



**FEDERAL PUBLIC  
DEFENDER**  
— District of Nevada —

# The Busy Lawyer's Guide to Hearsay

Rene L. Valladares, Federal Public Defender, District of Nevada

# A Defender's Guide to Federal Evidence

*A Total Practice Handbook for Criminal Defense Attorneys*



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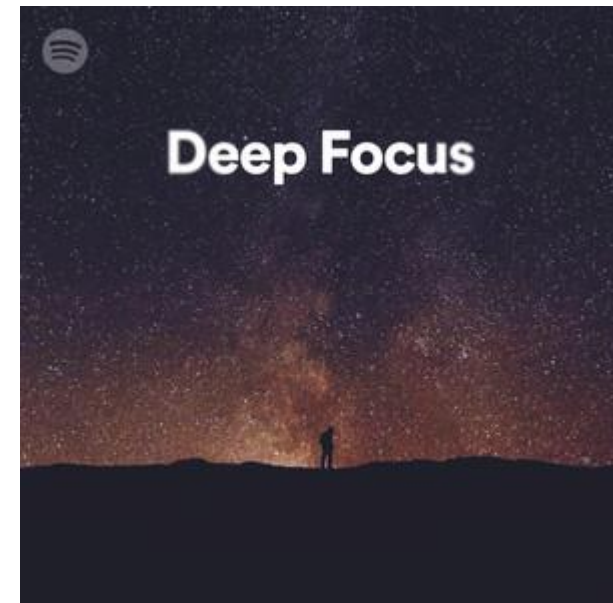
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# Areas of focus

- What is hearsay? When do statements NOT constitute hearsay
- Distinguish between hearsay exclusions (801) and hearsay exceptions (803)
- Which hearsay exceptions require unavailability? When is declarant considered “unavailable”?
- Attacking/supporting credibility of declarant.
- Hearsay and Crawford
- Hearsay Flowchart
- Objections



# A. Hearsay

- Out of court statement
- Offered for the truth of the matter asserted (TOMA)



# “Statement” + “TOMA”

- Includes nonverbal conduct intended as an assertion can be hearsay.
- If not offered for its truth, it is not hearsay and admissible.
  - If there is relevance to that statement apart from TOMA then it is not hearsay.

# Examples of Non-TOMA:

- To show impact statement had on listener/hearer.
- To impeach W with own prior inconsistent stat.
- Truth not an issue: greetings, questions, verbal acts of legal significance (e.g.: consent), warnings, demands.
- “Context”
- To show declarant’s *knowledge* of facts, not the facts stated.

# Example: to show D relied on advise

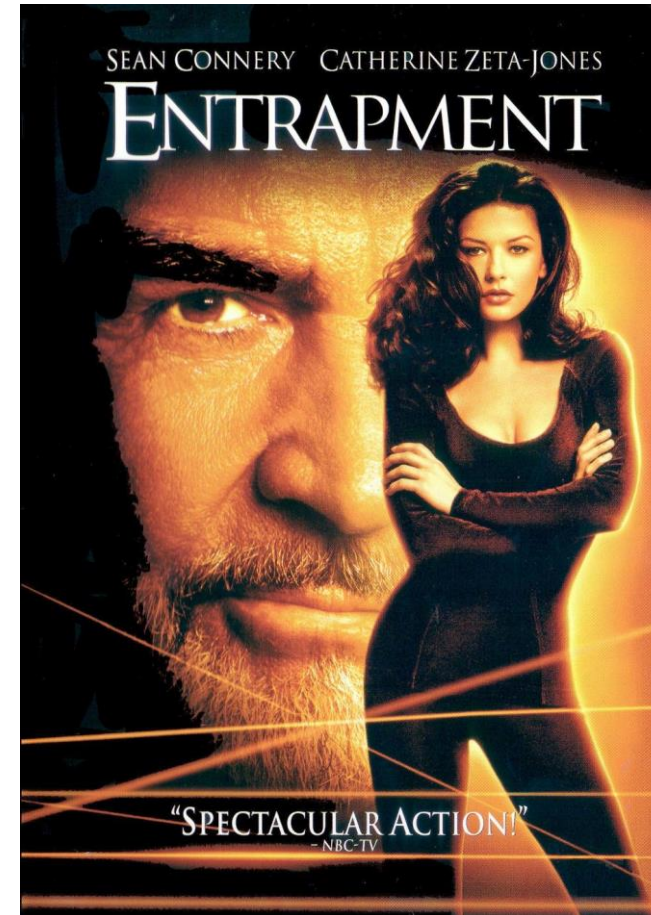
- U.S. v. Bishop, 291 F.3d 1100, 1111 (9<sup>th</sup> Cir. 2002).
- Court erred in excluding as hearsay D's testimony concerning tax advice he relied on in taking the position that advances from employer were loans rather than compensation.
- Testimony not offered to prove content of advice, but to prove understanding of advice.



