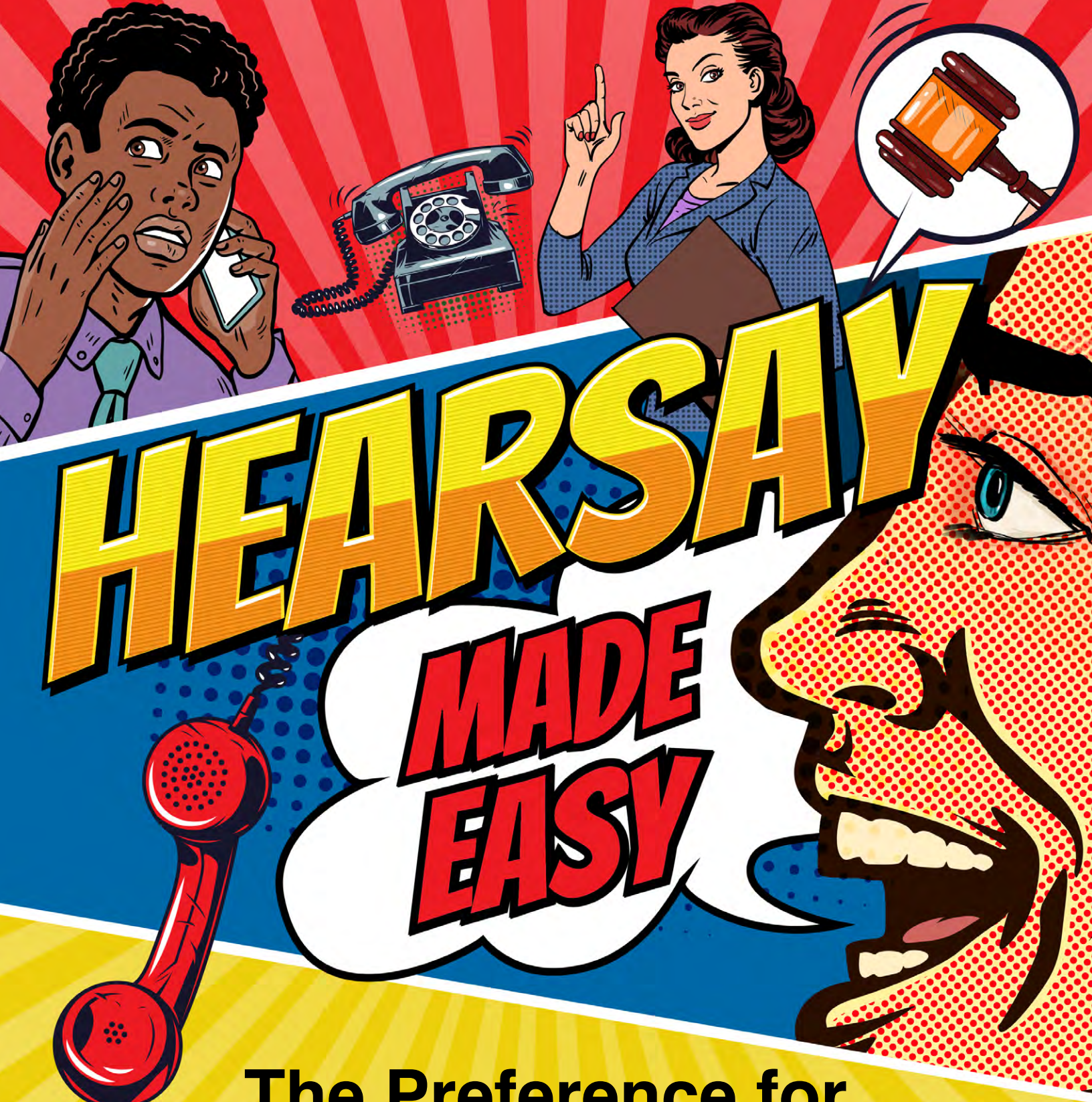


The Preference for Live Testimony in Court

By Bobby Harges

In court, there is a clear preference for live testimony, given that it is more reliable than second-hand statements and can be tested through cross-examination. When a witness gives live testimony, the factfinder can see the witness as she speaks, listen to how the witness tells her story, observe her sincerity and demeanor, and determine if the witness has a good memory of what she witnessed. However, live testimony is not always available, for a variety of reasons. Sometimes, eyewitnesses die or disappear, cannot be found, forgot what they said, or are generally unavailable to testify in court to what they witnessed. As a result, hearsay evidence is sometimes necessary and admissible.

Hearsay is one of the most difficult topics to navigate in the law, for law students, lawyers, law clerks, and judges alike. An understanding of this topic is extremely important for those involved with learning the principles surrounding hearsay or trying a case, whether civil or criminal. Of course, the starting point must be its definition. Under Article 801(C) of the Louisiana Code of Evidence, hearsay "is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."[1] Much of the strife inherent in navigating hearsay stems from the ending phrase in that definition, so we start with what is meant by the "truth of the matter asserted."

The Truth of the Matter Asserted

I have found in teaching Evidence for over thirty years that the phrase "the truth of the matter asserted" presents the most difficult part of understanding what is hearsay, what is not, and when it can be admitted as evidence. At the outset though, introducing evidence for "the truth of the matter asserted" is just one reason to introduce evidence. But turning to that key phrase "[t]he truth of the matter asserted," when the proponent is offering the "out-of-court statement" ("OCS") to prove that what is said in the statement is true, then it is hearsay. Conversely, as will be discussed below, if the OCS is not offered for that reason, then it is not hearsay (by definition).

The hearsay rule is based on the fact that when an OCS is offered for its truth, the factfinder is analyzing the credibility of the out-of-court declarant. In other words, when the OCS is offered for its truth, the factfinder is concerned with whether the declarant is telling the truth. Hearsay evidence is said to be unreliable because when the OCS was made, the factfinder was not able to see the declarant and thus could not possibly observe her demeanor, her narrative ability, and any other indicia that would tend to show whether the declarant was credible when the statement was made.

