to manifest adoption of it (104(a))

a. includes words, conduct, or silence

b. must show pty heard, understood, and acquiesced to statement then jury can decide whether adoption

b. justifications

i. fairness - inference drawn that pty knows contents of statements to be true or thinks speaker is reliable

iii. (2)(C) Explicitly Authorized Admission

a. foundational facts

i. statements concern a subject

ii. statements made by someone who pty authorized to make the statement concerning the subject

a. must be indep. evid. of auth. other than the statement

iii. statement is offered against the pty

b. prime examples (some not w/in def. of agency)

i. statements made by pty’s atty in court docs

ii. employer/independent contractor, parent/child
iii. but these relationships interpreted more narrowly than agency
   a. authorization should be clear
   c. justifications – see below
iv. (2)(D) Admissions by Agents, Servants, Employees
   a. foundational facts
      i. declarant is an agent of the pty
         a. must be indep. evid. of agency other than statement
      ii. statement was made during agency relationship
      iii. statement concerns a matter w/in scope of the agency
         a. not requires specific authority or even statement w/ scope
            of duties → must only concern a matter w/in scope of
            employment
         b. includes statements made away from the workplace
         c. excluded where declarant only a bystander to an event
            while on the job but has nothing to do with his duties
   iv. statement offered against the pty
v. Points that apply to both (2)(C), (D)
   a. justifications
      i. necessity – statements of others necessary to impos liability b/c
         that businesses conduct affairs through other ppl
      ii. fairness – accountability for advantages and reliance gained by
         conducting affairs through others
         a. if decl. disappears opponent is SOL
         b. 3d ptys rely on statements of others on behalf of biz.
      iii. efficiency – pty is in a better position than opponent to gain
         info that rebuts the reliability of the statement
      iv. reliability – reasonable to infer declarant selected by pty b/c he
         is trustworthy/reliable, declarant have a good reason fro
         making the statement, and declarant is loyal to the pty
   b. many courts get rid of personal knowledge and lay opinion req.
      i. justify it w/ necessity and fairness
      ii. problem – puts big burden on principal & expands hearsay
         a. the justifications for (2)(A) don’t apply in this context
   c. admissions by gov’t employees/independent contractors
      i. common law – individuals can never bind the sovereign
      ii. Ct’s split as to whether (2)(C), (D) change the common law
vi. (2)(E) Co-conspirators’ Admissions
   a. foundational facts
      i. declarant and pty against who statement offered where both
         members of same conspiracy
         a. must first prove that conspiracy existed – 104(a)
         b. must prove using indep. evid. corroborating participat’n
         c. can conditionally admit but unwise
      ii. statement made during course of conspiracy
         a. statements about events that occurred prior to pty joining
            the conspiracy admiss. if part of single consp’cy
b. pty must affirmatively b/f statements no longer admiss.
c. majority view – statements during concealment phase not part of the rule
   iii. statement made in furtherance of conspiracy
      a. idle chatter/narrate past events is not in furtherance
      b. but if keeping co-conspirators informed → admiss.

b. justifications
i. necessity (strongest) – this often essential evid. for pros.
ii. reliability (weak) – trustworthy b/c advance interests of the speaker

III. Hearsay Exceptions

A. R.803 Exceptions not requiring unavailability of declarant

1. Premise of declarant unavailability immaterial
   a. Reliability - These exceptions all have circumstantial guarantees of trustworthiness
   b. Declarant must speak from personal knowledge (b/c offered for truth)
      i. This is so for ALL the exceptions (unless otherwise stated???)
   c. Credibility of declarant can be attacked even if not testifying
   d. Subject to other exclusionary rules (e.g. 403)

2. R.803(1) Present Sense Impression
   a. Foundational facts
      i. the occurrence of an event or condition
      ii. statement describes/explains the event or condition
         a. statement narrower in scope – must “describe or explain”
            i. statements of past historical facts or purpose not covered
      iii. declarant made the statement while perceiving event or condition or immediately thereafter
         a. timing is crucial – usually only lapse of few seconds, anything over that requires great caution. if time unknown, even greater caution
      iv. Note: content of the statement itself may be sufficient to prove foundational facts
         a. but if used to first hand knowledge → must be explicit
   b. Justification – contemporaneity ensures:
      i. sincerity/trustworthy – if statement spontaneous, no time to fabricate
      ii. decreased memory dangers