# Example: to show inducement

U.S. v. Cantu, 876 F.2d  
1134, 1137 (5<sup>th</sup> Cir. 1989)

- Reversible error to prevent defendant claiming entrapment from testifying about statements DEA agent made to induce commission of crime.





# Example: statement offered to show why investigation undertaken

- A DEA task force agent testifies:
  - “I got a call from my informant. He told me that [defendant] was selling drugs from his mother’s home. We then began conducting visual surveillance of the home.”
  - Non-hearsay because info caused officer to investigate?



# Always remember relevance

- Even if TOMA, proponent must show that the statement is relevant.

# Note: Background info cannot be used as pretext

- Statement not hearsay if statement offered to show why investigation undertaken.
- However, testimony that Officer acted on information received should suffice.



# “Background info”: defense wins

- Impermissible for government to offer evidence that bears on ultimate issue when unnecessary to explain background of police investigation. *United States v. Hinson*, 585 F.3d 1328, 1337 (910<sup>th</sup> Cir. 2009)
- “Background information” **should not be used as pretext** to nullify defendant’s right of confrontation or to inject prejudicial evidence. *U.S. v. Becker*, 230 F.3d 1224 (10<sup>th</sup> Cir. 2000).
- Evidence may not be admitted for non-hearsay purposes of explaining police investigation **where propriety of investigation not in question**. *U.S. v. Blake*, 107 F.3d 651 (8th Cir. 1997).
- Testimony that officer acted on information **received should suffice**. *U.S. v. Cass*, 127 F.3d 1218, 1223 (10th Cir. 1997).
- Conviction reversed for improper use of background evidence of state of mind. *U.S. v. Reyes*, 18 F. 3d 65 (2d Cir. 1994).

# Hearsay Exclusions: FRE 801

- FRE 801(d)(1)(A): Prior **inconsistent** statement given under oath and subject to c/e
- FRE 801(d)(1)(B): Prior **consistent** statement offered to rebut claim of recent fabrication
- FRE 801(d)(1)(C): Statement of **identification**
- FRE 801(d)(2): Opposing party statement



# FRE 801(d)(1)(A): Prior Inconsistent Statement Under Oath

- Testifies at proceeding and subject to c-e on prior statement
- Prior statement inconsistent and given under oath at prior proceeding
- Diametrically opposed information not necessary, substantive divergence enough (evasive, “can’t recall”)



**“Perhaps you’d like to reconsider that last answer.”**

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# FRE 801(d)(1)(B): Prior Consistent Statement

- Testifies at prior proceeding and subject to c-  
e on prior statement, and
- Prior statement consistent and offered to  
rebut express charge of recent  
fabrication/improper influence



- Tome v. U.S. 513 U.S. 150 (1995) – Prior consistent statements are not allowed to counter all forms of impeachment or to bolster a witness that has been discredited – only to rebut allegations of *recent fabrication*.
- U.S. v. Al-Moayad, 545 F.3d 139 (2<sup>nd</sup> Cir. 2008) - trial court erred in admitting government informant's notes because they were made after the informant had been paid a large amount of money – giving him a motive to lie.

