

A Student's Guide to Hearsay

A Student's Guide to Hearsay

FIFTH EDITION

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LAW SCHOOL



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Dedication

This book is dedicated, in ascending order of importance, to:

1. My colleagues and friends at the Catholic University of America Law School.
2. My evidence students, who for the past 41 years have helped me learn how to teach, and therefore how to write about, the law of evidence.
3. Betty; Rebecca, Brian, Sam, Yael and Jonah; Sarah, Luke, and Orion.

Table of Contents

Preface	xix
Chapter 1 · The Hearsay Rule and Its Rationale	3
§ 1.1 Introduction	3
§ 1.2 Question	4
§ 1.3 Testimonial Inferences	4
§ 1.4 Rationale behind the Hearsay Rule	5
§ 1.5 The Hearsay Rule	6
§ 1.6 The Federal Rules of Evidence; Legislative History	6
Chapter 2 · Defining and Recognizing Hearsay	9
Part A: Introduction	9
§ 2.1 In General	9
§ 2.2 The Basic Definition of Hearsay; “Declarant”	9
§ 2.3 A Note on Vocabulary; Common Abbreviations	12
Part B: “Out-of-Court”	13
§ 2.4 “A Statement That the Declarant Does Not Make While Testifying at the Current Trial or Hearing”	13
§ 2.5 Questions	13
Part C: “Statement”	14
§ 2.6 In General	14
§ 2.7 Individual Declaration or Narration as a Whole	15
§ 2.8 Assertive Speech	16
§ 2.9 Non-Assertive Speech	16
§ 2.10 Implied Assertions	16
§ 2.11 Questions	19
§ 2.12 The Written Word	20
§ 2.13 Questions	20
§ 2.14 Assertive and Non-Assertive Conduct	21
§ 2.15 Questions	22
§ 2.16 Photographs, Films, Videos	25
§ 2.17 Questions	25
§ 2.18 Silence	27
§ 2.19 Non-Human “Declarants”	27

Part D: “Offer[ed] in Evidence to Prove the Truth of the Matter Asserted in the Statement”	28
1. Overview	28
§ 2.20 Introduction	28
§ 2.21 Questions	30
§ 2.22 “Reconstructing” the Testimony	31
2. Categories of Non-Hearsay	31
§ 2.23 In General	31
§ 2.24 Mental State	32
§ 2.25 Mental State as Element of Crime, Claim, or Defense	32
§ 2.26 Mental State: Relevant Facts Inferrable from Someone’s State of Mind	33
§ 2.27 Mental State: Declarant’s State of Mind	33
§ 2.28 Questions	34
§ 2.29 Mental State: To Show Declarant’s Knowledge	35
§ 2.30 Question	35
§ 2.31 Mental State: To Show the Effect on the Hearer	36
§ 2.32 Mental State, Effect on Hearer: Statements Made to the Defendant	36
§ 2.33 Questions	36
§ 2.34 Mental State, Effect on Hearer: Why the Police Acted	38
§ 2.35 Mental State, Effect on Hearer: Civil Cases	39
§ 2.36 Verbal Acts; “Operative Legal Facts”	39
§ 2.37 Questions	41
§ 2.38 Verbal Parts of Acts	41
§ 2.39 Questions	42
§ 2.40 “Res Gestae”	43
Part E: Statements That Are Relevant for Both a Hearsay and Non-Hearsay Purpose; Fed. R. Evid. 105 and Fed. R. Evid. 403	43
§ 2.41 In General	43
§ 2.42 Questions	45
 Chapter 3 · Exceptions to the Hearsay Definition, Exceptions to the Hearsay Rule; Courtroom Procedures; and Few Other Matters	 47
Part A: Exceptions, Exceptions, Exceptions	47
§ 3.1 Introduction	47
§ 3.2 Exceptions to the Rule; Exceptions to the Definition	47
[1] Rules 803 and 804	47
[2] Rule 807	48
[3] Rule 801(d)	48
§ 3.3 Applying the 37 Exceptions: Questions	48
Part B: Procedural Matters	49
§ 3.4 Introduction	49

