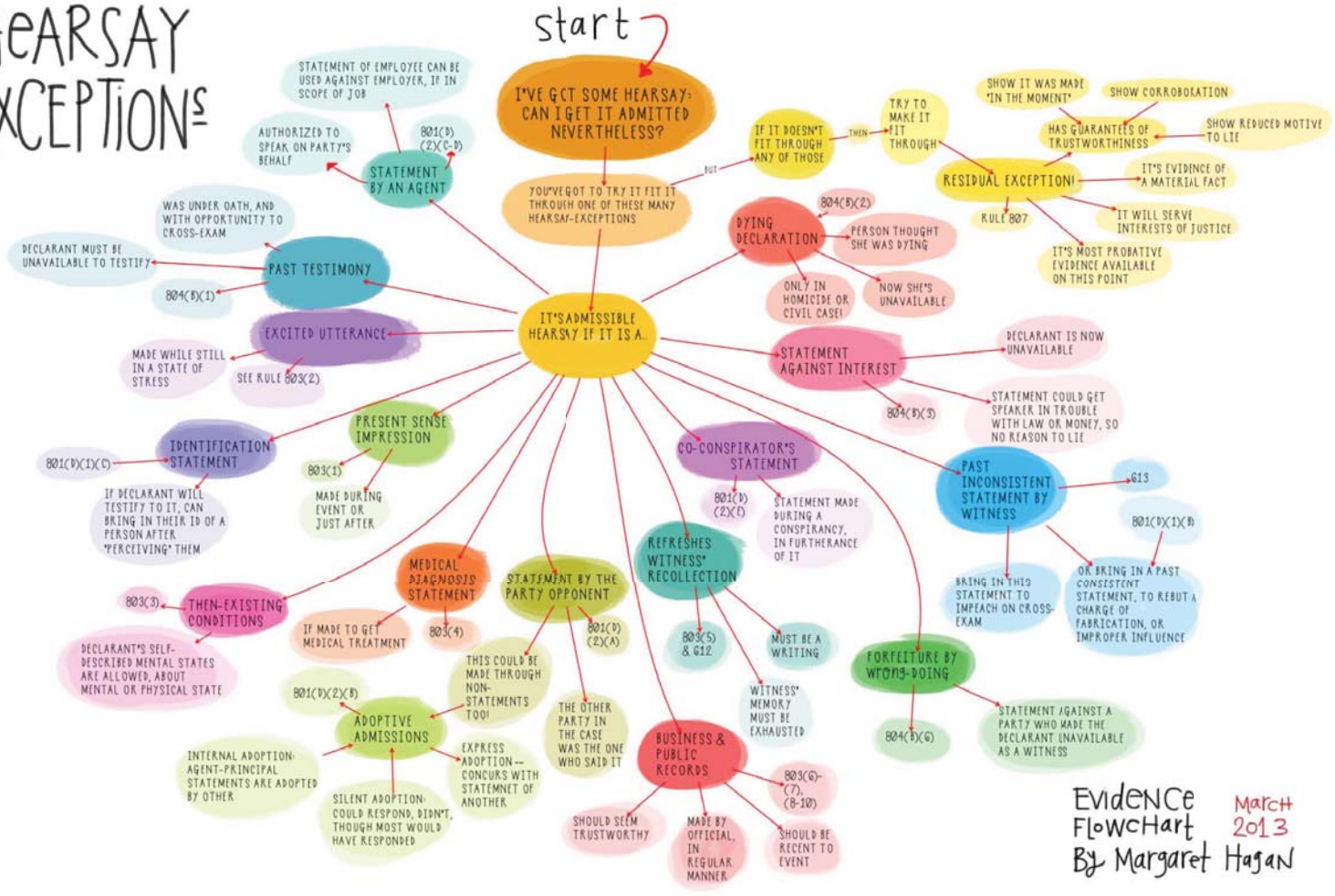
HEARSAY EXCEPTIONS



Evidence Flowchart
March 2013
By Margaret Hagan

Hearsay

A. Not For The Truth

Commonwealth v. Arrington 86 A.3d 831 (Pa. 2014)- The Court held that 404(b) evidence showing an appellant's common scheme in previous relationships was admissible. A log of his uncharged misconduct kept by a girlfriend was held to be used not for the truth but to show why his parole was revoked.

Commonwealth v. Trinidad 90 A. 3d 721 (Super '14)- The Court held that hearsay testimony is admissible when it is offered to explain the police's course of conduct rather than for the truth of the matters contained therein. Specifically, the statements were recited and offered to show how the testifying detective came to identify the defendant as a suspect through the statements another individual made in a police interview.