### ***CONSIDER***

- U.S. v. DeSimone, 488 F.3d 561 (1<sup>st</sup> Cir. 2007) – accountant's grand jury testimony that occurred prior to intimidating interviews with federal agents was admissible – despite defense's claim that the accountant had developed an earlier motive to lie to avoid a malpractice lawsuit
- U.S. v. Green, 258 F.3d 683 (7<sup>th</sup> Cir. 2001) – the prior consistent statement can come in through a 3<sup>rd</sup> party witness as long as the declarant is available at some time during the trial for c-e



# FRE 801(d)(1)(C): Statement of Identification

- Out-of-court statement by the witness identifying a person:  
Non hearsay
- Applies to photograph
- Applies to sketch
- Applies even if witness was able to make in-court identification
- FRE does not address issues of suggestiveness



# FRE 801(d)(2): Opposing Party Statement

- Personal statement
- Adoptive statement
- Statement by authorized spokesperson
- Agent/employee statement
- Statement by co-conspirator



# Pre-arrest v. Post *Miranda* silence as admission

- If accusatory statements made and reasonable under the circumstances to deny, silence (or failure to deny) admissible. *Fletcher v. Weir*, 455 U.S. 603 (1982).
- Post-arrest post-*Miranda* silence cannot be used. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

# FRE 801(d)(2)(e): Co-conspirator Stat

- Government must show that a conspiracy existed which involved the declarant and the defendant
- The statement must be during the course of a conspiracy, and
- The statement must be in furtherance of the conspiracy.



# Broad Scope

- When a person joins an existing conspiracy, he is deemed to have adopted all prior assertions of coconspirators made during and in furtherance of conspiracy. U.S. v. Gypsum Co., 333 U.S. 364 (1948).
- Government does not have to charge conspiracy to introduce co-conspirator statements.
- Statements from unindicted co-conspirators can also be used (so long as it can be established declarant part of conspiracy).





# Existence of a Conspiracy

- Co-conspirator statements themselves can be probative of the existence of a conspiracy, and the participation of both the declarant and the defendant. Bourlaily v. US, 483 US 171 (1987).
- There must be independent corroborating evidence of defendant's participation in conspiracy.
- Preponderance of the evidence standard.

# During the Course of a Conspiracy

- Statements are not in furtherance, if the conspiracy has ended. U.S. v. Lutwak, 344 US 604 (1953).
- Termination of the conspiracy occurs when objectives accomplished.
- Even egregious and organized acts of concealment are not sufficient to extend the life of the conspiracy.
- For acts of concealment to be counted, they must have been part of original plan.

# Furtherance of a Conspiracy

- Idle conversation is not sufficient, statements made to undercover officer are not “in furtherance.”
- Casual conversation about past events not “in furtherance.”
- Note, however, that fact that statement made to an informant does not matter.
- What matters is that statement made by member of the conspiracy.



# Hearsay Exceptions

- FRE 803 – Availability of declarant immaterial (>20 of these)
- FRE 804 – Declarant must be unavailable (4 of these)



**"Can we, just for a moment, Your Honor, ignore the facts?"**

# Hearsay Exceptions: FRE 803 Availability Immaterial

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In the future, please say "I object"  
rather than "that's total bullshit."

# FRE 803(1): Present Sense Impression

## Present Sense Impression

1. Statement describing
  2. event or condition
  3. made while declarant perceived it or immediately after
- Statement **need not be startling**.
  - Statement must be **nearly contemporaneous** with incident.
  - No per se rule on how much lapse time is OK (some cases: five minutes too much).
  - Declarant must have personal knowledge.

# Example: Present Sense Impression

- U.S. v. Murillo, 288 F.3d 1126, 1137 (9<sup>th</sup> Cir. 2002).
- Murder victim's statement over phone to W that she was with D and accomplice was made while declarant was properly admitted because it was made while declarant was perceiving event.



# FRE 803 (2): Excited Utterance

## Excited Utterance

1. Statement relating to
  2. Startling event or condition
  3. Made while declarant was under stress of excitement.
- Event **must be startling** (i.e.: accident, crime).
  - Time lapse is factor in determining whether statement qualifies.
  - Declarant must have personal knowledge.