§ 3.5 Procedure; Burden of Proof; Fed. R. Evid. 104(a)	49
§ 3.6 Order of Proof; Conditional Admissibility; Motion to Strike	50
§ 3.7 Motion for a Directed Verdict	51
§ 3.8 An Objection Is Overruled; What Can the Adverse Party Do to Challenge the Evidence? Fed. R. Evid. 104(e)	52
§ 3.9 Conditional Admissibility vs. Conditional Relevance (Fed. R. Evid. 104(b))	54
Part C: A Few Other Matters	56
§ 3.10 Hearsay and the Grand Jury	56
§ 3.11 Sixth Amendment Confrontation Clause	58
Chapter 4 · Exceptions to the Hearsay Definition: Prior Statements by Witnesses, Rule 801(d)(1)	59
Part A: Overview	59
§ 4.1 In General	59
§ 4.2 “Witness; Subject to Cross-Examination”	59
§ 4.3 “Meaningful Cross-Examination”; <i>United States v. Owens</i>	60
§ 4.4 Proving That the Declarant Made the Statement	60
§ 4.5 Sixth Amendment Confrontation Clause	60
Part B: Prior Inconsistent Statements — Sworn and Unsworn	60
§ 4.6 Prior Inconsistent <i>Unsworn</i> Statements: Rule 613	60
§ 4.7 Question	63
§ 4.8 Prior Inconsistent <i>Sworn</i> Statements: Rule 801(d)(1)(A)	64
§ 4.9 “Witness”; “Subject to Cross-Examination”	65
§ 4.10 “Inconsistent”	65
§ 4.11 Questions	65
§ 4.12 “Proceeding”	67
§ 4.13 Procedure	68
Part C: Prior Consistent Statements to Rebut Charges of Witness Misconduct	69
§ 4.14 Prior Consistent Statements Generally	69
§ 4.15 Questions	69
§ 4.16 Rule 801(d)(1)(B)	69
§ 4.17 Rule 801(d)(1)(B)(i): Rationale and Requirements	70
§ 4.18 “Witness”; “Subject to Cross-Examination”	71
§ 4.19 “Consistent”; Prior Oath Not Required	71
§ 4.20 “Recently Fabricated” or Prompted by “a Recent Improper Influence or Motive”	71
§ 4.21 Questions	72
§ 4.22 Rebutting the Accusation: “Recent”; <i>U.S. v. Tome</i>	74
§ 4.23 Questions	74
§ 4.24 Procedure and Tactics	75
§ 4.25 Fed. R. Evid. 801(d)(1)(B)(ii): Prior Consistent Statements to Rebut Other Attacks on the Declarant’s “Credibility”	75

§ 4.26 Questions	76
Part D: Statements of Prior Identification of a Person	79
§ 4.27 Rule 801(d)(1)(C)	79
§ 4.28 “Perceived” and “Identified”	80
§ 4.29 Declarant Testifies, Is Subject to Cross-Examination	81
§ 4.30 Procedure	81
Chapter 5 · Exceptions to the Hearsay Definition: Opposing Party’s Statement, Rule 801(d)(2)	83
Part A: “Opposing Party’s Statement”	83
§ 5.1 Overview of Rule 801(d)(2)	83
Part B: Rule 801(d)(2)(A): “The Party’s Own Statement”	84
§ 5.2 In General	84
§ 5.3 Questions	85
§ 5.4 “Opposing Party” (“Party-Opponent”)	87
§ 5.5 Questions	88
§ 5.6 Defining “Opposing Parties” in Criminal Cases	89
§ 5.7 Proving the Party Made the Statement	89
§ 5.8 “Representative Capacity”	89
§ 5.9 Sixth Amendment Confrontation Clause	90
§ 5.10 Other Objections	90
§ 5.11 Questions	90
Part C: Rule 801(d)(2)(B): Adopted Statements	91
§ 5.12 In General	91
§ 5.13 Expressed Adopted Statements	91
§ 5.14 Implicitly or Tacitly Adopted Statements	92
§ 5.15 Conversations Among a Group	93
§ 5.16 Constitutional Issues in Criminal Cases	93
§ 5.17 Sixth Amendment Confrontation Clause	94
§ 5.18 Questions	94
Part D: Rule 801(d)(2)(C): Statements by a Party’s Authorized Spokesperson	95
§ 5.19 In General	95
§ 5.20 Proving Declarant Was an Authorized Spokesperson	96
§ 5.21 Questions	97
§ 5.22 Sixth Amendment Confrontation Clause	99
Part E: Rule 801(d)(2)(D): Statements by a Party’s Agent or Employee	99
§ 5.23 In General	99
§ 5.24 “Agent or Employee . . .”	100
§ 5.25 Burden of Proof; Evidence to Be Considered	101
§ 5.26 Questions	101
§ 5.27 Statements by Government Agents	105
§ 5.28 Question	105
§ 5.29 Sixth Amendment Confrontation Clause	106

