

NAVIGATING THE RULES OF HEARSAY

The most frequently heard objection in trials is, “I object to the leading.” A close second is “I object – that calls for hearsay.” The problem is that frequently the answer to the pending question is not hearsay at all, and may well be admissible even if it is.

In an effort to help all of us with the hearsay issue, we will first revisit the framework of the hearsay rule and exceptions. We will then look at particular issues presented in criminal cases, and discuss how the Constitution may well override the Alabama Rules of Evidence. Finally, we will look at hearsay issues presented by social media, such as Facebook.

ALABAMA RULES OF EVIDENCE:

The Framework – Definitions and Exceptions

The starting point for a discussion of the hearsay objection is Rule 801 of the Alabama Rules of Evidence:

(c) Hearsay.

“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.

So who is a *declarant*?

(b) Declarant.

A "declarant" is a person who makes a statement.

And finally, what is a *statement*?

(a) Statement.

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.

So the first question is this: IS IT A STATEMENT?

Rule 801 (a) tells us that a "statement" can be oral or written, verbal or nonverbal; but it must be an *assertion*. What is that? According to Black's Law Dictionary, "assert" means "to state as true; declare; maintain." An "assertion" is defined as "a confident and forceful statement of fact or belief."

Generally speaking, statements made in casual conversation are not "assertions." Also generally speaking, questions and commands are not "assertions" as defined in Rule 801(a).

If we determine that words spoken by a *declarant* are a *statement* under Rule 801(a), the next question is this: Is the *statement* being offered to prove the truth of the matter asserted?

It is important to remember that numerous reasons other than proving truth can account for a statement being made. For example, statements may be made to prove context; the state of mind of the declarant; or the

state of mind of the person who hears it. If that's the case, then the statement is not hearsay under Rule 801(c).

Rule 801 also says that even though something qualifies as a *statement* – that is, it is an *assertion offered to prove the truth* - it may not be hearsay. Paragraph (d) addresses two such situations. Subparagraph (2) addresses admissions by a party opponent:

A statement is not hearsay if—

(2) Admission by a party opponent.

The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Note that the foregoing does not cover ANY statement of a party opponent – only an *admission*, defined as “statements by a party, or someone identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary.”

Rule 801(d) also provides that a statement is not hearsay if –

(1) Prior statement by witness.

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (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.

Remember that "witness" under the foregoing also includes a party opponent.

Also be mindful of the following Alabama statutes, which declare some "statements" admissible into evidence even though they constitute hearsay:

Ala. Code §12-21-300	Offering Certificate of Analysis in Lieu of Testimony
Ala. Code § 34-1-3(j)	State Board of Public Accountancy records
Ala. Code § 15-25-31	Out of court statements of Child victim
Ala. Code § 12-21-5	Copies of hospital records

THE RULE:

Now that we have all the definitions out of the way, let's look at the actual hearsay rule, which is found in Rule 802:

Hearsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute.

As we will see later, the unspoken “add-on” to the Rule is “unless the Constitution says it’s admissible.”

THE EXCEPTIONS

Rules 803 and 804 provide two categories of exceptions that allow introduction of hearsay. The exceptions in rule 803 apply without regard to the availability of the declarant; Rule 804 exceptions come into play only if the declarant is “unavailable.”

Rule 803 contains 23 exceptions, listed hereinbelow. We’ll just hit the high points of the most often used ones.

(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.

- Must *describe or explain* the event/condition.
- Must be contemporaneous
- Declarant must have “perceived” it – can be seen, heard, smelled, etc.

As an aside – nothing to do with hearsay – the objection for “undisclosed mental operations” is not valid. See *Starr v. Starr*, 301 So.2d 78 (Ala. 1974):

We now hold that a witness, on direct examination, may testify as to his intention, motive, or other physically unexpressed mental state, provided that the testimony is material to the issues in the case.

(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.

- Three requirements:
- Startling event or condition
- Statement must relate to circumstances
- Statement must be made before time has elapsed sufficient for declarant to fabricate

(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), 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.

- Focus in on “then existing,” “ not “past”
- Statements do not have to be made to medical professional

(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.

- May be made to any person who is part of the process of diagnosis or treatment (paramedic, nurse, technician, etc.)
- Does not have to be made by the person seeking treatment (e.g. bystander, family member)
- Causation v. fault

(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's 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.

(6) Records of regularly conducted activity

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, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make 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. 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.

- * Remember there is a specific statute for hospital records, which provides for "certification" and alleviates the necessity of a custodian as a witness.

- * Other medical records = custodian required.

- * Each statement in the record must have independent basis for admissibility.