# FRE 803(3): Then Existing Mental, Emotional, Condition (State of Mind)

## Mental/Emotional

- Contemporaneous statement.
- Does not include statement of memory or belief.
- May be admissible to prove conduct in accord with intent.

Statement regarding intent to perform a certain act in the future is not excludable on hearsay grounds.

Such a statement might be introduced to prove that declarant acted in accordance with stated intent. See Mutual Life Ins. Co. of New York v. Hillmon, 145 US 285 (1892).

# Example: Then existing state of mind

- U.S. v. Barraza, 576 F.3d 798, 804-805 (8<sup>th</sup> Cir. 2009).
- Victim's out-of-court statements to friend and victim's journal entries, both made day before she disappeared, stating that she intended to take trip to Mexico with defendant, were admissible as evidence of victim's then existing state of mind.



# Note: Cause of state of mind excluded

- Statement applies only to a statement describing state of mind expressed by the declarant.
- Statement cannot be used to prove cause of that state of mind:
  - “I’m scared”: OK.
  - “I’m scared because someone threatened me”: not OK.





# Note: Statement of memory and belief excluded

Example:

- Shepard v. United States, 290 U.S. 96 (1933)  
(Supreme Court refused to admit statement by defendant's wife that "Dr. Shepard has poisoned me.")
- Statement speaks to a past act.



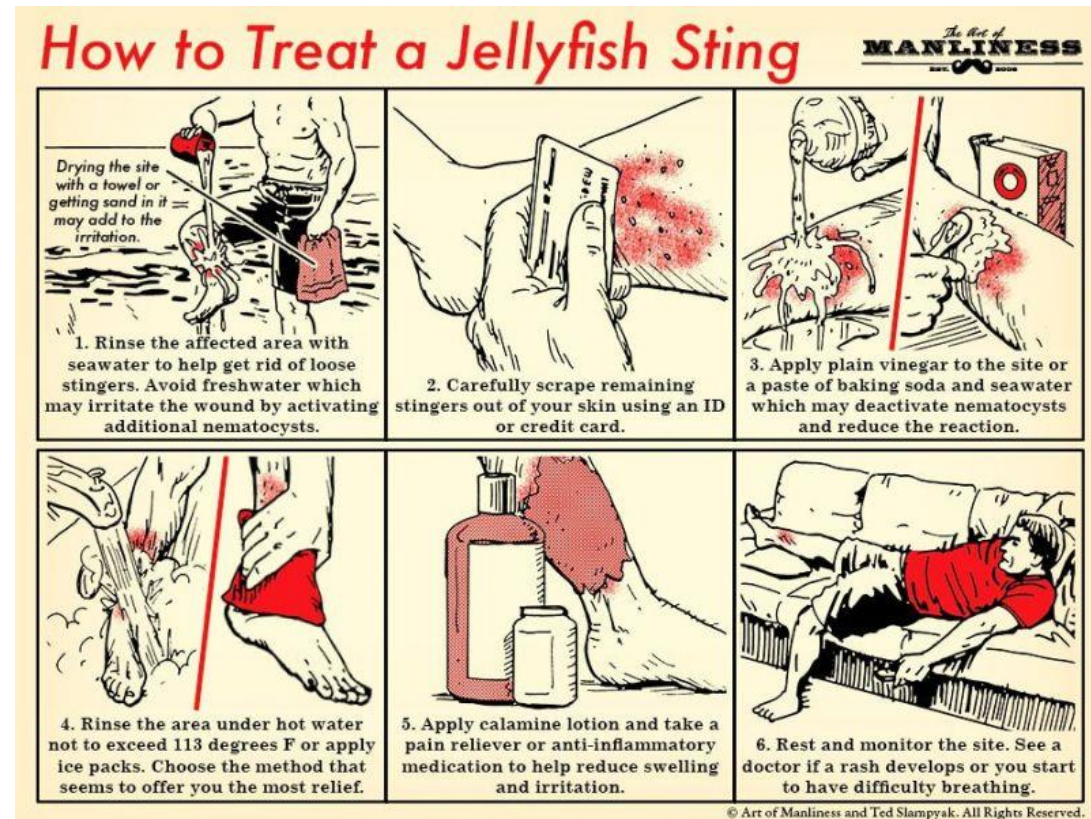
# 803(4): Statement for Purposes of Medical Diagnosis or Treatment

