

I. GENERAL

1. New York does not have a "code" of civil evidence
 - Common law rules generally apply
 - Sometimes statutes apply, e.g. CPLR Article 45
 - CPLR 4514 impeachment of witness by prior inconsistent statement, subscribed under oath
 - CPLR 4517 prior testimony in a civil action
 - CPLR 4518 business records
 - CPLR 4528 weather conditions
 - CPLR 4532-a graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests (a/k/a x-rays, MRIs, CT scans, etc.)
 - CPLR 4533-a prima facie proof of damages
2. Four Kinds of Evidence
 - A. Testimonial
 - B. Real
 - C. Documentary
 - D. Demonstrative

II. **MECHANICS OF INTRODUCING AN EXHIBIT INTO EVIDENCE**

1. Request that item be marked for identification as "Plaintiff's [Petitioner's, State's or Commonwealth's] Exhibit No. ___ for Identification" or "Defendant's [Respondent's] Exhibit Letter __ for Identification"
2. Display the marked item to your adversary. State on the record that you are doing so
3. Have the exhibit shown to the witness
4. Lay foundation through the witness for introduction of the item into evidence
 - Does the witness recognize it? What is it? Chain of custody.
5. Offer item into evidence, on the record
6. If admitted, request that the item be published to the jury

III. **EVIDENTIARY FOUNDATIONS**

A. **Letters/Signed Document**

1. Relevance
2. Witness can identify signature or handwriting
3. Document has not been altered

N.B. Depending on the contents of the document and the purpose in introducing it, there may be an appropriate hearsay objection. The proffering party should be prepared to argue any potential exceptions to the hearsay rule.

B. **Photographs**

1. Relevance
2. Witness is familiar with the scene, object or person depicted
3. Witness is familiar with the scene, object or person depicted *at relevant date and time*
4. Does this photograph fairly and accurately represent_____?

N.B. A frequent objection to photographs is that their prejudicial impact outweighs their probative value. Ultimately, this will be the discretion of trial judge. Objecting party might propose minimizing the harm either by redacting photographs or limiting the number of photographs admitted.

N.B. The person who took the photograph need not testify to lay a foundation. However, an opponent may request a voir dire, which will then sometimes bring out differences between how the scene actually looked on the date in question and what the photograph shows. For example, if the photo is taken in summer, with leaves on the trees vs. winter with snow and ice on the road, it is irrelevant if the issue is the layout of the intersection, the location of a stop sign. But, if the photo is offered to show the road conditions, or visibility of the stop sign, then when the photo was taken might be relevant.

C. **Physical Evidence**

1. Relevance
2. Item can be *uniquely* identified through the five senses
OR
A chain of custody can be established
one person retained control
initials on evidence
sealed in a container and vouchered
gun, serial number
3. Witness had first-hand knowledge of the item *at relevant date and time*
4. Witness recognizes the item in court
5. Item is in the same or substantially the same condition as it was at relevant date and time

D. **Diagrams**

1. Relevance
2. Witness is familiar with scene depicted
3. Witness is familiar with scene depicted *at relevant date and time*
4. Diagram would be useful to jury in understanding witness' testimony
5. Diagram is to scale or is reasonably accurate, but need not be exact
6. Don't use unless in evidence
7. Are there items which should be placed by the witness (i.e., the location of the car) and not already put in by the attorney?

N.B. Be careful to use different colored markers, initials, numbers to memorialize a witness' testimony. Use overlays if there is a concern that one witness' markings will be suggestive to the other witnesses as to how to testify.

N.B. Attorneys often try to have the witness tell the story, and then step down and repeat it while marking a diagram. An opponent may object that it is cumulative, i.e., the witness has already given this same testimony and a judge may sustain the objection.

E. Business Records

1. Relevance
2. Witness is custodian of the record or another qualified person: Witness need not be preparer of the record; certified records may be self-authenticating
3. Record was prepared by a person with *knowledge* of the facts contained in it
4. Record was completed *contemporaneously* (i.e. diagram at time, police record at time of interview)
5. Record was ***kept as regular part of business activity***; if the record was made solely because the party thought the matter would end up in court, this is made in contemplation of litigation and does NOT qualify as a business record.
6. It is regular course of business to keep and store such records

IV. IMPEACHMENT OF WITNESSES

A. OWN WITNESS

- Generally not permitted. In a criminal case governed by CPL 60.35
But see, CPLR 4514

CPLR 4514: "In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath."

- May be permitted in case of *genuine surprise*, and testimony is *materially* different

•*People v Fitzgerald*, 40 NY2d 44 - Court reversed defendant's conviction and ordered a new trial where the trial court allowed prosecutor to impeach state's witness with his grand jury testimony when witness's testimony at trial did not affirmatively damage state's case. If ADA knows beforehand witness is jumping ship, then ADA cannot put witness on and then attempt to introduce prior statement.