Whereas Article 801 of the Louisiana Code of Evidence defines hearsay, it is Article 802 that generally prohibits the admission of hearsay evidence. When we examine Article 802, we see that this rule seeks to keep out evidence that is offered for only *one purpose*, with the rule designed to prohibit, in court, the admissibility of "out-of-court statements" that are introduced for "the truth of the matter asserted in the statement."[2] Importantly, that represents the only restriction on hearsay evidence.

So, if the OCS is being introduced for any other relevant purpose than for its truth, then the statement is not hearsay. And there are many other relevant purposes for introducing a statement such as, *inter alia*: i) to show that a statement was made, ii) to demonstrate that a person had notice or knowledge of a salient fact, iii) to illustrate the state of mind of the declarant or of the listener, or iv) to impeach a witness. In these instances, the statement is not being introduced for its truth; thus, the credibility of the out of court declarant is not important, although the statement itself is germane for other reasons, perhaps just its existence or timing.

As an illustration, let's examine the OCS "*It is raining now*." This statement could be introduced at a trial for many reasons. For example, if the proponent seeks to introduce the statement at trial to *establish as a fact that it was raining that day*, then the statement is hearsay because it is an OCS being offered for its truth. On the other hand, if the statement is introduced to show that the store employee who was near the speaker *had notice of a dangerous condition on the floor*, then the statement is not hearsay – it is not being offered for its truth. Similarly, if the out-of-court statement "it is raining now" is introduced at trial to show *that the speaker could speak the English language*, then the statement is not hearsay – again, it not offered for its truth. Moreover, if the OCS is introduced *to impeach* the witness in court, then the statement is not hearsay. In each of the non-hearsay examples above, the statement was introduced for purposes other than its truth. In short, whether or not a statement is hearsay all depends on *the purpose* for which the statement is being introduced.