Part F: Rule 801(d)(2)(E): Statement by a Party's Co-Conspirator	106
§ 5.30 In General	106
§ 5.31 Prerequisites to Admissibility	107
§ 5.32 Procedural Issues	109
§ 5.33 Evidence to Be Considered; "Bootstrapping"; "Independent Evidence" Requirement	109
§ 5.34 Prosecutor's Burden of Proof	110
§ 5.35 Order of Proof	111
§ 5.36 Conditional Admissibility: Procedure	111
§ 5.37 Sixth Amendment Confrontation Clause	112
§ 5.38 Miscellaneous Co-Conspirator Statement Issues	112
§ 5.39 Questions	112
Chapter 6 · Hearsay and the Sixth Amendment Confrontation Clause	117
§ 6.1 Introduction	117
§ 6.2 Don't Blame Me!	118
§ 6.3 Author's Web Site	118
§ 6.4 Statements Offered for Non-Hearsay Purposes	119
§ 6.5 The <i>Ohio v. Roberts</i> Approach to the Confrontation Clause	119
§ 6.6 <i>Crawford v. Washington</i>	119
§ 6.7 Defining "Testimonial": "Solemn Declaration"	120
§ 6.8 Subsequent Supreme Court Confrontation Clause Decisions; Lots of Dicta	121
§ 6.9 Statements to Non-Government Officials	123
§ 6.10 "Primary Purpose" Test; "Interrogation"; "Conversation"	123
§ 6.11 Testimonial Statements: Satisfying the Confrontation Clause	124
§ 6.12 Nontestimonial Hearsay: <i>Davis v. Washington</i> ; <i>Wharton v. Bockting</i>	124
§ 6.13 Summary So Far: Your Confrontation Clause Check List	125
§ 6.14 The Provisions Covered Thus Far	127
[1] Rules 801(d)(1)(A), 801(d)(1)(B), 801(d)(1)(C)	127
[2] Rules 801(d)(2)(A), 801(d)(2)(B)	127
[3] Rules 801(d)(2)(C), 801(d)(2)(D)	128
[4] Rule 801(d)(2)(E)	128
Chapter 7 · Exceptions to the Hearsay Rule: Preliminary Matters; Multiple Hearsay; Credibility and Impeachment	129
§ 7.1 Introduction	129
§ 7.2 The Requirement of First-Hand Knowledge	129
§ 7.3 Hearsay Within Hearsay: Fed. R. Evid. 805	131
§ 7.4 Assessing Credibility	132
§ 7.5 Impeaching and Defending the Hearsay Declarant: Fed. R. Evid. 806	133
§ 7.6 Admissibility Determined by Other Rules	135