Commonwealth v. Mosley 114 A.3d 1072 (Super. '15)- Course of conduct testimony may become too detailed and violate a defendant's right of confrontation.

Commonwealth v. Raynor 2016 Pa Super 310 – DA reference to anonymous tip that led police to search for key fingerprints is not hearsay.

Commonwealth v. Yates 613 A. 2d 542 (Pa. 1992)- The court found that the informant's statement, to the effect that the suspect, defendant, was dealing drugs, was admitted as evidence to explain a course of police conduct. Although this statement was not hearsay offered to prove the truth of the matter asserted, in this case, the statement was highly prejudicial and, when balanced with the need to explain, was inadmissible.

Castellani v. Scranton Times, L.P., 124 A.3d 1229 (Pa. 2015)- The trial court should have permitted the county officials to introduce them in their action against the newspaper. A limiting instruction to the jury that it was to consider the judicial opinions as evidence of the newspaper's actual malice, but not as evidence of the whether the defamatory statements were false, was appropriate with regard to whether the opinions constituted hearsay under Pa. R. Evid. 801 and 802. Two strong dissents argued against the effectiveness of the limiting instruction.

B. Statements By Party Opponent

Commonwealth v. Feliciano 67 A.3d 19 (Super. '13)- The Court held that only slight evidence of a conspiracy is needed for a co-conspirator's statement to be admissible and the order of proof is discretionary. A co-conspirator's statement is inadmissible only when it is the sole evidence of the conspiracy.

Commonwealth v. Bamett 121 A.3d 534(Super '15)- Court reaffirms tacit admission rule but openly asks PASC to revisit the admissibility of such statements as not having sufficient probative value to exceed their prejudicial effect.

Commonwealth v. Vallone 32 A.29 889 (Pa. 1943)- Defendant sought a new trial because the Commonwealth introduced evidence that defendant remained silent during statements made by the prostitute who he was accused of transporting to police in defendant's presence while he was in custody

C. Excited Utterance/Present Sense

Commonwealth v. Hood 872 A.2d 175 (Super '05)- The appellate court found that the description of the shooting event, including specifics such as day, time, location, and the manner of the shooting itself, provided by the callers mirrored the account testified to by a witness, as well as the written statement given by another witness. Because the exact times of the 911 calls were documented, it was easily verifiable from the record that the calls were made almost contemporaneously with the shooting and that callers witnessed the event. Thus, the tape recordings of the 911 calls, which identified defendant as the perpetrator, were admissible as excited utterances.

Commonwealth v. Colon 102 A.3d 1033 (Super '14)- The Court ruled that the victim's statement to an officer was an excited utterance, as she was contemporaneously crying, yelling and screaming when responding to the officer's question that the defendant assaulted her. She additionally had scratches and fresh blood on her face and torn clothing to corroborate her statement.

Commonwealth v. Mitchell 2016 Pa Super 53- The evidence was sufficient to convict appellant of second-degree murder, robbery, and conspiracy to commit robbery, as it established that a witness saw appellant, then a juvenile, and another man hiding in the bushes before they confronted the victim while armed with a shotgun; that he heard the shotgun fired; and that police found the victim shot.

Commonwealth v. Hairston 2015 Pa. Super. Unpub. LEXIS 3425- Victim's two-hour recitation of abuse by her stepfather held not to be an excited utterance because no startling event precipitated it and statement was urged by boyfriend.

Commonwealth v. Stephens, 74 A.3d 1034 (Super '13)- The Court held that a statement not made immediately after perceiving or during an event is not permissible under the present tense impression or excited utterance exceptions to hearsay, as the passage of time allows for reflection and the fabrication of a false statement.

Commonwealth v. Green 76 A. 3d 575 (Super '13)- The Court holds that hearsay testimony of a victim's statements concerns the victim's state of mind, but when the testimony is offered to establish the accused's motive, it is not the victim's but the accused's state of mind that is at issue and the testimony is therefore inadmissible.

Commonwealth v. Kunkle, 79 A.3d 1173 (Super '13)- The Court holds that hearsay testimony of a victim's statements relaying fear of the accused is admissible because it reflects Appellant's ill will and malice toward the victim.

Commonwealth v. Luster, 71 a.3d 1029 (Super. '13)- The Court holds that hearsay testimony of a victim's statements relaying fear of the accused is admissible because it reflects Appellant's ill will and malice toward the victim.

