PACIFIC JUDICIAL COUNCIL
2017 BIENNIAL CONFERENCE

Evidence Presentation by
Judge John C. Coughenour

September 28, 2017

3:45 pm–5:00 pm: Hearsay, Nonhearsay, & Exceptions (Rules 801-805); *Crawford* and the Confrontation Clause

Hearsay, Nonhearsay, and Exceptions

Hearsay

***Rule 801*:** Hearsay is an out-of-court statement by a declarant not testifying that a party offers to prove the truth of the matter asserted in the statement. It is inadmissible except where determined by federal statute, the Federal Rules of Evidence, and the Supreme Court.

- **Declarant:** the person who made the statement
- **Statement:** a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- **Offered for the truth of the matter:** evidence that is offered as probative if trier of fact believes that declarant was speaking truthfully

Rule 805: Hearsay within hearsay is also excluded by the rule against hearsay unless each part of the combined statement conforms with an exception to the rule.

Nonhearsay

There are four different areas where statements are either not hearsay by definition or have been statutorily exempted from hearsay.

1. **Statements not offered for the truth of the matter**
   - Impeachment evidence
   - Evidence offered for the effect on the listener or reader
     - Example: Customer's report that a store floor was slippery is admissible as notice of a potential problem but not as to whether the floor was truly slippery.
   - Declarant's state of mind to show knowledge of the existence of a fact

2. **Non-assertive conduct**
   - K-9 unit dog's actions while searching. *Terrell v. State*, 3 Md. App. 340 (1968).
   - Lab test results created by machines. *US v. Washington*, 498 F.3d 225 (4th Cir. 2007).

3. ***Rule 801(d)(1)*: Prior Statements by a Witness**
   If a declarant is testifying and is subject to cross examination at the current proceeding, the statement is admissible if:

   a. It is <u>inconsistent</u> with testimony given under oath at a trial, hearing, or other official proceeding. Inconsistent is broadly construed.

   b. It is <u>consistent</u> with testimony (not under oath) *and* offered to rebut a claim of improper influence or recent fabrication. The statement has to have been made before the alleged improper motive arose. *Tome v. US*, 513 U.S. 150 (1995).

   c. It <u>identifies</u> a person the declarant perceived earlier.

4. *Rule 801(d)(2)*: Opposing Party Statement

If a statement by an opposing party is offered *against* that party, the statement is admissible if:

a. It was made in **individual or representative capacity**. The declarant does not need to have personal knowledge and can speculate.

b. The party **manifested or adopted the statement, or believed it to be true**. Silence can be admitted as an adoptive statement. *US v. Ward*, 337 F.2d 671 (7th Cir. 2004).

c. It was made by a person who was **authorized to make a statement on the subject.** For example, in an employment discrimination case, a declarant involved in the decision-making process affecting the employment action could make a non-hearsay statement.

d. It was made by the **party's agent or employee** on a matter within the scope of the relationship and while the relationship existed. Independent contractors are typically not agents.

e. It was made by a **co-conspirator** during and in furtherance of a conspiracy. The conspiracy (and the non-hearsay statements) end when the co-conspirators are arrested.

Hearsay Exceptions

There are also many different hearsay exceptions: statements that are not exempted from the rule against hearsay, but can be admitted if certain requirements are met.

Rule 803 outlines exceptions that are available regardless of whether the declarant is available as a witness. Some common examples are:

1. **Present sense impression**: a statement describing or explaining an event/condition, made while or immediately after the declarant perceived it.

2. **Excited utterance:** a statement in reaction or relating to a startling event or condition, made while the declarant under the stress of the excitement it caused.

3. **Then-existing mental, emotional, or physical conditions:** a statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health). This does not include a statement about the cause of the condition. It also does not include a statement of memory or belief (*e.g.*, past conditions) unless it relates to the validity or terms of the declarant's will.
    - Example: *US v. Houlihan*, 871 F. Supp. 1495 (D. Mass. 1994). In *Houlihan*, a statement that the declarant intended to meet someone was admissible as circumstantial evidence to show that the meeting did happen.

4. **Statement made for medical diagnosis or treatment:** a statement made to a physician that is reasonably pertinent to medical diagnosis or treatment. The declarant's motive must be

consistent with promoting treatment and the content must be relied on by the physician. The statement can be about the cause of the condition.

- Example: *US v. Renville*, 770 F.2d 430 (8th Cir. 1985). In *Renville*, statements made by a child abuse victim regarding the identity of the abuser were admissible because the identity was important in the child's diagnosis and treatment.

5. **Recorded recollection:** a record that is (1) on a matter the witness once knew about but now cannot recall; (2) was made or adopted by the witness when the matter was fresh in the witness's memory; and (3) accurately reflects the witness's knowledge. The contents of the record can be read into evidence. The person who recorded the recollection has to be the one testifying. An example is the Comey memos written after meeting with President Trump, if Director Comey was testifying.
    - Compare**:** A witness's memory can also be refreshed with a document. However, if the requirements above are not met, the document cannot be read into evidence and is not admissible.

