

# Evidence

Hearsay & *Crawford*

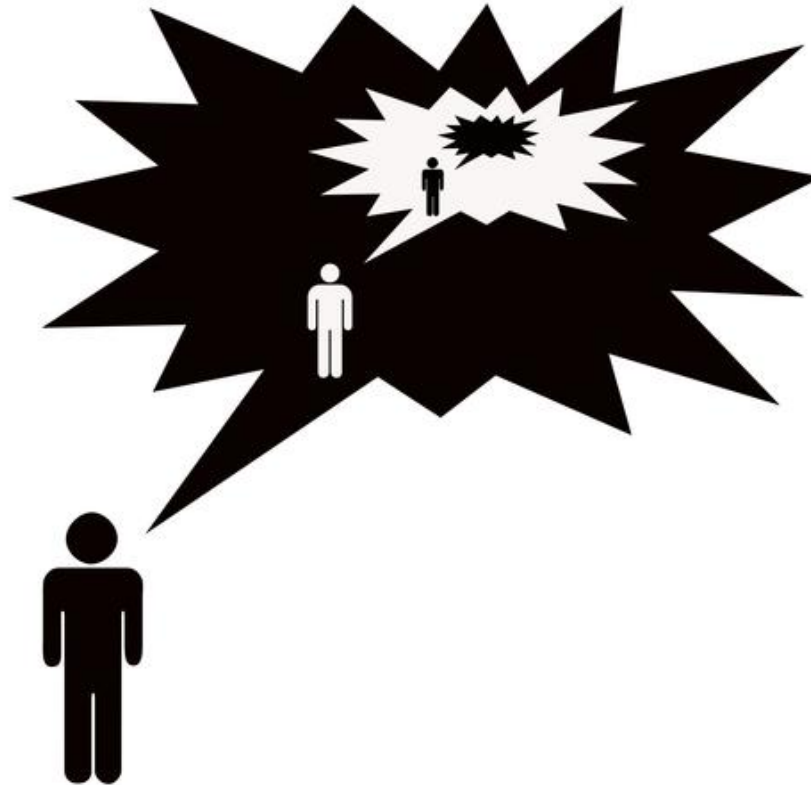
# Hearsay, Nonhearsay, & Exceptions



# Rule 801: Hearsay

**What is hearsay?**

A declarant's out-of-court statement that is offered to prove the truth of the matter asserted.



# Rule 801: Hearsay

**What constitutes a statement?** A person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.



# Rule 805: Hearsay within Hearsay

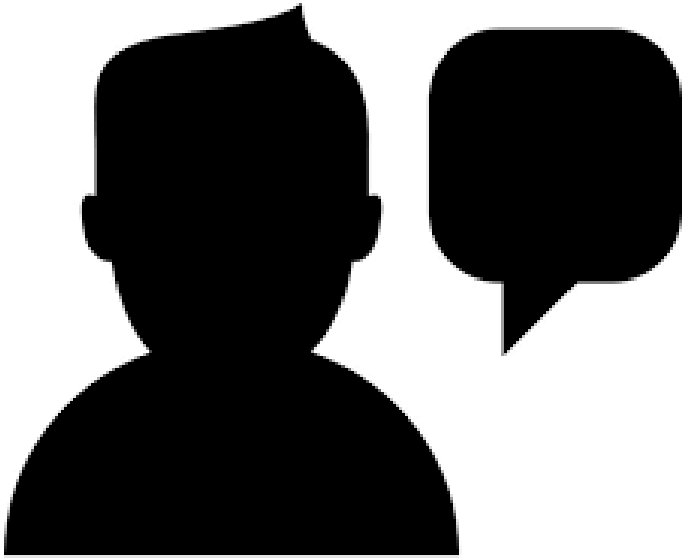


Hearsay within hearsay is permissible if each part of the combined statements conforms with an exception to the rule.

# Nonhearsay

- ▶ Statements not offered for the truth of the matter
- ▶ Nonassertive conduct
- ▶ Prior statements by a witness
- ▶ Opposing party statements

## Rule 801(d)(1): Prior Statements by a Witness



A declarant-witness's prior statement is not hearsay if the declarant is subject to cross-examination about the statement and the statement meets certain qualifications.