- Medical diagnosis or treatment
- Describing medical history, past or present symptoms, pain or sensations, or cause if it's relevant to treatment



# Broad Scope:

- Doctor, my knee hurts.
- Nurse, my knee hurts.
- Doctor, my knee hurt yesterday.
- Doctor, I was stung by a jellyfish while I was visiting Mary at the beach.
- Doctor, Mary was stung by a jellyfish at the beach.



# Note: A statement that identifies perpetrator usually excluded

- Statement that assigns fault or identifies perpetrator usually excluded.

Examples:

- U.S. v. Renville, 779 F.2d 430 (8<sup>th</sup> Cir. 1985) (doctors rarely rely on statements of identity to provide treatment).
- U.S. v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977) (statement by patient he was shot was admissible but not statement that he was shot by white man).





# **FRE 803(5): Past Recollection Recorded**

- Witness once had knowledge but has forgotten
- Record made or adopted by the witness
- At a time when the matter was fresh in his/her memory
- Record can be read to jury but does not come in evidence unless offered by opposing party

# FRE 803(6): Business Records

1. Record **in any form**,
2. Made at or near **the time**,
3. By, or from information transmitted by, **a person with knowledge**,
4. If kept in the course of a **regularly conducted business activity**,
5. Regular practice to keep such records.
6. As shown by the testimony of the **custodian** or other qualified witness, or by certification....

# FRE 803(6): Business Records (cont.)

- Cannot be prepared in anticipation of litigation.
- Cannot be used to circumvent prohibition on police records in criminal cases.



# FRE 803(8): Public Records

- Records setting forth activities of a public office or agency, or
- matters observed in the course of official duties
- may be admitted unless the sources of information or other circumstances indicate lack of trustworthiness





# Note: Law Enforcement Exclusion

- FRE 803 (8) excludes matters observed by police in criminal cases.
- FRE 803 (8) bars the prosecution in a criminal case from introducing factual findings resulting from an investigation.
- The defendant, however, can use these factual findings.



# Example:

Officer spots someone running away after a burglary and writes in his report, “The burglar was a 6’2” Hispanic male.”

In a criminal case against D for the burglary, this report can’t be introduced against D. **But it can be used by D to show that D doesn’t fit the description.**

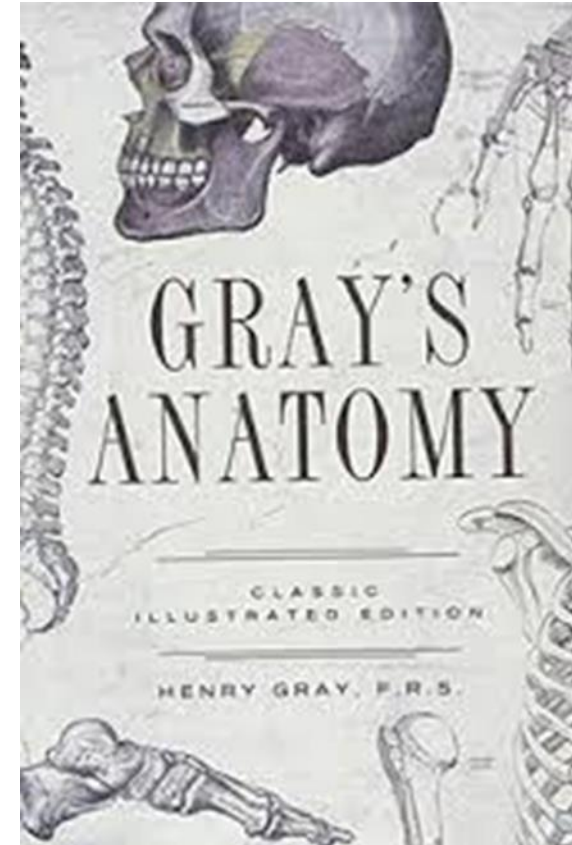
# FRE 803 (10): Absence of Public Record

- Absence of entry might prove non-occurrence. FRE 803(7).
- Record regularly made and preserved.
- Examples:
  - Failure to file tax return
  - Failure to obtain firearms license.
  - Certificate of non-existence of immigration records.