Chapter 8 · Rule 803: The “Regardless of Whether the Declarant Is Available as a Witness” Exceptions: Common (Mostly) Oral Statements, Rules 803(1)–803(4)	137
Part A: “Regardless of Whether the Declarant Is Available as a Witness”	137
§ 8.1 In General	137
Part B: Spontaneous Statements: Rules 803(1)–803(2)	139
§ 8.2 In General	139
§ 8.3 First-Hand Knowledge Requirement	141
§ 8.4 Trustworthiness or Reliability of the Statement; Self-Serving Statements	142
§ 8.5 Nature of Event or Condition; Effect on Declarant	143
§ 8.6 Subject Matter of the Statement	143
§ 8.7 Spontaneity; Passage of Time between the “Event or Condition” and Declarant’s Statement	144
§ 8.8 Questions	145
§ 8.9 Sixth Amendment Confrontation Clause: <i>Crawford</i>	147
§ 8.10 Confrontation Clause: <i>Davis v. Washington</i> : Calls to 911; Crime-Scene Questioning by the Police; “Primary Purpose” Test	147
§ 8.11 Confrontation Clause—Questioning by the Police: <i>Giles v. California</i>	149
§ 8.12 Confrontation Clause—Police Interrogation: <i>Michigan v. Bryant</i> —Facts	151
§ 8.13 Bryant—“Primary Purpose”; “Objective” Test	151
§ 8.14 “Emergency”: <i>Clark and Bryant</i>	152
§ 8.15 Confrontation Clause: Statements to Non-Government Officials	154
§ 8.16 Confrontation Clause: Statements to “Friends and Neighbors”	155
§ 8.17 Questions	155
§ 8.18 Young Children as Declarants	157
Part C: The “State of Mind” Exception: Rule 803(3)	158
§ 8.19 In General	158
§ 8.20 State of Mind as an Element of a Crime, Cause of Action, or Defense	160
§ 8.21 Questions	160
§ 8.22 Mental Feeling, Pain, Bodily Health	162
§ 8.23 Intent as a Basis to Infer Declarant’s Subsequent Conduct: “ <i>Hillmon</i> Doctrine”	162
§ 8.24 Questions	162
§ 8.25 “Second-Party <i>Hillmon</i> ”: Declarant’s Statement of Intent to Do Something with Z, as Proof of Z’s Subsequent Conduct	163
§ 8.26 Questions	164

§ 8.27 “Then-Existing” vs. “Backward-Looking” Statements; “Statement of Memory or Belief”	166
§ 8.28 Questions	167
§ 8.29 Homicide Cases: Victim’s Fear of Defendant	168
§ 8.30 Questions	169
§ 8.31 Will Cases	170
§ 8.32 Questions	171
§ 8.33 Sixth Amendment Confrontation Clause	171
§ 8.34 Questions	172
Part D: Statements for Medical Diagnosis or Treatment: Rule 803(4)	174
§ 8.35 In General	174
§ 8.36 First-Hand Knowledge; Second-Party Statements	175
§ 8.37 “For Medical Diagnosis or Treatment”	176
§ 8.38 Child as Declarant in a Child Abuse Prosecution	177
§ 8.39 “Pertinent”; Cause; Fault	177
§ 8.40 Interplay with Other Rules	178
§ 8.41 Questions	178
§ 8.42 Sixth Amendment Confrontation Clause	179
§ 8.43 Statements to Child Abuse, Domestic Violence and Sexual Assault Counselors	180
§ 8.44 Questions	180
Chapter 9 · Rule 803: The “Regardless of Whether the Declarant Is Available as a Witness” Exceptions: Common Written Statements— Rules 612 & 803(5)–803(10)	183
Part A: Introduction	183
§ 9.1 Overview	183
Part B: “Refreshing Recollection,” Rule 612; “Recorded Recollection,” Rule 803(5)	183
1. Refreshing Recollection: Fed. R. Evid. Rule 612	183
§ 9.2 In General	183
§ 9.3 <i>Any</i> Writing May Be Used	186
§ 9.4 “While Testifying”; “Before Testifying”; Privileged Writings	186
a. While testifying	186
b. Before testifying	186
c. Procedure	186
d. Privileged writings	187
§ 9.5 The Jencks Act: 18 U.S.C. § 3500	187
2. Recorded Recollection: Fed. R. Evid. 803(5)	188
§ 9.6 Rule 803(5): “Recorded Recollection”	188
§ 9.7 Rule 803(5): Requirements and Issues	189
§ 9.8 Declarant/Witness	189
§ 9.9 Read, but Not Received	190
§ 9.10 “Record”	190

