

# Hearsay

Criminal Practice Conference

October 10, 2012

Anchorage, Alaska

Judge Kevin S. Burke

**With thanks to Hon. Jim Morrow, Senior Judge/Professor of Law,  
Hamline University School of Law.**

## Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.

In a civil case, when it is thin,  
let it in;

In a criminal case, when in doubt,  
keep it out.

-Judge Weird



# Rule 801. Hearsay Definitions

- (a) A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.**
- (b) A "declarant" is a person who makes a statement.**
- (c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.**

- A "statement" is an oral or written *assertion*.
- A "statement" is nonverbal conduct of a person, *if the conduct is intended* by the person as an assertion.

# Hearsay Definition

- There must be an assertion
  - Made *out of* court
  - Repeated *in* court
  - Offered to the jury for the truth contained in the assertion (Truth Of the Matter Asserted – TOTMA)

# Not Offered For Truth

- Statements may be offered to prove issues other than truth of the matter asserted such as:
  - 1. State of Mind or physical condition
  - 2. Verbal Acts-words that have legal consequences
  - 3. Effect on the listener
  - 4. Circumstantial or direct evidence of other facts of consequence
  - 5. Offered to impeach—to prove the declarant is not a trustworthy witness

# Hypo

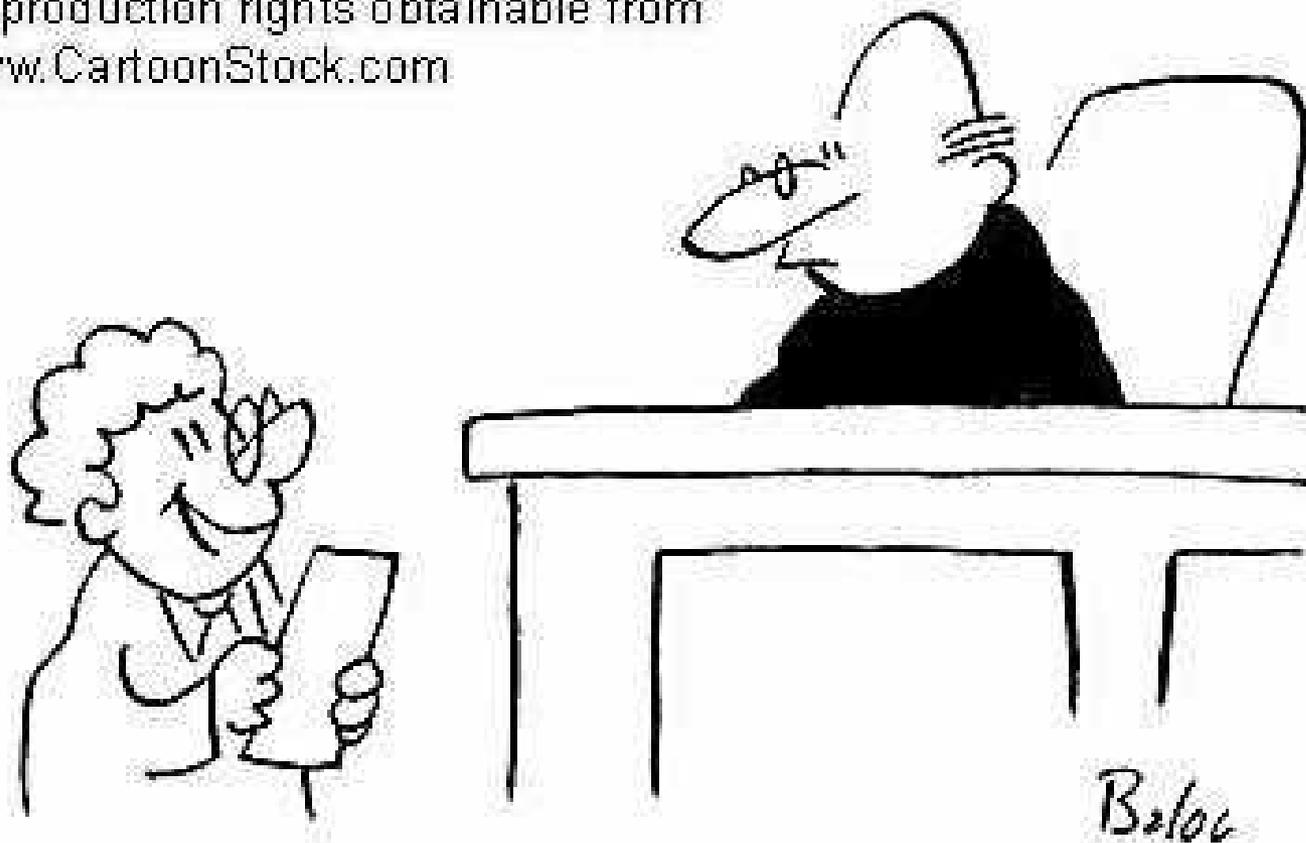


- Defamation case P testifies D stated at a public meeting, “P is a cheat.”

# Hypo-Verbal Act

- Not offered to prove D was telling the truth—  
P was a cheater.
- Offered, because stating these words in a  
public setting have legal consequences—  
defamation.—Verbal Act.

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"I realize that hearsay evidence isn't admissible by the court, Your Honor, but you're going to *love* this!"

# Statement-Non-verbal conduct intended as an assertion

- Non-verbal conduct intended as an assertion qualifies as a statement. Rule 801(a)(2).
  - Pointing, nodding ones head up and down-conduct intended to convey a message.

# “Not Hearsay”

- Non-hearsay = “not for the truth of the matter asserted”
- “Not hearsay” = the out-of-court statements of persons here in court *introduced for their truth*
  - Party Opponent Statements
  - Prior Statements of Witnesses

# “Not Hearsay” – 801(d)(2)

(2) Admissions by Party Opponent, offered against a Party

- (A) Own
- (B) Adopted
- (C) Authorized
- (D) Agent/Employee
- (E) Coconspirator

# Admissions

Admissions are not necessarily confessions.