Freedom Forge September 1 <sup>st</sup> 1792. (129)	
145 147	Genl Charges to To Wm Smith for 1 Year Salary as Clerk 110 Dollars, equal to... 41.5
	" 8 Mo. Boarding himself 27/6-7 - - - - - 48 5
113 99	Sundries to To Bar Iron Wm Mite for 2 <sup>o</sup> per halsy 24 <sup>o</sup> . . . . . 8 George Nixon for 7 <sup>o</sup> . . . . . 2.4
133 148	Cash recd. of Zimmerman for 17 <sup>o</sup> . . . . . 5.8 ~ 8 8
117 140	Horse Provender to To Thomas Braeken for 95 Bundles Straw 2 P. . . . . 7 11
127 145	Frederick Nipple to To Genl Charges for 1 Bushel of wheat from Mill . . . . . 4 6
145 119	Genl Charges to To Thomas Beale for 6 <sup>o</sup> Bushels of wheat 24 <sup>o</sup> . . . . . 1 6
127 130	Wm Smith to To Cash paid him . . . . . 5 8
150 80	Sundries to To Bar Iron Robert Nelson for 60 <sup>o</sup> . . . . . 1.0.0 Robert Irvine for 10 <sup>o</sup> . . . . . 3.4
150 147	Wm Beatty for 2 <sup>o</sup> 27 <sup>o</sup> . . . . . 1.3.9 Frederick Nipple for 8 <sup>o</sup> . . . . . 2.8

# FRE 803 (18): Learned Treatises

- Accepted by experts or recognized by court
- Only in examination of experts in direct and cross
- May read into e., but not exhibit



# FRE 803 (22): Judgment of prior Conviction

- Trial or guilty plea (not nolo)
- Punishable by year or more
- To prove fact essential to sustain judgment
- May show appeal pending, but does not render inadmissible

CASE NO. CR2005-2500

2006 MAY 17 AM 11:00

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY JH DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	
	)	Case No. CR-2005-02500
V.	)	
	)	JUDGMENT OF CONVICTION AND
JAMIN C. WIGHT,	)	ORDER RETAINING JURISDICTION
DOB: 09-19-1977	)	PURSUANT TO I.C. 19-2601(4)
SSN: [REDACTED]	)	
	)	
Defendant.	)	

On the 12th day of May, 2006, the defendant, JAMIN C. WIGHT, defendant's counsel, James E. Siebe, and the State's attorney, William W. Thompson, Jr., appeared before this Court for pronouncement of judgment.

At that time the defendant was advised that an Amended

JUDGMENT OF CONVICTION AND ORDER  
RETAINING JURISDICTION PURSUANT  
TO I.C. 19-2601(4): Page -1-

# Hearsay Exceptions: FRE 804 Declarant Unavailable

The person you are trying to reach is emotionally unavailable at this time. Please try again later.



som<sup>ee</sup>cards  
user card

# “Unavailable”

- Not necessarily absent from the proceeding
  - Privilege
  - Refuses to testify despite a court order
  - Lack of memory
- Absent and proponent of evidence cannot procure witness's attendance
- Forfeiture by wrongdoing only if defendant intended to prevent testimony