- Only can impeach with sworn testimony OR a signed writing

B. ADVERSE WITNESS

I. STATEMENT AT TRIAL INCONSISTENT WITH ...

a. Prior Sworn Testimony

Lay Foundation

- Did you testify about this matter: in the grand jury, at suppression hearing, at an examination before trial? (EST/deposition)

- Although not necessary for the foundation, many attorneys will also bring out, if true, the fact that counsel for the party was present, that the witness was told by the questioner that if the question was unclear, the witness could ask to have the question rephrased.

- page, line

- "Were you asked these questions, and did you give these answers?"

Do not ask "Do you remember being asked these questions and giving these answers?" That is not the relevant inquiry.

- *unlike with prior written statements of the witness or oral or written statements of third parties*, need not pose inconsistency to witness because this is **sworn testimony**

ADMITS



DENIES

Transcript does not come in
/

Ask adversary, at a sidebar, for stipulation that this what the transcript states
/

Some lawyers then ask, is memory better now or then? Others leave it for summation.
/ STOP

Yes / No /

STOP Call court reporter

Prior testimony is in evidence

b. Prior written statement by witness (e.g., insurance form, police report)

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- *must pose the inconsistency to the witness*

ADMITS
/
Does not come in
/
STOP

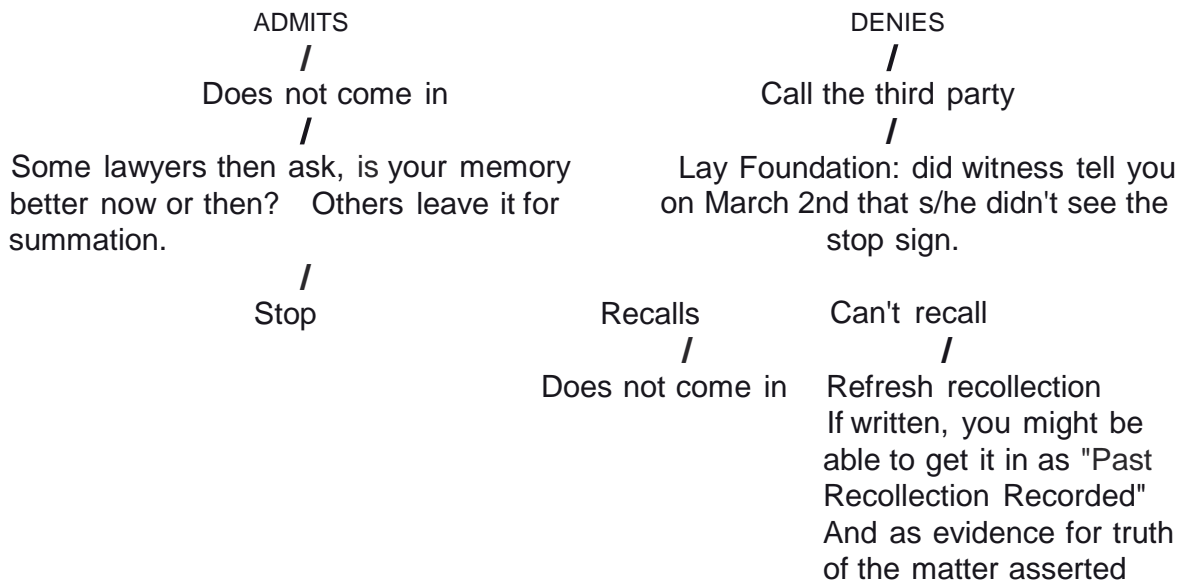
DENIES
/
Document can come into evidence
/
Need foundation for document. Try to make witness adopt the form
/
Richardson on Evidence § 6-411
/

Business record; *Johnson v Lutz*, 253 NY 124 - informant must have *duty* to give information in document/form. If so, then can offer for truth. With police reports typical complainant has no duty to complain, therefore these reports are generally not admissible for truth of statements, but merely for inconsistency.

c. Prior oral or written statement (third party)

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- *must pose the inconsistency to the witness*
- remind witness of situation, conversation
- "Did you tell PO Jones on March 2d that you didn't see the stop sign?"



2. PRIOR CONSISTENT STATEMENTS

- Generally inadmissible as bolstering, hearsay
- Exceptions when claim of **recent fabrication**
 - means witness is making up story well after event, not confusion, mistake
 - only if motive to falsify arose *after* prior consistent statement was made can p.c.s. be used
 - mere impeachment with a prior inconsistent statement does not

amount to a claim of recent fabrication because it is not offered for its truth

- rarely is it a true recent fabrication, rather usually the adverse party is alleging an ongoing fabrication from the outset

C. CREDIBILITY

Unlike in a criminal case, where the court should conduct an in limine *Sandoval* hearing regarding the scope of impeachment of a criminal defendant by his or her prior convictions or bad acts should he or she testify, a party in a civil action is not constitutionally protected from such impeachment. Nevertheless, you should attempt to seek the court's guidance as to what it will permit in advance. For example, in many civil cases, one or more of the parties or witnesses may have prior histories of drug or alcohol abuse.