3. R.803(2) Exited Utterances
   a. Foundational Facts
      i. occurrence of a startling event or condition
      ii. statement relates to the startling event or condition
         a. statement can be broader in scope – only has to “relate”
      iii. statement made while declarant under stress of excitement
         a. timing not as crucial as 803(1)
         b. factors in determining if made under stress
            i. age of declarant, nature of event, lapse of time, statement made in response to questions, declarant’s physical/mental state
            ii. time lapse interplay (“rekindled excitement”)
a. less stressful = needs to be more contemporaneous
b. younger the declarant = great time lapse allowed
c. pattern domestic abuse = greater time lapse allowed
iv. stress of excitement caused by startling event or condition
v. Note: content of the statement itself may be sufficient to prove foundational facts
   a. but if used to first hand knowledge → must be explicit
   i. but criticism that stress increases memory/perception dangers

4. **R.803(3) State of Mind** (then existing mental, emotional, physical condition)
   a. Foundational Facts
      i. statement express’ declarant’s state of mind that is currently existing at time statement made
      ii. state of mind includes emotion, sensation, physical condition, intent, plan, motive, design, mental feeling, pain, and bodily health
      iii. state of mind of memory/belief can’t be used to prove fact remembered unless relates to declarant’s will
         a. typically this would be the fact that caused the state of mind
   b. Direct v. Circumstantial
      i. Some statements can be used to infer (circumstantial) a mental state
         a. ex. “D is vile” can infer declarant has a hate for D
      ii. Some ct’s treat this as nonhearsay, but Kuhns says to treat as hearsay
   c. Relevant uses for state of mind evid.
      i. Future and past states of mind of declarant – if hate him now, hated him yesterday and probably hate tomorrow
      ii. Future conduct of declarant – if had intent to, probably did it
         a. lower probative value if intent far in advance or contingent
         b. can’t use declarant’s statement of future conduct to infer the future conduct of somebody else
            i. this would bring in declarant’s perception/memory
            ii. but some ct.’s allow if there is corroborating evid.
               a. some ct.’s allowed even w/out corroborating evid.(wrong)
      iii. Evid. of state of mind to prove facts – Can’t do this b/c involves perception/memory risks
   d. Justification
      i. perception/memory – no risk b/c no perceiving anything outside own state of mind and stated at the time perceiving it
         a. diminishes importance of cross examine
         b. memory/belief not used to prove the fact b/c then you have to take a whole trip around the triangle
      ii. but high sincerity risk b/c declarant could plan to deceive
         a. some ct.’s combat by requiring spontaneity
      iii. necessity – mental states are a crucial part of many cases