§ 9.11 A Straightforward Example	190
§ 9.12 Multiple-Person Documents	192
§ 9.13 Questions	192
§ 9.14 “Now Cannot Recall Well Enough”	194
§ 9.15 “Made or Adopted”; “Fresh in Memory”	194
§ 9.16 Questions	195
§ 9.17 Time; Accuracy; Foundational Testimony	197
§ 9.18 Sixth Amendment Confrontation Clause	197
§ 9.19 Questions	198
Part C: Records of Regularly Conducted Activity (The “Business Records” Exception): Rules 803(6)–803(7)	200
§ 9.20 In General	200
§ 9.21 “Business, Organization, Occupation, or Calling . . .”	203
§ 9.22 Records of Criminal Activity	203
§ 9.23 Original Source of Information	204
§ 9.24 Questions	205
§ 9.25 Multiple Hearsay (1)	208
§ 9.26 Making the Record: Time, Duty, “Regularity”	208
§ 9.27 Questions	209
§ 9.28 Keeping the Record	211
§ 9.29 Subject Matter and Contents of the Record	211
§ 9.30 Multiple Hearsay (2): “Compression”	212
§ 9.31 Questions	212
§ 9.32 Procedures for Admission	215
§ 9.33 Computerized Records; Data Compilations	216
§ 9.34 Records Created by Multiple Entities	216
§ 9.35 The “Trustworthiness” Clause	217
§ 9.36 The Sixth Amendment Confrontation Clause	219
§ 9.37 Interplay with Other Rules	219
§ 9.38 Fed. R. Evid. 803(7): Absence of Entry in Business Record	220
Part D: Public Records and Reports: Rules 803(8), 803(9) & 803(10)	221
§ 9.39 Fed. R. Evid. 803(8)	221
§ 9.40 Procedure for Admission	222
§ 9.41 Trustworthiness	223
§ 9.42 The Three Subsections of Fed. R. Evid. 803(8)(A)	224
§ 9.43 Rule 803(8)(A)(i): Activities of the Office or Agency	224
§ 9.44 Rule 803(8)(A)(ii): Matters Observed and Reported Pursuant to Duty	226
§ 9.45 Rule 803(8)(A)(ii): Law Enforcement Exclusionary Clause; Confrontation Clause	228
§ 9.46 Fed. R. Evid. 803(8)(A)(iii): “Factual Findings”	230
§ 9.47 Rule 803(8)(A)(iii) and the Trustworthiness Clause	233
§ 9.48 Questions	235

§ 9.49 Government’s Use of 803(8)(A)(ii) and 803(8)(A)(iii) in a Criminal Case	237
§ 9.50 Forensic Reports and the Confrontation Clause: “Purists,” “Rejectionists” and Justice Thomas	239
§ 9.51 Forensic Reports and the Confrontation Clause: <i>Melendez-Diaz</i>	240
§ 9.52 Forensic Reports and the Confrontation Clause: <i>Bullcoming v. New Mexico</i>	241
§ 9.53 Forensic Reports and the Confrontation Clause: <i>Williams v. Illinois</i>	242
§ 9.54 Forensic-Related Records That Are Not Testimonial	244
§ 9.55 Autopsies in Homicide Prosecutions	244
§ 9.56 Rule 803(9): Records of Vital Statistics	246
§ 9.57 Rule 803(10): Absence of Public Record or Entry	247
Chapter 10 · Rule 803: The “Regardless of Whether the Declarant Is Available as a Witness” Exceptions: Miscellaneous Exceptions Rules 803(11)–803(23)	249
§ 10.1 Introduction	249
§ 10.2 Rule 803(11): Records of Religious Organizations	249
§ 10.3 Rule 803(12): Marriage, Baptismal, and Similar Certificates	250
§ 10.4 Rule 803(13): Family Records	251
§ 10.5 Rule 803(14): Records of Documents Affecting an Interest in Property	251
§ 10.6 Rule 803(15): Statements in Documents Affecting an Interest in Property	252
§ 10.7 Rule 803(16): Statements in Ancient Documents	252
§ 10.8 Rule 803(17): Market Reports, Commercial Publications	253
§ 10.9 Rule 803(18): Learned Treatises	254
§ 10.10 Rule 803(19): Reputation Concerning Personal or Family History	256
§ 10.11 Rule 803(20): Reputation Concerning Boundaries or General History	256
§ 10.12 Rule 803(21): Reputation as to Character	257
§ 10.13 Rule 803(22): Judgment of Previous Conviction	257
§ 10.14 Questions	260
§ 10.15 Rule 803(23): Judgment as to Personal, Family or General History, or Boundaries	263
§ 10.16 Rule 803(24)	263
Chapter 11 · Rule 804: Exceptions to the Rule against Hearsay—When the Declarant Is Unavailable as a Witness	265
§ 11.1 Introduction	265
Part A: Defining “Unavailable”: Rule 804(a)	266