Admissions are anything said by one party offered by the opposing party.

# Admissions and Personal Knowledge

- No Rule 602 Application
- No Opinion Rule Application
- P offers D's statement: "It's my fault; I'm an idiot; I think I had the green light; I didn't look both ways did I?"

# Admissions – A Party's Own Statement

- Words
- Writings
- E-Mails
- Party may deny making the statement –  
credibility is a jury issue

# Admissions – A Party's Own Statement

- Silence – the adoptive admission
- “After the accident I got out of my car and said to the other driver, ‘You idiot. You ran the red light.’ The other driver just stood there and said nothing.”
- Works in Civil cases but what about Criminal cases?

# “NOT HEARSAY” – 801(d)(1)

## (1) Prior Statements By Witness

- (A) Prior inconsistent statement under oath
- (B) Prior consistent statement offered to rebut claim of recent fabrication
- (C) Prior statement of identification

## ARE 801(d)(1)(A)

(1) Prior statement by witness. The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with the declarant's testimony. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action

# ARE 801(d)(1)(B)

The declarant testifies at the trial or hearing and the statement is

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

# ARE 801(d)(1)(C)

The declarant testifies at the trial or hearing  
and the statement is

(C) one of identification of a person made  
after perceiving the person

# ARE 803(1)

PRESENT SENSE IMPRESSION – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

# ARE 803(2)

Excited Utterance – A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

# ARE 803(3)

THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

# ARE 803(4)

## STATEMENTS FOR PURPOSES OF MEDICAL

DIAGNOSIS OR TREATMENT -- Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

# ARE 803(5)

RECORDED RECOLLECTION. -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

# ARE 803(6)

Business Records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, ...

## ARE 803(6) (Continued)

and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness...

# ARE 803(6) (Continued)

The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

# ARE 805

HEARSAY WITHIN HEARSAY - Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

# ARE 803(8) Public Records.

Public Records and Reports. (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

# ARE 803(8) (Continued)

(b) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

# ARE 804(b)(1)

Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, ...