5. **R.803(4) Statements for Medical Diagnosis or Treatment**
   a. Foundation Facts
      i. statement made for purposes of medical diagnosis
a. this is a motive test
b. statement can be made to other than medical personnel
   i. ex. social worker, friend, wife
ii. statement describes medical history, past/present symptoms/pain/sensation, or cause of symptoms
   a. if statement about cause must be reasonably pertinent to diagnosis
      i. pertinence determined by standards of medical profession
      ii. statements of identity of domestic sexual abuser can be pertinent
b. Statement can be made by anyone seeking medical care (not just the one w/ the symptoms)
   i. key is purpose for the statement – must be seeking care, not giving
c. Note: Statements made to expert in anticipation of litigation is treated the same even through increased sincerity risks b/c experts in other contexts can rely on client’s statements
   i. this is a drastic departure from the CL
d. Justification
   i. sincerity – selfish motive for med. treatment = trustworthy
6. **R.803(5)** Recorded Recollections
   a. Foundational Facts
      i. Declarant is testifying as to her statement
      ii. Statement has been recorded
      iii. Statement is about a matter witness can’t remember well
         a. this essentially makes the declarant unavailable
      iv. Declarant once had personal knowledge of the matter recorded
      v. Statement made or adopted while matter fresh in declarant’s mind
         a. factors to consider
            i. lapse of time, clarity/detail of statement, making changes
      vi. Statement correctly reflects declarant’s knowledge
         a. must lay foundation
            i. witness just testifies the record “accurately “reflects her
            ii. records says “this is an accurate statement”
            iii. detail of the record, other circumstantial evid.
   b. 104(a) question whether foundation met – judges strict
b. Multiple pty's can play a role in the recording, but unless another hearsay exception applies, both the observer and recorder must testify
c. Record can only be read to the jury, but not received as an exhibit
d. Justification
   i. sincerity/reliability – foundational requirem’ts increase trustworthiness
   ii. availability of gen’l cross examination of declarant
   iii. necessity – absence of accurate memory of the past event
e. Note: Under R.612 you can also show a witness something on the stand to refresh their memory. If it does then don’t have to admit into evid.
   i. the thing that you show them can be inadmiss. evid.
   ii. other pty has the right to see the document
7. **R.803(6)** Business Records
a. Foundational Facts
   i. Statement is recorded (including data compilation)
      a. data storage, email and webpage info may count if input pursuant
         to biz. duty
   ii. Record concerns acts, events, conditions, opinions, diagnosis
      a. both of the first two foundational facts are very broad
         b. but some states exclude opinions b/c
            i. may not be an opportunity to cross examine person who had
               opinion
            ii. 702, 705 – expert opinion not qualified
               iii. 403 – jury will be misled or give undue weight
   iii. Record made at or near time of the matter recorded
   iv. Source of info had personal knowledge of the matter
      a. if info contemporaneously transmitted along biz. chain no more
         hearsay exceptions needed
      b. declarant must have a biz. duty to transmit the info
         i. but if made by person w/ not biz. duty, okay if biz. checks
            accuracy of statement
         ii. okay if declarant’s statement admiss. under other exception
   v. Record kept in course of regular business activity
      a. business activity interpreted broadly – any formal organization
         where record keeping provides a function
      b. but there should be a “business duty” to keep the record
   vi. It is the regular practice of the business to make the record
      a. making records of this type happen systematically
b. Other features
   i. Proponent must produce custodian or qualified witness to testify to
      foundational facts
      a. but need not be employee of witness so long as familiar w/ the
         record keeping system
      b. 902(11), (12) allow foundation met through written declaration
   ii. Judge can still exclude if source or method show lack of
      trustworthiness
      a. excludes docs w/ self interest purpose (ex. in prep. for litigation),
         record contains serious mistakes, source/preparation unknown
      b. opponent bears burden of showing
  c. Justification
   i. Necessity
      a. costly, time consuming, impossible to call everybody
      b. might not have memory of matters in the record
   ii. Reliability – time requirement minimizes memory dangers, self-
       interest increases sincerity, business record keeping increases accuracy
b. Justification
  c. Necessity
     a. costly, time consuming, impossible to call everybody
     b. might not have memory of matters in the record
  d. Reliability – time requirement minimizes memory dangers, self-
     interest increases sincerity, business record keeping increases accuracy

8. R.803(8) Public Records and Reports
   a. Foundation Facts
      i. Statement is a record/report from public office/agency stating:
      ii. Activities of that office/agency (housekeeping functions)
iii. **(B)** Observations reported by public employees pursuant to their duty
   a. Each link in the chain must have a public duty to report

iv. **(C)** Factual findings from an investigation authorized by law
   a. The findings can be based on sources w/ no public duty to report
      i. rat. – public officer can evaluate the source b/f inclusion
      ii. but the basis for the findings are not admiss. for their truth
          unless a hearsay exemption applies
   b. Conclusions contained in the report based on the factual findings is
      admiss. too so long as they are not preliminary.
   c. Administrative hearings (but not judicial hearings) fall under this
      category but may be excluded under 403 if misleading to jury

v. Note – Must be sufficient showing of personal knowledge w/ A & B
   records (but can be satisfied by their content)

b. Exclusions
   i. **(B)** Exclusion – observations reported by law enforcement personal
      against a D in a criminal case
      a. Ct.’s construe this exception strictly
         i. “law enforcement personnel” = public employee with
            prosecutorial or investigative function (but not administrative
            duties)
         ii. routine/non-adversarial reports by law enforcement personnel
             admiss. (serial numbers, 911 calls, ext.)
   ii. **(C)** not admissible against D in criminal case (6th A. confrontation
        clause)
   iii. Note – Some ct.’s do not admit records excluded under these
        provisions to be admitted under 803(6) – but limited holding

iv. Lack of trustworthiness
   a. Factors: Timeliness of report, skill/expertise/motivation of
      investigator, procedures followed in preparation of report, reliance
      of findings in the report on inadmiss. or unreliable hearsay
   b. Burden on opponent to prove
   c. Justification (like 803(5))
      i. Necessity
         a. costly, time consuming, impossible to call everybody
         b. might not have memory of matters in the record
      ii. Reliability – officials public duty/public’s access to records presumes
          reliability