D. Medical Diagnosis

Commonwealth v. Belknap 105 A.3d 7 (Super '14)- The Court held that statements made by two individuals to an officer that they believed the defendant had overdosed were admissible under the 803(4) medical diagnosis or treatment exception, as such statements were made specifically in the context of the officer attempting to identify the defendant's medical condition and resuscitate him.

Commonwealth v. Smith 681 A. 2d 1288 (Pa. 1996)- The court held that the statement made by appellant's daughter to the nurse were not admissible under the medical treatment exception to the hearsay rule.

E. Prior Testimony

Commonwealth v. Bazemore, 614 A.2d 684 (Pa. '92)- The court held that the witness's prior testimony was inadmissible because the commonwealth failed to disclose vital impeachment evidence regarding the witness prior to the preliminary hearing. The court concluded that appellant was denied a full and fair opportunity to cross-examine the witness.

Commonwealth v. Mitchell, 2016 PA Super 279- Appellant's judgment of sentence for attempted murder and related offenses was affirmed because appellant had a full and fair opportunity to cross-examine the witness who did not appear for trial when she was at the preliminary exam, but declined to do so.

Commonwealth v. Stays, 70 A.3d 1256 (Super. '13)- The Court held the introduction of a former witness' inconsistent statements are admissible at trial after the witness' death because the introduction of the statements at the preliminary hearing provided defense counsel with an adequate opportunity for cross-examination.

Commonwealth v. Ricker 120 A.3d 349 (Pa. Super. 2015)- Defendant did not have a constitutional right under U.S. Const. amend. VI and Pa. Const. art. I, § 9 to confront his witnesses at the preliminary hearing, based on the historical underpinnings, the reasons for the creation of the confrontation clauses, and the original public meaning thereof.

Commonwealth v. Watley 2016 Pa Super 311 – A prior statement must be inconsistent with trial testimony. If witness says he does not know or cannot remember, a limit on using the statement for substantive evidence.

F. Statement Against Interest

Commonwealth v. Brown 52 A.3d 1139 (Pa. 2012)- The Court holds statements admissible that so far tend to subject the declarant to criminal liability—and exculpate the defendant—that a reasonable person in the declarant's position would not have made the statements unless believing them to be true.

G. Bruton

Bruton v. United States, 391 U.S. 123 (U.S. 1968)- The Supreme Court reversed the decision, holding that despite the limiting instruction, the introduction of the accomplice's out of court confession at defendant's trial violated defendant's Sixth Amendment right to cross-examine witnesses against him.

Gray v. Md. 523 US 185 (1998)- The Court held that in general, a co-defendant's confession was a powerfully incriminating extrajudicial statement which, insulated from cross-examination, violated a criminal defendant's Sixth Amendment rights, particularly if it used a form of name substitution that implicated the defendant.

Commonwealth v. Rainey A.2d 215 (Pa. 2007)- If a confession can be edited so that it retains its narrative integrity and yet in no way refers to defendant, then use of it does not violate the principles of Bruton. As with most evidentiary questions, substantial deference must be afforded to the trial court in this regard.

Commonwealth v. Travers 768 A. 2d 845 (Pa. 2001)- The co-defendant had confessed to taking part in the murder and implicated defendant in the confession, but did not testify at trial. The trial court redacted the co-defendant's confession to replace any reference to the defendant by name with the term "the other man." Additionally, the trial court twice gave a cautionary instruction to the jury, informing the jury that co-defendant's statement could only be considered as evidence against him. The Supreme Court affirmed, holding that this redaction and cautionary charge sufficed to meet the *Bruton* requirements.

Commonwealth v. Markman 916 A. 2d 586 (Pa. 2007)- The trial court erred in allowing a jury to hear the redacted tape as it comprised an attempt by a non-testifying codefendant to shift the bulk of the blame to defendant. As defendant was the only other person who could have been involved, the error was not harmless. The dubbing over of the defendant's name was not an effective redaction.

Brown v. Supt. 834 F.3d 506 (3d. '16)- During closing arguments the prosecutor revealed to the jurors that petitioner was "the other guy." Sixth Amendment right to confrontation was violated. As the *Bruton* violation had a substantial and injurious effect, habeas relief was warranted.

H. Crawford

Michigan v. Bryant 131 S.Ct. 1143 (2011)- The informality of the exchange suggested that the officers' purpose was to address what they perceived to be an ongoing emergency. Because of these circumstances, the victim's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at defendant's trial.

Commonwealth v. Williams, 103 A.3d 354 (Super '14)- The Court held that the primary purpose of the victim's statements during a 911 call was to seek medical assistance and assist first responders in addressing an ongoing emergency, such that they were not testimonial. The victim's additional statements made to neighbors, police officers and paramedics were merely cumulative of the non-testimonial statements made to the 911 operator and thus did not violate the defendant's confrontation rights.