## **ARE 804(b)(1) (Continued)**

**if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.**

# ARE 804(b)(2)

## STATEMENT UNDER BELIEF OF IMPENDING

DEATH – A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

# ARE 804(b)(3)

STATEMENT AGAINST INTEREST - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

## ARE 804(b)(3) (Continued)

A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

# ARE 803(18)

LEARNED TREATISES. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science

## ARE 803(18) cont

or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

# Crawford v. Washington

## 124 S.Ct. 1354 (2004)

- Judges no longer make a reliability determination regarding testimonial statements. Ohio v. Roberts, 100 S.Ct. 2531 (1980), was abrogated by Crawford; Confrontation Clause has nothing to do with reliability
- Confrontation Clause applies to witnesses against the accused – those who bear “testimony”
- If a statement is not testimonial, then the Confrontation Clause is not implicated because the declarant is not a witness (one who bears “testimony”) under the terms of the Sixth Amendment

## Crawford v. Washington (continued)

- Testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact
- Thus, the determination of whether a statement violates the Confrontation Clause is dependent upon whether that statement is testimonial

# Davis v. Washington

## 126 S.Ct. 2266 (2006)

(companion case with Hammon v. Indiana)  
The Davis court looked at four factors in determining that the statements were non-testimonial:

- The victim described events as they actually happened and not past events
- Any reasonable listener would conclude that the victim was facing an ongoing emergency
- The questions asked and answers given were necessary to resolve a present emergency rather than only to learn what had happened in the past
- There was a low level of formality in the interview because the victim's answers were frantic and her environment was not tranquil or safe

# Michigan v. Bryant

## 131 S.Ct. 1143 (2011)

### Facts:

- At 3:25 am police respond that a man got shot
- Found victim lying on the ground in a parking lot
- Gunshot wound to abdomen
- Victim in great pain, spoke with difficulty
- Police asked him what happened, who shot him and where the shooting occurred
- Victim said Rick (Bryant) shot him around 3 am

# Michigan v. Bryant

## (Continued)

- Victim said he had conversation with Bryant through the back door of Bryant's house
- Victim said when he turned to leave, he was shot through the door and then drove to the gas station where police found him
- Conversation ended within 5-10 minutes when emergency medical personnel arrived
- Victim's answers were punctuated with questions about when emergency services would arrive
- Victim died within hours

# Michigan v. Bryant

## (Continued)

### Case Discussion:

- Existence of an ongoing emergency at the time of the encounter between the individual and the police is among the most important (but not the only; see Krasky) circumstances informing the primary purpose of an interrogation (the emergency focuses the participants on ending the emergency rather than proving past events potentially relevant to later criminal prosecution)

# Michigan v. Bryant

## (Continued)

- Court needs to look at the statements and actions of BOTH the declarant and the interrogator (content and tenor of questions) to determine the primary purpose (what is asked and answered); e.g., “Tell us who did this so we can arrest and prosecute him,” followed by the answer “Rick did it,” would be inadmissible testimonial hearsay
- Even though a “primary purpose” inquiry would suggest that the focus is on the police questioning, it is the declarant’s answers, not the police questions, that the Confrontation Clause requires the court to evaluate

# Michigan v. Bryant

## (Continued)

- The victim's medical condition is relevant to the primary purpose inquiry because it sheds light on the ability of the victim to have any purpose in responding to the police questions and on the likelihood that any purpose formed would be a testimonial one

# Bobadilla v. Carlson

## 575 F.3d 785 (8<sup>th</sup> Circuit 2009)

### Case discussion:

- The interview was initiated by law enforcement to obtain statements for use during a criminal investigation, it did not occur until five days after the abuse was first alleged (which indicates that the primary purpose was to confirm a past allegation rather than to assess immediate threats to the victim's health and welfare), the police officer sat in the room during the interview, the interview was recorded and involved "forensic" structured questioning designed to confirm a prior allegation of abuse
- Holding: A child abuse "CornerHouse" interview conducted by social worker was testimonial; Minnesota Supreme Court was reversed

# Melendez-Diaz v. Massachusetts

## 129 S.Ct. 2527 (2009)

- Report from state crime lab showing the test results of seized substances was testimonial and therefore inadmissible.