9. Hearsay Exception for Absence of Entry into Records
   a. **Rs. 803:**
      i. (7) Absence of Entry in Business Record under 803(6)
      ii. (10) Absence of Entry in Public Record under 803(8)
   b. Offered to show non-existence or non-occurrence of an event that would
      normally be included in such records
      i. As a practical matter, this isn’t really hearsay to being with
      ii. Note – this evid. is not subject to the exclusion rules of 803(8)(B), (C)
   c. Foundation Facts:
i. Search for such a record was diligent
ii. Documents searched were proper business or public records

10. Hearsay Exceptions for Other Records
   a. **Rs. 803:**
      i. **(9) Records of Vital Statistics**
      ii. **(11) Records of Religious Organizations**
      iii. **(12) Marriage, Baptismal, and similar Certificates**
      iv. **(13) Family Records**
      v. **(14) Records of Documents Affecting an Interest in Property**
      vi. **(15) Statements in Documents Affecting an Interest in Property**
      vii. **(16) Statements in Ancient Documents**
      viii. **(17) Market Reports, Commercial Publications**
   b. Justification: Same as 803(8)
      i. Reliable b/c of subject matter and nature of entity preparing them

11. **R. 803(22) Judgment of Previous Convictions**
   a. Foundation Facts
      i. Judgment must follow a criminal trial or guilty plea
      ii. Judgment must be for a felony
      iii. Offered to prove the truth of a fact essential to the conviction
      iv. If offered against a criminal D, can only admit judgments against that
          D, unless being used only for impeachment
             a. E.g., telling jury that co-conspirators have already been convicted
                is not permissible, unless you are impeaching the D
             b. rat. – that would be a violation of D’s 6th A. confrontation clause
                b/c the D wasn’t part in the judgments against others.
   b. Justification
      i. Reliability – b/c judgment found beyond a reasonable doubt
         a. civil claims not as reliable b/c lower standard of proof

B. **R.804 Exceptions requiring unavailability of declarant**
   1. **804(a) When a witness is considered “unavailable”**
      a. Situations where declarant must still testify to her unavailability
         i. **(1) Declarant asserts a privilege from testify as to her former statement**
            a. CL – criminal D can’t claim a privilege then try to benefit from the
               privilege
         ii. **(2) Declarant refuses to testify after being ordered to by the court**
         iii. **(3) Declarant testifies as to lack of memory on a subject matter**
            a. Even if judge doesn’t believe, the witness is in effect refusing to
               testify so would fall under (2) if judge gives court order
      b. Situations where declarant does not have to be present at all
         i. **(4) Death or then existing physical or mental illness or infirmity**
            a. Illness must be serious and last a long time, otherwise court will
               just continue until declarant is available
         ii. **(5) Proponent has been unable to procure declarant’s attendance by a**
             subpoena or other reasonable means (good faith effort but no futile act
             is required)
a. For (b)(2),(3),(4) proponent must first use declarant former testimony or make reasonable efforts to take her deposition

c. Exception – declarant will not be found unavailable, if unavailability “purposefully” caused by the proponent of the hearsay.