Hearsay and Human Declarants

In examining hearsay issues, keep in mind that for the statement to be hearsay, the statement must be made by a human declarant, outside of the present trial, and be introduced for its truth. For instance, data compilations that are automatically generated by a computer are not considered hearsay because there is no human declarant; however, computer printouts which reflect computer-stored human statements are hearsay when introduced for the truth of the matter asserted in the statements.[3] For example, a printout of a telephone trace in an electronic telecommunications switching system with no manual involvement would not be considered hearsay, while a computer-generated letter typed by a human being and produced from a printer would be hearsay if it is offered for the truth asserted in the letter. The telephone trace system is simply recording the numbers dialed, while the letter is generated by a human declarant. Similar reasoning applies to the now-ubiquitous example of emails – an automatic email delivery notification generated by Outlook or Gmail is not hearsay, while

the statements asserted in an email between two individuals are hearsay if they are offered for the truth of the statements made therein.

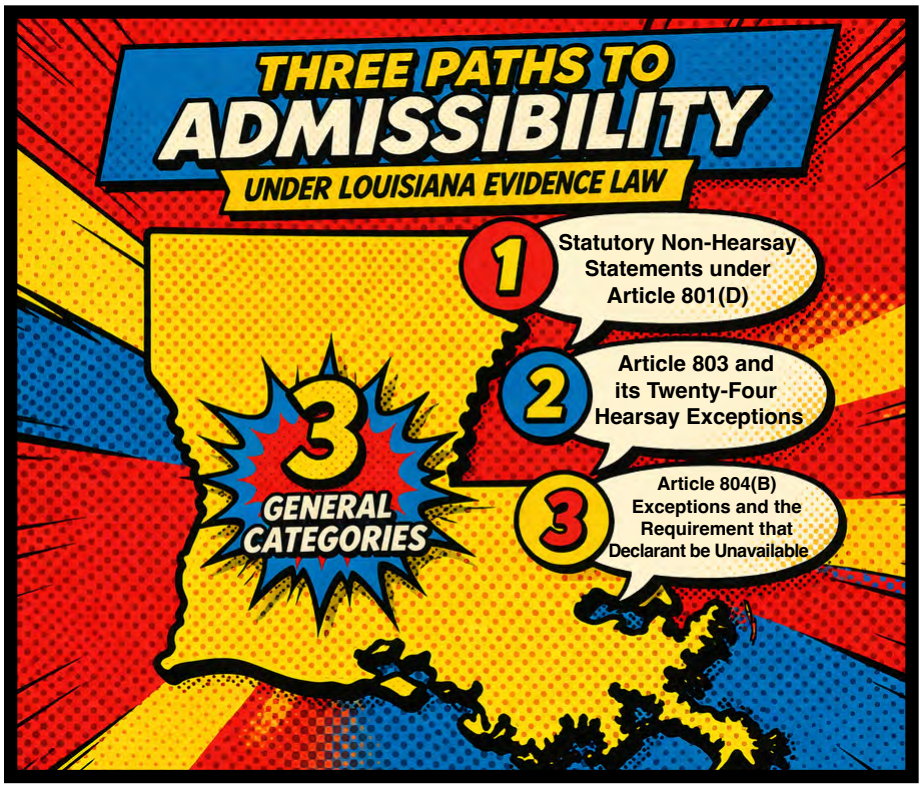
Exceptions to the Hearsay Rule

Although Article 802 decrees that hearsay is not admissible, the rule also contains the phrase "except as otherwise provided by this Code or other legislation." This clause contemplates the admissibility of hearsay evidence in a number of different contexts, and sure enough, the Louisiana Code of Evidence contains numerous articles that allow for the admissibility of hearsay-type statements. In fact, there are over forty-six (46) different ways to introduce statements that meet the definition of hearsay, with admissibility based upon their reliability and/or necessity. Each of the articles is said to have its own separate basis of reliability and/or necessity.