# Rule 801(d)(1): Prior Statements by a Witness

The statement must:

(A) be inconsistent with the declarant's testimony and be given under penalty of perjury; *or*

(B) be consistent with the declarant's testimony and be offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying, *or*

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; *or*

(C) identify a person as someone the declarant perceived earlier.



## Rule 801(d)(2): Opposing Party Statements

An opposing party's statement is not hearsay if it is offered against that party and meets certain requirements.



# Rule 801(d)(2): Opposing Party Statements

The statement must:

(A) be made by the party in an individual or representative capacity; *or*

(B) be one the party manifested that it adopted or believed to be true; *or*

(C) be made by a person whom the party authorized to make a statement on the subject; *or*

(D) be made by the party's agent or employee on a matter within the scope of that relationship and while it existed; *or*

(E) be made by the party's co-conspirator during and in furtherance of the conspiracy.

# Hearsay Exceptions

There are also exceptions to the rule against hearsay: some that require the declarant to be unavailable (Rule 804) and some that do not (Rule 803).

~~EXCEPTIONS~~

# Rule 803: Declarant Does Not Have To Be Unavailable

## Common examples include:

- ▶ Present sense impression - 803(1)
- ▶ Excited utterance - 803(2)
- ▶ Then-existing mental, emotional, or physical condition - 803(3)
- ▶ Statements made for medical diagnosis or treatment - 803(4)
- ▶ Recorded recollection - 803(5)
- ▶ Business records - 803(6)

# Rule 803(1): Present Sense Impression



A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

# Rule 803(2): Excited Utterance

A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.



# Present Sense Impression v. Excited Utterance

Requirement	Present Sense Impression	Excited Utterance
Time limit	Yes	No
Startling event	No	Yes
Special mental state	No	Yes
Scope of content	Describe event or condition	Relate to event or condition

# Rule 803(3): Then-Existing Mental, Emotional, or Physical Condition

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).





# Rule 803(4): Statement Made for Medical Diagnosis or Treatment



A statement that:

(a) is made for – and is reasonably pertinent to – medical diagnosis or treatment; *and*

(b) describes medical history, past or present symptoms or sensations, their inception, or their general cause.

# Statements for Medical Diagnosis v. Then-Existing Condition

Element	Medical diagnosis	Then-existing condition
Purpose matters?	Yes—statements must be made to obtain diagnosis or treatment	No
Present or past?	Present or past pain	Only present condition
Cause?	Yes if necessary to diagnosis or treatment	Can only be about the condition, not about the cause

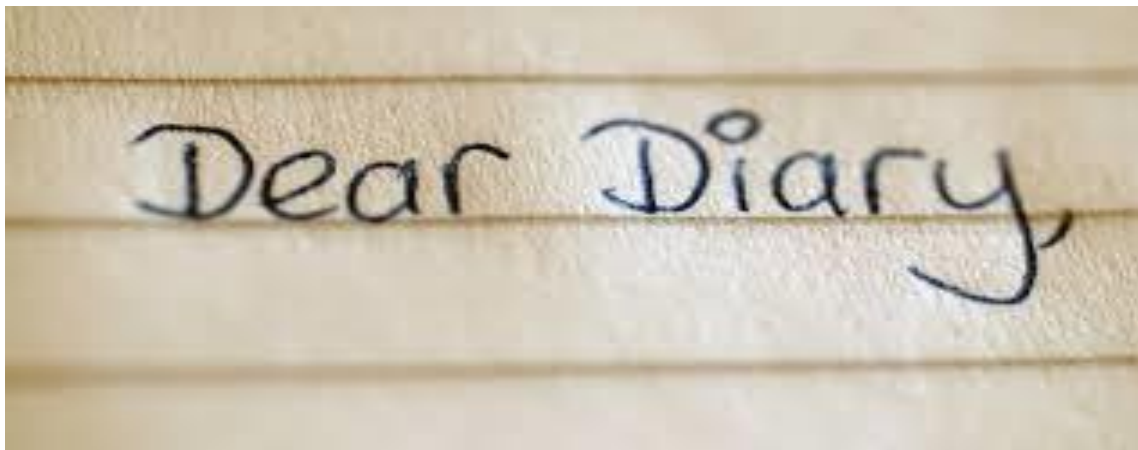
# Rule 803(5): Recorded Recollection

A record that:

(a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; *and*

(b) was made or adopted by the witness when the matter was fresh in the witness's memory; *and*

(c) accurately reflects the witness's knowledge.