- * Remember that a plaintiff claiming medical expenses as damages in a personal injury case must still prove reasonableness/necessity – the business records exception does not do away with that requirement.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report,

excluding, however, when offered against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state or governmental authority in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

- Ala Code § 32-10-11 Accident reports – “no such report shall be used as evidence in any trial, civil or criminal, arising out of an accident.”
- Ala. Code § 12-21-3.1 – law enforcement investigative reports and related investigative materials are not public records.

(9) Records of vital statistics.

Records of data compilations, in any form, of vital statistics such as those relating to births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation entry.

(11) Records of religious organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or with a reasonable time thereafter.

(13) Family records.

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like.

(14) Records of documents affecting an interest in property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.

A statement contained in an document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.

Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Market reports, commercial publications.

Market quotations, tabulations, lists, directories, or other publishes compilations, generally used and relied upon by the public or by persons in particular occupations.

(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 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.

(19) Reputation concerning personal or family history.

Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage,

divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, an reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character.

Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state or other governmental authority in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Rule 804 contains additional exceptions that apply only if the declarant is “unavailable.” The first thing Rule 804 does is define “unavailability”:

“Unavailability as a witness” includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so;

(3) now possesses a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, lack of memory, inability, or absence is due to the proponent of a statement for the purpose of preventing the witness from attending or testifying.

If the Court determines a declarant is “unavailable” under the foregoing, the following exceptions apply:

(1) Former testimony.

Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.

(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 the declarant's impending death and offered in an criminal case.

(3) Statement against interest.

A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

(4) Statement of personal or family history.

Finally, Rule 805 addresses "double hearsay":

Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements confirms with an exception to the hearsay rule provided in these rules.

CONSTITUTIONAL CONSIDERATIONS IN CRIMINAL CASES

Alabama courts have consistently recognized that constitutional considerations regarding hearsay in criminal cases may call for a different result than dictated by the Alabama Rules of Evidence.

First, evidence disallowed by the rules may be admissible if constitutionally required to preserve a defendant's right to a fair trial. Consider *Ex Parte Griffin*, 790 So.2d 351 (Ala. 2000), involving a charge of capital murder of Christopher Davis. The State charged two defendants – Embry and Miles – with the murder. Embry pleaded guilty and was sentenced to 20 years' imprisonment. Miles was tried and acquitted. Thereafter, in a separate federal proceeding, Griffin pleaded guilty to RICO violations and allocated that he had participated in the murder of Davis. The State then exonerated Embry and initiated proceedings against Griffin. At trial, Griffin claimed that he lied to get better treatment from the feds, and claimed he really had nothing to do with killing Davis. He offered the following evidence:

- 1) after investigation, the State charged two other people;
- 2) Embry admitted the murder by pleading guilty;
- 3) Embry was convicted pursuant to a plea agreement and served four years.;
- 4) the State dismissed the valid plea of Embry.

The trial court disallowed the evidence. Griffin was convicted and sentenced to death. On appeal, he argued that the exclusion of the foregoing evidence violated his right to present a defense guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth amendments.

The Alabama Supreme Court agreed and reversed Griffin's conviction. First, the Court said, a defendant has a right to introduce evidence that somebody else committed the crime; but that right must be balanced against the State's interest in preventing admission of unsupported speculation about the guilt of another party. The Court reiterated a three-prong test to ensure that evidence of another's guilt is probative and not speculative: 1) the evidence must relate to the "res gestae" of the crime; 2) the evidence

must exclude the accused as the perpetrator of the crime; and 3) the evidence would have to be admissible if the third party were on trial. The Court found all three elements present. With regard to the State's argument that Embry's confession constituted inadmissible hearsay, the Court found that "Griffin's constitutional rights superseded the hearsay rule in the Alabama Rules of Evidence."

Second, constitutional considerations sometimes preclude the admission of evidence otherwise allowable by the Rules of Evidence. The leading case in this regard is *Crawford v. Washington*, 124 S.Ct. 1354 (2004). Before discussing that case, it should be noted that Alabama appellate courts applied the basic ideas of *Crawford* well before that case was decided. Consider, for example, *Arthers v. State*, 459 So.2d 972 (Ala. Crim. App. 1984). Defendant Arthers was charged with the murder of his ex-wife. His defense was that he accidentally shot her when he stepped up on a chair to get a gun from a gun rack and the chair broke. The State offered certified hospital records pursuant to § 12-21-5, documenting a visit to the emergency room by both parties the night before the murder, arising from their attempts to commit suicide by drug overdose. The records contained the following statement: "despondent [sic] stated that he would kill his wife

if she didn't take the pills." The trial court admitted the record in its entirety. Arthers appealed his conviction, arguing that the notation about killing his wife was inadmissible hearsay because the person who made it was not available for cross-examination. The Court of Criminal Appeals acknowledged that the statement may well constitute "a statement before the accused, before the time of the alleged criminal act, asserting a design or emotion in him which points to his guilt," and would otherwise be admissible as an admission by defendant; but under this exceptional circumstance, there was a strong probability the defendant's lack of opportunity to confront and cross-examine the person who made the notation would deny his constitutional rights.