In addition to the class of statements mentioned above that are not hearsay because they are not offered for their truth, in Louisiana, there are three general categories of hearsay statements that are generally admissible. Understanding these categories will be a major step toward understanding the hearsay exemptions and exceptions.

Statutory Non-Hearsay Statements under Article 801(D)

The first category of statements that are offered for their "truth" consists of hearsay-type statements that meet the definition of hearsay, but they are not classified as hearsay statutorily. Because the Louisiana Legislature has classified these statements as non-hearsay, we will refer to them as "statutory non-hearsay." Article 801(D) of the Louisiana Code of Evidence contains fifteen (15) different out-of-court statements that are admissible even though they are introduced for the truth of the matter asserted. Examples include a prior inconsistent statement of a witness in a criminal case who testifies at the trial,[4] an out-of-court statement of a testifying witness that identifies a suspect in a crime,[5] and a statement made by a party that is offered against that party.[6]



Starting with the first of those examples, a prior inconsistent statement in a criminal trial that is offered for its truth is considered reliable because the declarant of the statement is present at the trial and can be cross-examined about the statement. Thus, the factfinder can observe the declarant under direct, cross, and re-direct examination. An example of a prior inconsistent statement that is offered for its truth in a criminal trial is that of a victim of domestic violence who calls 911 for emergency assistance and states that her husband injured her by striking her several times on the face and body. If the husband is charged with domestic abuse battery,[7] and the victim-wife testifies at the trial that the husband did not strike her on the night in question, the prosecutor can introduce the wife's prior inconsistent statement as substantive evidence of the battery. In this type of case, this prior inconsistent statement, along with other evidence, can be sufficient for the prosecution to meet its burden of proving the elements of the crime by proof beyond a reasonable doubt.[8]

Similarly, the out-of-court statement of a testifying witness that identifies a suspect in a crime is considered reliable because the witness testifies at the trial and is available for cross examination. The basis of admissibility of a statement by a party that is offered against that party is that the party made the statement outside of the court and if the party does not like the content of the statement, she can always take the witness stand at trial and explain the reasons for making the statement. Grounded in our adversary trial process, this rule basically states that if a party made an out-of-court statement, the other side should have the right to introduce that statement for any relevant purpose. The maker of the statement cannot successfully argue that it could not cross-examine the maker of the statement because it was his own statement.

Article 803 and its Twenty-Four Hearsay Exceptions

Next, there are twenty-four (24) hearsay exceptions under Article 803 that allow statements to be introduced, regardless of whether or not the out-

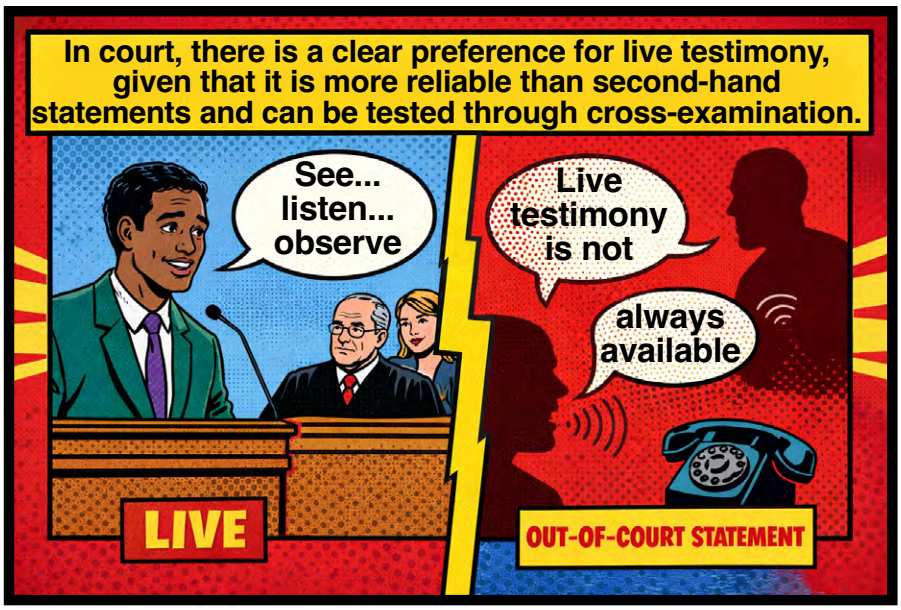
of-court declarant is present in court or unavailable to testify. Examples of these include an excited utterance[9] (which is an OCS made while the declarant was under the stress of excitement caused by the event or condition) and the business records exception.[10] An excited utterance is considered reliable because it is the result of a spontaneous reaction to a startling event, while business records are considered reliable because such records are kept in the ordinary course of business activities and are generally relied on by businesses in conducting their daily activities. Beyond those two examples, the category of "availability of declarant immaterial" exceptions is wide-ranging, with the exceptions potentially covering a broad spectrum of circumstances that could be applicable to any given civil or criminal case.