## Recorded Recollection v. Refreshing a Witness's Memory

Element	Recorded recollection	Refresh witness memory
What can be used?	Foundational requirements	Anything
Read into evidence?	Yes—the contents of writing, not witness memory, are evidence	Witness cannot read from writing, must testify from present memory
Evidence?	Yes	No

# Rule 803(6): Records of Regularly Conducted Activity (Business Records)

A record of an act, event, condition, opinion, or diagnosis if:

- (a) the record was made at or near the time by (or from information transmitted by) someone with knowledge; *and*
- (b) the record was kept in the course of the business's regularly conducted activity; *and*
- (c) making the record was a regular practice of that activity; *and*
- (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a qualifying certification; *and*
- (e) the opponent does not show that the source of information or the record's preparation indicate a lack of trustworthiness.

# Rule 804: Declarant Must Be Unavailable

## Common examples:

- ▶ Former Testimony
- ▶ Dying Declaration
- ▶ Statement Against Interest



# Rule 804(a): Unavailability

A declarant is considered to be unavailable as a witness if he or she:

1. is exempted from testifying about the subject matter of the statement because a privilege applies; *or*
2. refuses to testify about the subject matter despite a court order; *or*
3. testifies to not remembering the subject matter; *or*
4. cannot testify because of death or a then-existing infirmity; *or*
5. is absent and the statement's proponent cannot procure:
  - a) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6), or
  - b) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

# Rule 804(b)(1): Former Testimony

Testimony that:

1. was given as a witness at a trial, hearing, or lawful deposition, whether during the current proceeding or a different one; *and*
2. is now offered against a party who had an opportunity and similar motive to develop the testimony.





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

In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.



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

A statement that:

1. a reasonable person would have made only if he or she believed it was true because it was so contrary to his or her interest; *and*
2. if offered in a criminal case as a statement that could expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness.



# *Crawford* and its Progeny

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. The shapes are primarily triangles and polygons, creating a dynamic, layered effect. The overall composition is clean and modern, with the text centered on a white background.

# The Confrontation Clause

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."



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

- ▶ Supreme Court moves away from the “adequate indicia of reliability” test of *Ohio v. Roberts*.
- ▶ Touchstone is now whether the out-of-court statement was “testimonial.”
- ▶ “Testimonial” defined as prior testimony in a formal proceeding and police interrogations.

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

- ▶ Nontestimonial statements fall outside the scope of the Confrontation Clause.
- ▶ “Testimonial” further defined.
- ▶ “Primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution” = testimonial.
- ▶ Primary purpose to help officers address an ongoing emergency = nontestimonial.

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

- ▶ Nontestimonial statements fall outside the scope of the Confrontation Clause “even if they lack indicia of reliability.”

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

- ▶ Primary purpose inquiry refined.
- ▶ Requires an objective evaluation of the circumstances.
- ▶ Threat not limited to the first victim.
- ▶ Type of weapon involved relevant.
- ▶ Formality of the exchange between law enforcement and declarant important.



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

- ▶ Teachers' questions of child abuse victim not intended to create out-of-court testimony.
- ▶ Statements of very young children will rarely, if ever, violate the Confrontation Clause.
- ▶ Statements made to individuals other than law enforcement personnel less likely to be testimonial.

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

- ▶ Statements given to the DMV considered testimonial under the circumstances.
- ▶ Only given after witness discovered her car had been seized in connection with drug trafficking.
- ▶ An objective witness would reasonably believe such statements regarding the ownership of the car used to traffic drugs would be later used in a trial.

# *United States v. Fryberg*, 854 F.3d 1126 (2017)

- ▶ Discussed which types of public records are testimonial.
- ▶ Warrants of removal, dealing with immigration, were not testimonial.
  - ▶ Primary purpose not to be used at trial.
- ▶ Transcription of birth information was testimonial.
  - ▶ Made at the government's request for the purpose of providing evidence against the defendant.
- ▶ Return of service of notice of a hearing for a protective order was not testimonial.
  - ▶ Served more of an administrative function than a prosecutorial function.