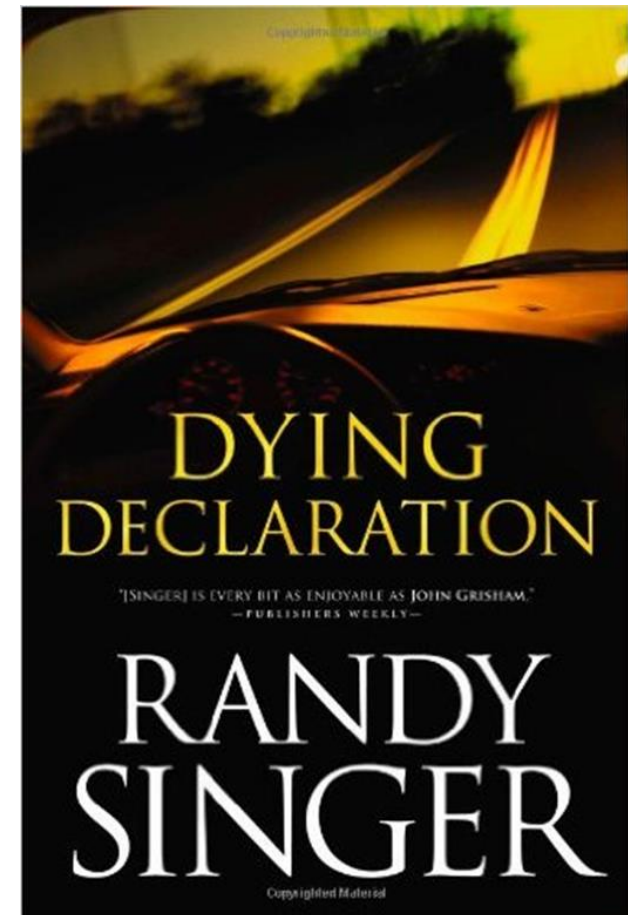


# **FRE 804(b)(1): Former testimony**

- Testimony at formal hearing
- Offered against party
- Party had prior opportunity to develop testimony

# Rule 804(b)(2): Dying Declaration

- Homicide case
- Made while declarant believed death was imminent
- Concerning cause of death



## Example:

Valerie, believing she will soon die of gunshot wounds, says, “Dexter shot me.”

If Valerie dies (or is otherwise unavailable at Dexter’s trial), her statement is admissible against Dexter to show that Dexter shot her.

# FRE 804 (b)(3): Statement Against Interest

- Statement against interest
- Pecuniary or proprietary
- Subjects declarant to civil or criminal liability
- Accomplice confession not admissible against defendant
- If declarant inculpated but offered to exculpate accused, need corroborating circumstances “clearly indicative of trustworthiness.”

# Compare:

## Party Admissions

1. Have to be made by the party against whom they are being used.
2. Do not have to be against interest when made.
3. Declarant can be available.

## Statement Against Interest

1. Can be made by anyone, party or not.
2. Does have to be against interest when made.
3. Declarant must be unavailable.

# Example:

- After a car accident, the passenger tells police, “We should have had our lights on.”



# Creative Ways Around 804

Not CLEARLY against interest

- U.S. v. Gadson, 763 F.3d 1189 (9<sup>th</sup> Cir. 2014) – statements made to police by DF’s brother inadmissible because they were not “truly self-inculpatory”
- U.S. v. Guzman, 603 F.3d 99 (1<sup>st</sup> Cir 2010) – statements made by accomplice to an informant that he was not involved in fire, but someone wanted him to do it were inadmissible because they were not clearly against his interest



# Rule 806

- Hearsay declarant is “in effect a witness,” so declarant’s credibility should be subject to impeachment and support as through he had testified.” (Advisory Cmte Notes)
- U.S. v. Uvino, 590 F.Supp.2d 372 (E.D.N.Y. 2008) – allowing defense counsel to read portions of 302s containing information about prior criminal acts of declarant not resulting in a conviction.
  - *Good analysis of the mechanics of using Rule 806 – including jury instruction*
- **Extrinsic evidence may or may not be permitted:** U.S. v. Friedman, 854 F.2d 535 (2<sup>nd</sup> Cir. 1988)(allowing extrinsic evidence) vs. U.S. v. Saada, 212 F.3d 210 (3<sup>rd</sup> Cir. 2000) (not allowing extrinsic evidence).
- Great Resource: Barbara Bergman & Nancy Hollander, *Creative Uses of the Rules of Evidence* –fd.org

# FRE 806: Attacking and Supporting Declarant Credibility

- Hearsay or non-hearsay statement such as co-conspirator statement can be attacked and supported like any other testimony.
- Inconsistent conduct or statement not subject to requirement of opportunity to deny or explain.
- Party against whom offered may call declarant as witness and examine concerning statement as if on cross.