# Williams v. Illinois

## 132 S.Ct. 2221 (2012)

- Crawford does not bar an expert witness from expressing an opinion based on facts provided by another laboratory and about which the expert is not competent to testify (another laboratory, Cellmark, produced a male DNA profile of a suspect from a vaginal swab of rape victim; that profile was entered into a DNA data base; D was arrested on an unrelated charge, his DNA was collected and put into the computer database; the expert testified that the computer showed that the DNA from the D matched the DNA profile taken from the victim; she then confirmed the match)

# Williams v. Illinois

## (Continued)

- Bench trial April 2006: Victim raped on February 10, 2000; Defendant was arrested on August 3, 2000 on an unrelated charge and his DNA was taken and entered into the database.
- D's argument: Lambatos did not have personal knowledge that the male DNA profile that Cellmark said was derived from the victim's vaginal swab was in fact correctly derived from that sample

# Williams v. Illinois (Continued)

- Holding:
- No violation of D's right to confrontation because testimony regarding the Cellmark report was not offered for its truth
- Even if it were offered for its truth, there is still no Confrontation Clause violation because it is not "testimonial"

Justice Breyer wrote one concurring opinion,  
Justice Thomas wrote a separate concurring  
opinion

# Davison v. State of Alaska

The doctor who performed a sexual assault response team examination testified to statement made during the examination. Davison argues that the doctor's testimony regarding the statements was not admissible under ARE 803(4), the hearsay exception for statements made for the purpose of medical treatment, because the examination was conducted primarily to gather evidence against him and not for purposes of medical treatment.

# Davison v. State of Alaska (Continued)

The doctor's hearsay testimony was not admissible under Rule 803(4). The Court declined to adopt a bright-line rule for determining whether a sexual assault victim's statements during an exam that has both medical and forensic purposes are admissible under the medical treatment exception.

# Davison v. State of Alaska (Continued)

The Court must determine whether “the declarant’s motive is consistent with the purpose of [Evidence Rule 803(4)]” and whether “it [is] reasonable for the physician to rely on the information in diagnosis and treatment.” This test properly focuses on the victim’s motivation when making the statements, regardless of the forensic purposes of the exam.

Let's go to the video



# Scenario 1

# Scenario 2

# Scenario 14

# Scenario 15

# Scenario 7

# Scenario 3

Special thanks to  
Katherine D'Ambrosio  
Meryn Grant  
Christopher Wall

- The first step in learning is often confusion.

-- John Dewey

Tony is suspected of robbing a bank in Boston. The day after the robbery, police go to Tony's house, where they encounter his wife Linda. She tells them, "My husband's in Reno because his mother just died and he flew out to her funeral two days ago. He's coming back the day after tomorrow." The story doesn't check out.

Later that week, agents question another suspect, who tells them that "Tony is hiding out at his brother's in the Bronx." The police find him there.

At Tony's trial in federal court, the government offers testimony by the agents describing their encounter with Linda, quoting what she told them of her husband's whereabouts. Counsel for Tony objects: "Linda is not on trial here, her husband is. What she said or thought is hearsay."

In a lawsuit involving a dispute over who had the green light, a bystander Witness is asked “Which car had the light in its favor?” Bystander replies: “The light was green for the black car. The white car ran a red light.”

On cross, bystander is asked about a conversation he had with an insurance adjuster a day after the accident. Over a hearsay objection, counsel wants to ask bystander whether he said to the adjuster, “The white car had the green light in its favor.” Counsel replies to the objection, “Your Honor, we seek only to impeach the witness, not to offer the statement for its truth.”