Article 804(B) Exceptions and the Requirement that Declarant be Unavailable

The third category of hearsay exceptions is reflected in Article 804(B), which sets forth seven (7) circumstances allowing hearsay statements to be admissible if the declarant is unavailable. That is, the declarant of the OCS must not be able to testify at the trial because of death, illness, or other good reason or be unwilling to testify at the present trial.[11] The primary basis for the admissibility of these exceptions is necessity. Examples in this category include former testimony (testimony at another trial or hearing),[12] dying declarations (statements made under belief of impending death),[13] and the residual exception (for civil cases only).[14] Former testimony is allowed because the party against whom the hearsay evidence is used (or a party with a similar interest) had an opportunity to cross-examine or otherwise develop the testimony at the prior hearing, while a dying declaration has been allowed historically to prevent killers from escaping justice. Finally, the residual hearsay exception allows hearsay evidence in civil cases where no other hearsay exception applies, and the evidence is necessary and trustworthy.

Conclusion

Out-of-court statements are sometimes necessary at a trial, despite the preference for live testimony. When the out-of-court statement is not offered for the truth of the matter asserted in the statement, there are no hearsay concerns, and there is no need to enter the quagmire. And when the out-of-court statement is offered for its "truth," there are numerous articles in the Louisiana Code of Evidence allowing for the admissibility of hearsay-type statements, notwithstanding the general rule against hearsay in Article 802: the fifteen statutory non-hearsay rules contained in Article 801(D); the twenty-four hearsay exceptions under Articles 803; and the seven hearsay exceptions under 804(B). Knowing the purpose for which a statement is introduced is key to determining whether it constitutes hearsay and its evidentiary value.



FOOTNOTES

1. La. C.E. art. 801(C).
2. Article 802 of the Louisiana Code of Evidence states, in its entirety: "Art. 802. Hearsay rule. Hearsay is not admissible except as otherwise provided by this Code or other legislation."
3. *See State v. Carter*, 1997-2902 (La. App. 4 Cir. 5/10/00), 762 So.2d 662, 678.
4. La. C.E. art. 801(D)(1)(a).
5. La. C.E. art. 801(D)(1)(c).
6. La. C.E. art. 801(D)(2)(a).
7. Under La. R.S. 14:35.3(A), "Domestic abuse battery is the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member."
8. *See In Interest of K.M.*, 2014-0306 (La. App. 4 Cir. 7/23/14), 146 So.3d 865 (holding that prior inconsistent statement qualified as statutory non-hearsay and was admissible as substantive evidence of guilt).
9. La. C.E. art. 803(2).
10. La. C.E. art. 803(6).
11. *See* La. C.E. art. 804(A) for more on the unavailability of witnesses.
12. La. C.E. art. 804(B)(1).
13. La. C.E. art. 804(B)(2).
14. La. C.E. art. 804(B)(6).

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