6. **Records of regularly conducted activity (business records):** a record of an act, event, condition, opinion, or diagnosis if (1) the record was made at or near the time by (or on from information transmitted by) someone with knowledge; (2) the record was kept in the course of a regularly conducted activity; (3) making the record was a regular practice of that activity; and (4) the record is introduced by the custodian or another qualified witness. The opposing party can challenge the source or circumstances if they lack trustworthiness.

Other hearsay exceptions where the declarant can be available include:

- absence of a record of a regularly conducted activity
- public records
- public records of vital statistics
- absence of a public record
- records of religious organizations concerning family or personal history
- certificates of marriage, baptism, and similar ceremonies
- family records
- records/statements of documents that affect an interest in property
- market reports and similar commercial publications
- statements in learned treatises
- reputation concerning personal or family history/boundaries or general history/character
- judgment of a previous conviction

Rule 804 establishes hearsay exceptions that apply only when the declarant is unavailable as a witness. A declarant is **unavailable** if:

- He or she is exempted from testifying because of a privilege
- He or she refuses to testify about the subject matter despite a court order to do so
- He or she testifies to not remembering the subject matter
- He or she cannot be present or testify because of death or then-existing physical or mental illness
- He or she is absent from the trial or hearing and the proponent has not been able to procure, by process or reasonable means, former testimony.

A declarant is not unavailable if the proponent of the statement wrongfully caused his or her unavailability.

Common ***Rule 804*** exceptions include:

1. **Former testimony**: a statement that (1) was given as a witness at a trial, hearing, or lawful deposition (current or different) *and* (2) is now offered by a party—or in a civil case, a predecessor-in-interest—who had the opportunity and similar motive to develop it by direct, cross, or redirect.
   - Predecessor-in-interest: in a former suit, a party having like motive to cross-examine the witness about the same matters as the present party would have
   - Similar motive: an interest of similar intensity to prove/disprove the same side of a substantially similar issue

2. **Dying declaration**: in a prosecution for homicide or in a civil case, a statement that the declarant, while believing his or her death to be imminent, made about his or her death's cause or circumstances. Under the Federal Rules, the declarant does not have to actually die for the statement to be admissible. The court may redact portions of a statement that do not directly relate to the declarant's death. *US v. Angleton*, 269 F. Supp. 2d 878 (S.D. Tex. 2003).

3. **Statement against interest**: a statement that a reasonable person in the declarant's position would have made only if the person believed it to be true, because it was so contrary to the declarant's proprietary or pecuniary interest; *or* a statement that has so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability. These kinds of statements must also be supported by corroborating circumstances that clearly indicate trustworthiness if offered to expose the declarant to criminal liability.

Other hearsay exceptions where the declarant must be unavailable include statements of personal or family history and statements offered against a party that wrongfully caused the declarant's unavailability.

***Crawford* and its Progeny**

Crawford v. Washington, 541 U.S. 36 (2004)

This case reformulated the standard for determining when hearsay statements are admissible in a criminal trial under the Confrontation Clause of the Sixth Amendment. The Court departed from the "adequate indicia of reliability" standard of *Ohio v. Roberts*, and held that out-of-court "testimonial" statements made by an unavailable witness are barred by the Confrontation Clause.

In *Crawford*, the statement at issue was made by the defendant's wife to a police officer during an interrogation. Crawford was unable to confront his wife on her statement without waiving the spousal privilege. The trial court allowed the prosecution to introduce the out-of-court statement, even though the wife did not testify, because it bore adequate indicia of reliability. The Washington State Court of Appeals reversed the trial court, and the Washington State Supreme Court reversed the Court of Appeals.

The U.S. Supreme Court again reversed, applying a textual approach and finding that the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Therefore, out-of-court testimonial statements of unavailable witnesses—regardless of whether the court deems such statements reliable—are barred by the Confrontation Clause unless the defendant had a prior opportunity to cross-examine the witness.

The Court left for another day a comprehensive definition of "testimonial." However, the Court held that it "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

Davis v. Washington, 547 U.S. 813 (2006)

In *Davis*, the Court returned to the question of what constitutes a testimonial statement, as well as addressing the effect of the Confrontation Clause on nontestimonial statements. First, the Court held that nontestimonial statements fall outside the scope of the Confrontation Clause. Next, the Court addressed whether two different statements were testimonial in nature. The first statement was made to a 911 operator; the Court found it was nontestimonial. The second statement was made to police and preserved in a police report; the Court held that it was testimonial. The takeaway from *Davis* is that statements are nontestimonial when they are made "under circumstances objectively indicating that the primary purpose" is to assist officers in meeting an ongoing emergency. On the other hand, statements are testimonial if given under circumstances that indicate "that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Wharton v. Bockting, 549 U.S. 406 (2007)

Wharton confirmed that nontestimonial statements do not fall under the scope of the Confrontation Clause and clarified that they are admissible "even if they lack indicia of reliability."