Turning now to *Crawford*:

At the outset, it is important to understand that *Crawford* and the cases decided thereafter only apply if the declarant is unavailable. If the proponent of the hearsay statement at issue has the declarant at trial to testify, then the *Crawford* test doesn't apply. Why? Because there is no confrontation issue.

In *Crawford*, defendant was charged with assault and attempted murder resulting from his stabbing a man who allegedly tried to rape his wife. Defendant asserted that he acted in self-defense. The police interrogated both defendant and his wife. The wife's statement differed from the defendant's, particularly on the issue whether the victim had a weapon drawn before the incident took place. The husband invoked the marital privilege, so the State could not call her as a witness. The State therefore claimed she was "unavailable." In the statement, she had admitted that she led defendant to the victim's apartment and had facilitated the assault; the State said her statement fell under the Washington evidence rule providing a hearsay exception for statements against penal interest. The trial court admitted the statement; the Washington Court of Appeals reversed; then the Washington Supreme Court reversed that decision and reinstated defendant's conviction.

The United States Supreme Court then gave a very lengthy and careful consideration to the "confrontation" issue, and announced a new test. First, the Court focused on "testimonial" hearsay. Non-testimonial hearsay is not barred by *Crawford* standard, which is this: If the hearsay at issue is "testimonial," it can only be admitted if (1) the declarant can be confronted

in the present trial, or (2) the declarant is unavailable and this defendant has had the prior opportunity to “confront” him.

Obviously, then, the first determination to make is whether the statement at issue is “testimonial.” Even if it is “testimonial,” it’s only an issue if it’s offered to prove the truth. The *Crawford* court said that the Confrontation Clause was concerned with witnesses who “bear testimony” and that “testimony” is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The *Crawford* court concluded that the wife’s statement to police was testimonial and that the trial court erred in admitting it.

Cases decided thereafter have not exactly provided a bright line test for determining whether a statement is “testimonial,” but have provided guidance. For example, in *Davis v. Washington*, 547 U.S. 813 (2006), the Court discussed two cases involving claims of domestic violence. One case involved statements to a 911 operator, and the other involved statements made to police who responded to a 911 call. The Court said this:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the

interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Suffice it to say that in this context, it's a case-by-case determination whether statements are "testimonial" or "non-testimonial." Some categories have been addressed by the Supreme Court. For example, from *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) we know that certificates of analysis indicating that a substance was cocaine are "testimonial." From *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), we know that a report from a gas chromatograph machine used to establish a BAC level is "testimonial"; and if the analyst who performed the testing is not available, having another analyst testify will not cure the problem. From *Williams v. Illinois*, 132 S. Ct. 2221 (2012), we know that a DNA profile created before a suspect was identified in a rape case, utilized by an expert witness who testified at trial, was not testimonial.

The bottom line – be aware of the issue and please please please bring it up to the Court before it's even mentioned in front of a jury.

HEARSAY ISSUES WITH SOCIAL MEDIA

Attempts to introduce postings on social media sites are becoming more and more common, but may present significant issues regarding authentication and hearsay. A document does not become admissible just because it purports to be a copy of a person's Facebook page and has his picture on it. As observed by the Supreme Court of Mississippi in *Smith v. State of Mississippi*, 136 So.3d 424 (Miss. 2014):

"Facebook presents an authentication concern that is twofold. First because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate. Second, because a person may gain access to another person's account by obtaining the user's name and password, the person viewing communications on or from an account profile cannot be certain that the author is in fact the profile owner." (quoting *Campbell v. State*, 382 S.W.3d 545 (Tex. App. 2012).

Overcoming authentication and hearsay issues is easier – theoretically, at least – in civil cases where either side can call any witness and have him or her authenticate their Facebook postings. It is more difficult in criminal

prosecutions when the State seeks to introduce social media postings of a defendant who cannot be compelled to testify.

One way to address the authentication issue is to obtain an affidavit from Facebook that “the records are basic subscriber information . . . made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook. The records were made at or near the time the information was transmitted by the Facebook user.” *See People v. Glover*, 363 P.2d 736 (Colo.Ct.App. 2015). While that may make the document itself admissible as a business record, it does not cure the “double hearsay” problem. Something more will be required to establish that the postings were in fact made by the person whose account is at issue. For example, other witnesses who are familiar with the declarant may be able to testify regarding particular aspects – nicknames, particular words or terms – that are used by/linked to a declarant.