d. Declarant’s “unavailability” is a R.104(a) question for judge

2. **804(b)Hearsay exceptions if witness is unavailable**
   a. **(1) Former Testimony**
      i. **Foundational Facts**
         a. Statement is in form of testimony given at hearing or deposition
         b. The pty against who the statement is being offered was present at the former hearing or deposition AND
            i. In civil cases, having a predecessor in interest present at the prior proceeding is sufficient
               a. Two views on meaning of “predecessor in interest”
                  i. Must be legal privity b/t the two parties (Kuhns likes this view better b/c gives meaning to the stat. language)
                  ii. Any pty w/ a similar motive b/c disputing same factual issues (this is the recent trend of interpretation)
            c. Had a chance and similar motive to develop the testimony at the former hearing or deposition (through direct, cross, or redirect)
               i. The prior opportunity to develop must have been “meaningful”
               ii. Factors in determining whether similar motive (not have to be identical)
                  a. Questioner on same side of issue at both proceedings
                  b. Nature of prior proceeding the testimony was given at (if prior testimony was at a preliminary proceeding, then likely pty did not have similar motive to develop the issue)
               c. Trial strategy
               d. Potential penalties or financial stakes
               e. Number of issues/parties
               f. Similarity b/t factual issues in dispute

      ii. **Justification**
         a. Necessity – but this alone is not enough
         b. Prior opportunity and motive to develop the testimony is substitute for present lack of opportunity to cross

   iii. **Process of Admission**
      a. Any pty present at the prior proceeding can testify as to what was said, but most common method is ct. reporter transcript
         i. Transcript admiss. under 803(6) and (8)
      b. Objections to the content of the prior testimony
         i. Objections as to form (leading, unresponsiveness, opinion) must be made at the time of the prior testimony
         ii. Objections as to relevancy can be made at time of admission

b. **(2) Dying Declarations**
   i. **Foundational Facts**
a. Statement concerns cause or circumstances of what declarant believes is impending death
b. Statement made while declarant believes death is impending
   i. Interpreted to mean declarant’s own death
   ii. Declarant’s belief of impending death can be shown through:
       a. own statement, circumstances like nature of the wound, evid. declarant was told death impending, opinion of a dr.
       iii. If belief turned out later to be untrue, that is not dispositive
c. Statement offered in civil case or homicide prosecution
d. Implicit trustworthiness inquiry to see if statement is self serving
ii. Justification
   a. Necessity – unavailability of declarant
   b. Sincerity – if declarant believe death impending no motive to lie
      i. But there is no proof of this theory, only speculation
   c. Note – This theory is suspect, however, b/c if in fear of life that may lead to increased perception/memory problems

c. (3) Declarations against Interest
i. Foundational Facts
   a. At time statement was made, contents of statement either:
      i. went against the pecuniary or proprietary interests of the declarant
      ii. could subject the declarant to civil or criminal liability
      iii. could render invalid a claim held by declarant
   b. Harmed declarant’s interests in such a way that a reasonable person wouldn’t have made the statement unless it was true
      i. This means declarant must have known that it could harm his interests if exposed publicly.
      ii. Ct. must examine declarant’s motive to make sure there isn’t mixed motive that appears to be against interest but is actually in declarant’s interest
   c. If statement exposes declarant to criminal liability and is offered to exculpate the accused, there must be corroborating evid. that clearly indicates the trustworthiness of the statement
      i. Used when D out of ct. declarant has made a statement taking responsibility for crime in which D has been charged
      ii. Need to either be evid. that corroborates the declarant’s statement or show’s trustworthiness of the declarant
         a. other evid. of the facts that exculpate D are true
         b. statement made voluntarily
         c. lack of motive of the declarant to curry favor w/ D
ii. Statements that are against both declarant’s interest and a criminal D
   a. If the statement constitutes “testimonial hearsay” under Crawford, then barred from admission against the criminal D because of the 6th A. confrontation clause, unless D had prior opportunity to cross examine declarant
b. If declarant’s statement inculpates accomplices, it must also specifically inculpate the declarant

iii. Justification
   a. Necessity
   b. Sincerity – Because ppl. don’t normally say things that would harm them, when they do we assume an absence of a motive to lie. And assume ppl. with no motive to lie, tell the truth.
   i. Criticisms – statement not really “against interests”
      a. Mixed motive – there could be a hidden self serving motive to make the statement (therefore eliminating the absence of a motive to lie). Ct.’s need to ferret these hidden motives out.
      b. Even with no motive to lie, the statement could just be a neutral recitation (no different than any other hearsay)

d. (4) Statements of Personal or Family History
   i. Foundation Facts
      a. Statement must concern the personal or family history of either
         i. Declarant himself OR
            a. Declarant need not have personal knowledge
         ii. One whom the declarant is related or intimately associated
            a. Relationship must be such that declarant would have accurate information about the family history
               i. Independent corroborating evid. may be required
               ii. This expands CL rule that relation must be by blood or marriage
         b. Limited to past FACTS or objective statements
            i. Can not speculate as to motives for marriage, ect.
   ii. Justification
      a. Necessity
      b. Reliability – b/c involved declarant’s own pedigree
         i. A/C states whether statement made b/f or after controversy arose is relevant to determining how reliable statement is.