Michigan v. Bryant, 562 U.S. 344 (2011)

In *Bryant*, the police arrived at a gas station to find a mortally wounded man who told the officers that he had been shot by Bryant outside of Bryant's house and then drove himself to the gas station. Because the emergency—specific to the shooting victim—had passed, the Court was required to further explore what is meant by "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

The Court held that the "primary purpose" inquiry requires an objective evaluation of the circumstances in which the encounter between the witness and the police occurs and the parties' statements and actions. The existence of an "ongoing emergency" is one of the most important circumstances in evaluating an interrogation's primary purpose. This inquiry cannot narrowly focus on the threat to the first victim if the assailant remains at large. However, the Court was careful to clarify that an ongoing emergency does not last the entire time a suspect is on the loose, and a trial court is best positioned to judge at what point an interrogation transitions from testimonial to nontestimonial.

In addition, the type of weapon involved—here, a firearm—is highly relevant. The encounter's formality is also instructive. Formality suggests the absence of an emergency, although informality does not necessarily indicate the presence of an emergency or an indication that the declarant intended her statements to be testimonial. Finally, a court should look to the statements and actions of the parties, particularly the contents of both the questions and the answers. Police officers have a dual responsibility as a first responder and criminal investigator. Victims, on the other hand, may want the threat to end, but not envision a later prosecution. Severely wounded victims may have no motive at all. The test therefore focuses on the understanding and purpose of a reasonable victim in the actual victim's circumstances.

The Court held that, under the circumstances in *Bryant*, the victim's statements were intended to assist the police in addressing an ongoing emergency and were therefore nontestimonial.

Ohio v. Clark, 135 S. Ct 2173 (2015)

In *Clark*, the Court addressed whether a three-year-old's statements to his preschool teachers were testimonial. The victim's teachers noticed marks on his body, and when they asked him about it, he identified Clark, his mother's boyfriend, as his abuser. The trial court found the child incompetent to testify but did not exclude his statements.

The Court first found that a state statute requiring teachers to report instances of child abuse did not convert a conversation between a student and concerned teacher into a law enforcement mission aimed primarily at gathering evidence for a prosecution. Next, the Court found that the primary purpose of the teachers' questions was not to create an out-of-court substitute for trial testimony, but rather to meet an ongoing emergency. The child had visible injuries and could have been released back into the hands of his abuser.

Clark is significant because the Court found that (1) statements of very young children will rarely, if ever, implicate the Confrontation Clause, and (2) statements to individuals other than law enforcement—while not categorically outside the scope of the Confrontation Clause—are significantly less likely to be testimonial than to those charged with uncovering and prosecuting criminal behavior.

United States v. Esparza, 791 F.3d 1067 (9th Cir. 2015)

In *Esparza*, the Ninth Circuit addressed whether the statement of a registered car owner that she had sold her car to the defendant was testimonial. Esparza was convicted of importing marijuana. At trial, the only issue was whether he owned the car. At the time he was arrested, Diana Hernandez was the registered owner. Hernandez provided hearsay documents to the California Department of Motor Vehicle that she sold her car to Esparza six days prior to his arrest, but only after she was notified that her car had been seized for trafficking drugs. The government did not call Hernandez at trial, but introduced her statements.

The Ninth Circuit held that Hernandez's statements were testimonial because she gave them "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

United States v. Fryberg, 854 F.3d 1126 (9th Cir. 2017)

In *Fryberg*, the defendant was convicted of possession of a firearm by a prohibited person, stemming from a domestic violence protection order that forbade him from owning a firearm. Fryberg did not participate in the hearing on the protective order, and therefore the government had to prove he had notice of the hearing. The officer who served Fryberg with the notice of the hearing died one month before trial, so the government had to rely on his return of service to prove that Fryberg had been served with notice of the hearing that led to the permanent protective order. Fryberg argued that the admission of the return of service violated the Confrontation Clause.

The Ninth Circuit held that the document was not testimonial, relying on Ninth Circuit cases that clarified which types of public records—and the statements contained therein—were testimonial.

For example, in *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010), the court held that warrants of removal (immigration documents that contain an order to remove an alien from the United States and documentation of that alien's physical removal) were not testimonial. Because the documents were not made in anticipation of litigation, their primary purpose was not to be used at trial to establish a fact.

Also, in *United States v. Bustamante*, 687 F.3d 1190 (9th Cir. 2012), the court held that a document containing a transcription of information from a birth certificate was testimonial. The document was essentially an affidavit testifying to the contents of a birth record, as opposed to the birth record itself, and was prepared at the request of the government to investigate the defendant's citizenship. The court therefore found that it was a new record created for the purpose of providing evidence against the defendant.

Ultimately, the *Fryburg c*ourt found that the return of service fell somewhere between the documents in *Orozco-Acosta* and *Bustamante*. While the return of service had a criminal prosecutorial function in that it was necessary to effectuate the protective order, its primary purpose was to inform the court that Fryberg had been served with notice of the hearing. Therefore, it was not made for use in a future criminal trial and was not testimonial.