Davis v. Washington, 547 U.S. 813 (U.S. 2006)- The elicited statements were necessary to resolve the emergency rather than to investigate events.

Commonwealth v. Walter, 93 A.3d 442 (Pa. '14)- The Court held that a finding of a child's competency is not a prerequisite to the admission of hearsay statements under the Tender Years Hearsay

Act.

Commonwealth v. Allshouse, 985 A.2d 847 (Pa. 09)- The court held that the sibling's statement to the case worker was nontestimonial under case law precedent because it was given during an ongoing emergency.

In Re NC, 105 A.3d 1199 (Pa. '14)- The Court held that a child's statements not made during an ongoing emergency or immediately after an incident but, rather, seemingly obtained for the sole purpose of later use in criminal proceedings, are testimonial in nature and thus inadmissible under the Tender Years Hearsay Act.

Commonwealth v. Barnette, 50 A.3d 176 (Super. '12)- The Court held that spontaneous, internally consistent statements made by more than one child to a non-suggestive parent are reliable and admissible under the Tender Years Hearsay Act, particularly when there is no evidence the children knew of each other's statements at the time.

Ohio v. Clark 135 S. Ct. 2173 ('15)- The statements were not testimonial because the statements clearly were not made with the primary purpose of creating evidence for defendant's prosecution since the child's statements occurred in the context of an ongoing emergency involving suspected child abuse, and the teacher's questions and the child's answers were primarily aimed at identifying and ending the threat.

Melendez-Diaz v. Mass. 557 U.S. 305 (2009)- The U.S. Supreme Court held that admission of the certificates violated petitioner's Sixth Amendment right to confront the witnesses against him. The certificates were affidavits, which fell within the core class of testimonial statements covered by the Confrontation Clause, and they were made under circumstances which would have led an objective witness reasonably to believe that they were made for use in a criminal trial. Although petitioner could have subpoenaed the analysts, that right was not a substitute for his right to confront them.

Bullcoming v. N.M. 564 U.S. 647 (2011)- The U.S. Supreme Court held that admission of the report of defendant's blood alcohol level violated defendant's right to confront the analyst who prepared the report. The report was clearly testimonial in nature as a statement made in order to prove a fact at defendant's criminal trial.

Commonwealth v. Brown 139 A.3d 208 (Super 16)- The autopsy report was testimonial because it established past events that were potentially relevant to later criminal proceedings with respect to the cause of death, it was reasonable to believe that it would be made available for use at a later trial, and the death was sudden, violent, or suspicious in nature.

Commonwealth v. Dyarman 73 A.3d 565 (Pa. '13)- The Court held that whether business records are subject to the Confrontation Clause depends on the purpose of the evidence. The calibration and accuracy certificates for a device used to test BAC are non-testimonial because they are not prepared for the primary purpose of proving some fact at trial.

Commonwealth v. Yohe 79 A.3d 520 (Pa. '13)- The Court held that when a law enforcement officer requests a toxicology report, the resulting formal analysis on a signed document is testimonial. Whomever's expert opinion—regardless of an extensive chain of custody—and signature appears on the report is the witness the defendant has a right to confront.

US v. Hendricks 395 F.3d 173 (3d Cir. 2005)- On appeal, the court held as to the wiretap conversations that the district court erred in finding the recordings "testimonial" and thus within the Crawford rule. Statements not offered for the truth are not testimonial.

I. Waiving the Error

Commonwealth v. Kuder 62 A.3d 1038 (Super. '13)- Multiple hearsay errors occurred due to failure of Commonwealth to assert basis for admissibility. However, harmless error.

Commonwealth v. Patterson, 91 A.3d 55 (Pa.'14) & Commonwealth v. Arrington, 86 A.3d 831 (Pa. 2014)- The Court held that an erroneous admission of hearsay during trial does not warrant relief when the appellant failed to object at the time of its admission.

Seven Steps to (Hearsay) Heaven

by **Jules Epstein**

The great jazz trumpeter Miles Davis recorded his classic *Seven Steps to Heaven* in 1963, with no explanation as to why this was the number of steps needed to ascend. He just laid down a seven beat, seven note structure and the music flew.

Well, perhaps there are an equal number of steps to "hearsay heaven," that place lawyers want and need to ascend to when proffering or confronting hearsay evidence. Yet virtually no attorney follows all of them, focusing either on admissibility or exclusion without regard to

content, effective use or minimization should the proof be allowed. So this guide will offer the steps necessary to completely address hearsay in the courtroom.