David is charged with knowingly receiving stolen goods, a stereo system, from Alex. At trial, the prosecution rests after making out a prima facie case. David proposes to testify that Alex gave David the stereo on December 1<sup>st</sup>, asking David to keep it for a few weeks since Alex had bought it as a Christmas gift for his son. David further testifies that he believed Alex. Objection, hearsay. What ruling and why?

As proof G stole a car, evidence that police stopped him and that his girlfriend H falsely stated at that time, “This car belongs to my brother.”

Nonhearsay. The statement is not offered to prove the truth of the matter asserted, similar to problem “My husband is in Reno.”

As proof that H was frightened when J brandished a plastic pistol and demanded cash, evidence that H began sweating and shaking.

Nonhearsay. No statement or assertion because it appears to be an emotion or behavior beyond the control of H. Burden on the objecting party to prove that there was an intent to communicate or an assertion.

As proof that P was unusually accomplished in Spanish, evidence that in her first year of college she was accepted into a fourth-year course.

Nonhearsay – Non-assertive conduct. The action of the college in placing P in a fourth year Spanish course during her freshman year is nonassertive conduct by the institution (or the Spanish Department or teacher.) - ambiguous

As proof that defendant Q participated in a criminal venture under duress, evidence that co-participant R told him, “We will kill you if you don’t help us.”

Nonhearsay. Words offered to prove effect on listener, similar to “I’m from the gas company.”

As proof that S favored increasing the penalties for drunk driving, evidence that she joined an organization entitled Mothers Against Drunk Driving, coupled with proof that the principal aim of that organization is to increase such penalties.

Nonhearsay. Non-assertive conduct, very close case. We don't know that she joined MADD to send a message that she favors increasing penalties for drunk drivers; it could have been for other reasons. -- ambiguous

As proof that defendant T owned a .32 caliber pistol, testimony by a police officer that when he asked T's father U whether T owned a pistol, U went to a drawer in the house where he and T lived, pulled out a .32 pistol, and handed it to the officer.

Hearsay. It's a non-verbal, assertive conduct that T owns a pistol. -- crystal clear

As proof that officer V acted in good faith in arresting W, offered by V in defending against the claim brought by W for violation of his rights, evidence that the prosecuting attorney told V, “you have probable cause to arrest W.”

Nonhearsay. Words offered to prove effect on listener – similar to “I’m from the gas company.”

As proof that Y went to Chicago on Tuesday, evidence that on Monday he said, “Tomorrow I’m going to Chicago.”

Hearsay. The statement of intent to go to Chicago only tends to prove that Y thereafter went, if taken as proof of what it asserts – that Y intended to go to Chicago. Similar to “It’s very cold in here.”

As proof that tenant G terminated his month-to-month tenancy effective November 1, evidence that G sent owner H a letter in September that stated: “October will be my last month as tenant. I am vacating by November 1.”

Nonhearsay. Verbal act (independent legal significance.) Substantive property law says just the fact that the words were said have independent legal significance. G's letter announcing his "last month" is a verbal act, carrying out the terms of a contract, here presumably a lease, which permits the tenant to vacate on one month notice. We don't care if the declarant is credible.

Factual content of a past act is often a 403 issue. In Shepard, the D, Dr. Shepard, was on trial for murdering his wife; his defense: his wife committed suicide. So D brought in proof of V's state of mind, that she was suicidal. In response the prosecution then tried to bring in the V's state of mind, using the statement, "Dr. Shepard has poisoned me" to prove (I am not suicidal – he tried to kill me).

This case illustrates two problems:

1. The “Dr. Shepard has poisoned me” statement, the declarant is looking backward, violating Rule 803(3).
2. The factual content of the past act has 403 problems. In other words, the prosecutor wants the jury to use the quote, “Dr. Shepard has poisoned me” to show the victim’s state of mind, “I want to live.” The 403 problem is that most likely the jury will use that statement, “Dr. Shepard has poisoned me,” to mean, “Dr. Shepard killed his wife.”



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