§ 11.2 Fed. R. Evid. 804(a): “Declarant Unavailable”	266
§ 11.3 Rule 804(a)(1): Privilege	267
§ 11.4 Rule 804(a)(2): Refusal to Testify	268
§ 11.5 Rule 804(a)(3): Lack of Memory	268
§ 11.6 Rule 804(a)(4): Death, Illness, Infirmary	269
§ 11.7 Rule 804(a)(5): Absent from the Hearing	269
Part B: Rule 804(b): The Exceptions	270
§ 11.8 Rule 804(b): Overview	270
1. Former Testimony	271
§ 11.9 Rule 804(b)(1)	271
§ 11.10 Questions	274
§ 11.11 “Similar Motive”	275
§ 11.12 “Opportunity”	276
§ 11.13 Questions	276
§ 11.14 Objections	281
§ 11.15 Questions	282
§ 11.16 “Predecessor in Interest”	284
§ 11.17 Questions	286
§ 11.18 Other Rules and Exceptions	288
§ 11.19 Sixth Amendment Confrontation Clause	288
2. Statement under Belief of Impending Death (“Dying Declarations”)	288
§ 11.20 Introduction	288
§ 11.21 Rule 804(b)(2): Statement under Belief of Impending Death	289
§ 11.22 Satisfying the Requirements	289
§ 11.23 “Unavailability”; “Prosecutions for Homicide”	291
§ 11.24 Sixth Amendment Confrontation Clause	291
§ 11.25 Other Hearsay Exceptions	292
§ 11.26 Questions	292
3. Statements against Interest	293
§ 11.27 Rule 804(b)(3)	293
§ 11.28 “Believed It to Be True”	294
§ 11.29 Use in Civil Litigation; “Interests” Included within the Rule	295
§ 11.30 “Against Interest”: Statements That Are Both Self-Serving and Dis-Serving	296
§ 11.31 Contrasting Rule 804(b)(3) and Rule 801(d)(2)	297
§ 11.32 Questions	297
§ 11.33 Statements against Penal Interest: Use by Defendant in Criminal Cases	299
§ 11.34 The “Trustworthiness” Requirement	299
§ 11.35 Questions	302
§ 11.36 Statement against Penal Interest: Use by Prosecutor	305

§ 11.37 “Against Interest”	305
§ 11.38 <i>Williamson</i> : Individual Statement or Narration as a Whole; “Collateral” Statements	306
§ 11.39 Sixth Amendment Confrontation Clause	307
§ 11.40 Rule 804(b)(3); Rule 801(d)(2)(E); Rule 803(3) (“Second-Party <i>Hillmon</i> ”)	308
§ 11.41 Guarantees of Trustworthiness	310
§ 11.42 Questions	310
4. Statement of Personal or Family History	313
§ 11.43 Rule 804(b)(4)	313
§ 11.44 Rule 804(b)(4)(A): Declarant’s Own Personal History	314
§ 11.45 Rule 804(b)(4)(B): Statement Concerning Family History of Another	314
5. Deleted Rule 804(b)(5)	315
§ 11.46 “Old” Rule 804(b)(5)	315
6. Statement Offered against a Party Who Wrongfully Caused the Declarant’s Unavailability	315
§ 11.47 Rule 804(b)(6)	315
§ 11.48 A Domestic Violence Scenario	316
§ 11.49 “Caused” or “Acquiesced”	317
§ 11.50 “Wrongfully”	318
§ 11.51 Confrontation Clause: <i>Giles v. California</i> — The Intent Requirement	319
§ 11.52 <i>Giles</i> : Rationale for the Decision	320
§ 11.53 Burden of Persuasion; Evidence to Be Considered	320
§ 11.54 Applying Rule 804(b)(6) and the Confrontation Clause Forfeiture Doctrine: Domestic Violence Cases	321
§ 11.55 Applying Rule 804(b)(6) and the Forfeiture Doctrine: An Organized Crime Scenario	323
Chapter 12 · The “Residual Exception”: Rule 807	325
§ 12.1 In General	325
§ 12.2 “Material”; “More Probative”	327
§ 12.3 Questions	327
§ 12.4 “Circumstantial Guarantees of Trustworthiness”	328
§ 12.5 Questions	330
§ 12.6 Confrontation Clause; Trustworthiness	334
§ 12.7 Pending Revision of Rule 807	335
Index	337

Preface

“I’ve already spent a ridiculous amount of money on a casebook and separate rules pamphlet. There are hornbooks and manuals that cover all of evidence. Why should I buy a book that only deals with hearsay?”