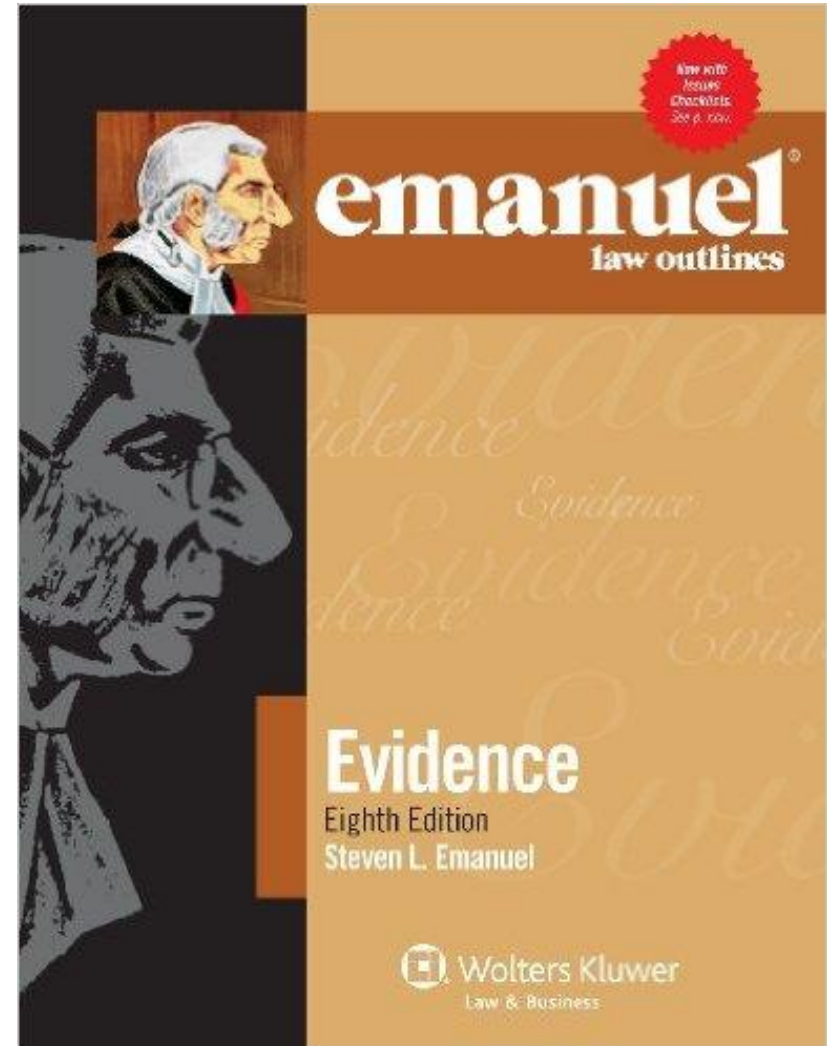
# Hearsay and Crawford

- Is statement being offered for its truth?
- Is statement a violation of confrontation clause?
- Is statement testimonial?
- Is primary purpose of statement “to establish or prove past events potentially relevant to criminal prosecution”?
- A hearsay objection will not preserve a confrontation clause challenge.



# Hearsay Flowchart

- Is statement relevant/prejudicial?
- Is statement being offered for its truth?
- Is it excluded – defined as non-hearsay by Rule 801(d)?
- Does it fall into an exception from the rule of categorical inadmissibility set forth in Rule 803?
- Does statement violate Crawford?



# Objection

- Q calls for hearsay
- A is Hearsay
- Move to strike A
- Move to instruct jury to disregard A
- Need for motion for mistrial?



# Strategy: Just because something is objectionable does not mean you have to object

- Does an objection advance your case (in what way/ what is the best way to make a record of your objection)?

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