Step **1 – Is there an assertion *by a human*?**

The first reminder here is that hearsay comes from humans, so barking alerts by a drug dog, or computer printouts of telephone records are not covered by the rule. And what *is* an assertion? In effect, it is a factual declaration, a sentence that could be restated with the words "it is true that" at the front and still retain its meaning. So "I hate you" is an assertion, but "go to #$!!" is not. The latter may be said assertively, but is not hearsay.

And if it is an assertion? Go on to step 2; and if not, turn to relevance and other rules.

Step 2 – is the assertion being offered for its truth?

In *this* trial, are we asking the jury to believe the assertions were made *and* that they are true? Unless both are answered "yes," there is no hearsay issue and, again, the focus must turn to relevance and other rules.

And what is "for its truth?" Where confusion often arises is between the ultimate issue being proved [in a murder trial, the 'who did it' issue] and subordinate facts. That distinction is of no moment in hearsay analysis. Even the most minor fact, such as the weather or what color sweater the perpetrator wore, if proved by an out-of-court assertion, is "for its truth." So, if the assertion *is* for its truth, go to step 4; and if it is offered for a reason other than for its truth, go to step 3.

Step 3 – is the assertion being offered for a reason other than for its truth?

This is where rules 401 and 403 come to the fore. Imagine the police officer who testifies "I arrested Jules *after ten people told me he committed the murder*." A cogent argument can be made that this is not offered for its truth – that Jules *did* commit the murder – but to explain *why* Jules was arrested.

Yet the 401 and 403 concerns should be evident *and controlling* in this circumstance. *Why* Jules was arrested is rarely relevant; and even if it has some bearing on the case there is a manifest risk that the jury will believe that ten people did identify Jules as the murderer, a paradigmatic case of unfair prejudice and misleading the factfinder. This risk of hearsay "spillover" warrants exclusion in many cases.

Step 4 – if offered for its truth, is there a hearsay rule that permits admission?

This step should be fairly simple – the application of Rules 801, 803, 804 and 807 to see if any ground(s) for admissibility may be found. If "yes," the issue then is foundation – establishing the predicate facts that prove the applicability of the hearsay exception or exemption.

Step 5 – if it meets a hearsay exception or exemption, are there other rules that preclude or restrict admission?

The phenomenon of tunnel vision is too often predominant when hearsay is at issue. Lawyers [and judges] become so focused on the hearsay analysis that they forget to examine the content, which may be barred by other rules including character, lay opinion, subsequent remedial

measure, etc. So, the best step, after determining that the form of the answer meets a hearsay exception, is to then forget the hearsay rule(s) at issue, pretend this is coming from a live witness, and analyze it for admissibility solely by scrutinizing the contents.

Step 6 – if the hearsay is being admitted, the proponent must not just ask the questions but then prove its reliability, while the opponent must cast doubt on its veracity or strength.

Too many lawyers forget that the battle over hearsay does not end with the decision to admit the assertion. The fact finder then has to assign weight.

For the proponent, this may be done in a number of ways. Corroboration supports hearsay; so, too, do the rationales for the rules themselves. If the statement was made for medical diagnosis, the rationale of the rule – that people tell their doctors the truth in order to get proper and necessary medical care – can be argued in closing to show reliability.

And the opponent? There are multiple ways to devalue the hearsay. Again, contrary evidence may show it to have little or no value; and so too may problems with the in-court witness, the 'channeler' or delivery vehicle for the hearsay statement. The in court witness may not have heard or remembered well, or have bias or other credibility flaws; and the in court witness also may not be able to answer questions about the declarant's initial opportunity to perceive or about the declarant's memory.

Step 7 – don't forget the invisible witness.

Too few lawyers [and judges] consider and apply Rule 806. One of the most potent rules of evidence, 806 permits impeachment of the hearsay

declarant the same as if the speaker was on the witness stand, And, of course, the declarant can't respond or explain.

These, then, are the seven steps. Okay, maybe they are only 6, and 7 is a subset of six. But I like Miles Davis. And if all lawyers adhered to these steps, it would be a form of hearsay "heaven." The rule would be applied properly, and the evidence given its due consideration.

Faculty Commentary
Advocacy, Evidence, Hearsay, Trial Advocacy

‹ Yell, Compel, or Soft-Sell: How Blatant Must Cross-Examination Be?
› LOOKING AT JURY TRIALS "OUTSIDE IN" – LESSONS FROM A JURY CONSULTANT

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