Good question. Here are my answers:

1. Hearsay is an important subject. It is a major component of your evidence course; it is one of those subjects that every lawyer should understand.
2. Hearsay is one of the most difficult bodies of law you will ever encounter in law school. The basic concept is a tricky one; once you’ve mastered that, you have to deal with dozens of technical exceptions, written and unwritten.
3. This book will help you learn it.

Let me expand a little on each of these reasons.

1. Hearsay is an important subject.

Hearsay pervades everything a lawyer does in a courtroom; it is impossible to try even the simplest case without encountering it. The leading evidence casebooks devote anywhere from 20–40 percent of their length to the hearsay rule and its exceptions; professors spend an equivalent percentage of classroom time covering the subject.

2. Hearsay is a difficult subject.

The hearsay *rule* is simple enough; hearsay is not admissible unless any of the following provides otherwise:

a federal statute;

these rules; or

other rules prescribed by the Supreme Court.

The legal profession has struggled for more than a century just to come up with a basic *definition* of hearsay. Even though hearsay is now defined by statute—thank goodness for the Federal Rules of Evidence!—there are numerous “unwritten exceptions” to the definition, as well as eight statutory exceptions to the definition, each of which creates a category of evidence that fits the definition (or appears to), but is classified as *non*-hearsay. In addition, there are 29 statutory exceptions to the hearsay rule,¹ each of which creates a category of evidence that is hearsay but is nevertheless

1. There are 23 exceptions codified in Fed. R. Evid. 803, five exceptions in Fed. R. Evid. 804, and a “residual” exception in Fed. R. Evid. 807.

admissible over a hearsay objection. Each of these statutory exceptions has its own requirements, procedural wrinkles, legislative history, and judicial gloss.

To learn this body of law and apply it correctly is a major challenge. Suppose, for example, I want to call W, a witness who will testify, “On March 1, X said to me, ‘I’m going out with Frank tonight.’” Under some circumstances, what X said to W is not hearsay; under some circumstances it fits the basic definition of hearsay but is not hearsay because what X said fits within an exception to the hearsay definition; under other circumstances what X said is hearsay but fits within an exception to the hearsay rule; in still other circumstances, it is hearsay and does not fit within any exception; and yet in other circumstances, it is hearsay but judges disagree as to whether it fits within an exception to the hearsay rule.

Additional complicating factors include constitutional considerations (in particular, the Fifth Amendment privilege against self-incrimination and the Sixth Amendment Confrontation Clause), as well as the concept of multiple hearsay.

To repeat the basic point: hearsay is a difficult subject.

3. This book will help you learn it.

This book will help you learn hearsay because it breaks down each element of the hearsay definition, and each exception to the definition or to the rule, into its component parts. For example, for each hearsay exception, this book:

- Outlines the policies underlying the provision
- Lists and explains the requirements that must be satisfied for the evidence to fit within the exception
- Explains additional issues that have arisen or are likely to arise
- Explains how a rule interacts with other rules of evidence
- Spells out the procedural and tactical considerations that must be understood to appreciate how the rule “plays” in the courtroom
- Gives review questions and answers so you can test and apply what you’ve learned
- Has an associated website, <http://www.caplaw.com/hearsay>, which will post updates on major developments in hearsay law. And if you want to reach me directly, email me at Fishman.hearsay@gmail.com.

Don’t misunderstand: you are not getting a simplified, comic book version of hearsay. This book will help you learn hearsay as you want to learn it, to do well on your final, on the bar exam, and in practice.

Along the way, I also explain the hearsay significance of: a ham sandwich, Humpty Dumpty, the Greek god of wine, Tim McGraw, dog saliva, IBM’s computer and Jeopardy champion “Watson,” my wife Betty, William Shakespeare, the Chicago Cubs, 1950’s TV shows, peat moss, a squeaky boot, Jonathan Rhys Meyers, Leonardo DiCaprio, the French Army, the speed of sound, and the way criminals treat their girlfriends. As a bonus, I even tell you a little bit about what “love” means.

I have taught evidence for 41 years, to an average of 70 or so students each year. (Before that, I was a prosecutor in New York City for eight years.) The outlines, explanations, and questions in this book have been tested in the classroom. They work for my students; I'm confident they will work for you.

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