e. (5) Forfeiture by Wrongdoing
   i. Foundation Facts
      a. The pty against who the statement is being offered engaged or acquiesced in wrongdoing
         i. Wrongdoing defined broadly to include threats, intimidation, acts of violence (including murder), ect.
         ii. The hearsay statements themselves can est. wrongdoing
      b. Wrongdoing intended to procure the unavailability of declarant as a witness against the pty
         i. If the statement being offered to prove the actual wrongdoing that procured declarant unavailability (victim’s statement in murder trial), must still show the intent of the wrongdoing was to keep the victim from testifying
Can be offered against co-conspirators if the unavailability of
the declarant (e.g., murder) was procured in furtherance of the
conspiracy
c. Wrongdoing did render the declarant unavailable
ii. Justification
a. Criminal D “waived” his 6th A right to confront the declarant by
procuring his unavailability (the law does not allow ptys to take
advantage of their own wrongdoing)

C. R. 807 The Residual Exception
1. Foundation Facts
   a. Statement must have circumstantial guarantees of trustworthiness
      “equivalent” to the exceptions under 803 and 804
      i. Reliability and necessity are the primary justification for 803, 804
      a. Show reliability/trustworthiness in one of two ways
         i. Sowing one or more hearsay dangers are minimized by facts
            relating to:
            a. The identity, knowledge, motivation of the declarant
            b. Content of the statement
            c. Circumstances statement was made
      ii. Present independent corroborating evid. that content of the
          statement is probably true
   ii. Can analogize to one of the other exceptions
b. Statement is offered to prove a material fact
   i. Must be relevant to prove an important point of the case
c. Statement is more probative on the point its being offered than any other
   evid. that can be secured through reasonable efforts
   i. Must show both
      a. Diligence in trying to procure other admiss. evidence
      b. No other hearsay evid. admiss. available that would substitute (this
         is the primary argument in these cases)
d. Admission will serve the gen’l purpose of the rules and interests of justice
   i. This requirement doesn’t provide much help to a judge
e. Notice is given to the opponent
   i. Some ct’s require notice on first day of trial, others just require notice
      in time to let your opponent prepare
2. This exception was intended to be rarely used – only in exceptional
   circumstances will court step outside bounds of categorical exceptions

IV. Process of admission
   A. Judge determines whether the statement is hearsay under 801(a) – (c)
      1. burden on opponent make the objections and to prove
   B. If so judge excludes under 802
   C. Proponent then must produce foundational facts that satisfies the requirements of
      a categorical exemption or exception under 801(d), 803, or 804
      1. foundational requirements
         a. usually proved by way of a foundational witness but some exceptions
            allow the contents of the hearsay statement to prove the foundation
b. usually must meet 104(a) standard – preponderance of the evd.
c. judge can also conditionally admit upon proponent proving the foundational facts later in trial.

D. Opponent can still argue 403 concerns, but because these are all categorical exceptions, rarely does ct. find low probative value.

E. If judge admits, opponent can still admit counter evid. to the jury for the jury to use in deciding how much weight to give the hearsay evid.

F. Testimonial hearsay inadmissible against D in criminal trial even if meets exemption/exception b/c violates 6th A. Confrontation Clause
   1. Unless it pases 2 part Crawford test
      a. Declarant is unavailable AND
      b. D had a prior opportunity to cross examine
   2. What counts as “testimonial hearsay”
      a. Gen’l Rule: Statements that the declarant might reasonably expect to be used in the prosecution
      b. Specific examples
         i. Prior formal testimony (hearing, trials, affidavits, depositions, ect)
         ii. Police interrogation statements
   3. Types of exceptions where this rule doesn’t apply
      a. Dying declarations
      b. Forfeiture by wrongdoing
      c. Excited utterances