1. Criminal Convictions (in a civil case)

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- Have you ever been convicted of a crime or violation?
- "Isn't it true, that on Jan. 12, 2007, you pleaded guilty to aggravated unlicensed operation of a motor vehicle in Southampton Village Court?"

ADMITS	DENIES
/	/
Does not come in	Certificate of Conviction, or transcript of plea comes in

Can ask about the underlying facts

2. Immoral Acts

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Generally party and witness need to be known to each other, in order to provide the good faith basis

ADMITS	DENIES
/	/
Stop	Collateral
	Cannot prove extrinsically, but can attempt to refresh witness' recollection

3. Reputation/Character

- only by third party opinion

4. Bias/Hostility/Interest

ADMITS	DENIES
t	t
STOP	Can attempt to prove extrinsically

IV. OBJECTIONS

- A. Relevance and materiality
- B. Unduly prejudicial vs. probative value
- C. Hearsay

Definition: an out-of-court statement offered to prove the truth of the matter asserted in the statement

Differently stated, an out-of-court statement is not hearsay when it is NOT offered to prove the truth of the matter asserted in it

Examples:

- there is an issue as to whether the statement itself was ever made
- to impeach a witness, without regard to its truth
- reveals the speaker's state of mind
- offered only to prove notice of a dangerous condition

D. Hearsay Exceptions

1. Statutory

a. CPLR Article 45

(former testimony of an unavailable witness; business or hospital records; public documents; ancient documents; marriage certificates; weather and market reports; census reports; birth and death certificates)

-2. Common Law

- a. Admissions
- b. Present sense impression
- c. Spontaneous declaration or excited utterance
- d. State of mind
- e. Pedigree
- f. Declaration against interest
- g. Public document
- h. Dying declaration
- i. Past recollection recorded

E. Privileges

- 1. Constitutional (self-incrimination)
- 2. Common Law
 - a. Informant
 - b. State secrets or official information
 - c. Parent-child
- 3. Statutory
 - a. Attorney-client
 - b. Attorney work product
 - c. Doctor-patient
 - d. Spousal
 - e. Cleric-congregant
 - f. Social worker
 - g. Psychologist
 - h. Rape victim-crisis counselor
 - i. Library records

F. Best Evidence Rule

Applies only when the contents of the writing are material, and not collateral, to the issues being tried. Requires production of the original writing.

G. Parol Evidence Rule

In a civil case based on a written contract intended to be the entire agreement, a party cannot introduce proof an oral agreement which varies or adds terms.

There are numerous exceptions to the rule.

FOUNDATIONAL REQUIREMENTS FOR INTRODUCTION OF ANY INSTRUMENT INTO EVIDENCE:

Authentication: FRE RULES 901-903

Relevance: FRE RULES 401-415

Compliance with Best Evidence Rule: FRE RULES 1001-1008

Hearsay: FRE RULES 801-807

AUTHENTICATION

- process of proving that evidence is GENUINE and that is it what it purports to be
- FOUNDATION: must establish the "identity and maker/author" of the evidence before it can be admitted into evidence.

RELEVANCE

- technically*, it means "probative worth"
- any tendency that a piece of evidence will establish a proposition or fact that is MATERIAL
- it is evidence which has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- REMEMBER: when objecting on Relevance grounds, ask for Side-Bar to avoid having Jury hear a debate discussing both relevant and "irrelevant" evidence
- ALL RELEVANT EVIDENCE IS ADMISSIBLE (with *some* exceptions)
- EVIDENCE THAT IS NOT RELEVANT IS NOT ADMISSIBLE.

What does "MATERIAL" mean in the context of Evidence?

- "material" refers to the relationship between the proposition on which evidence is offered and the issues as defined and outlined by the Pleadings and the substantive law.

BEST EVIDENCE RULE:

- "An original writing, recording or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."

- Does NOT address the *quality* of evidence (despite the name) but instead reflects a *preference* for Original Documents when seeking to prove the CONTENTS of those documents.

- Numerous Qualifications:

- "Original" document INCLUDES a counterpart intended by the executing parties to have the same effect as the original

- "Duplicate" is *generally* considered the equivalent of an original.

- DOES NOT APPLY if the document is collateral and does not deal with a controlling issue in the case

- "Originals" do NOT require productions where:

- the Original is LOST or DESTROYED (but NOT at the hand of the party offering)

- the Original CANNOT be obtained by Judicial Process

- the Original is in the CONTROL OF THE OPPONENT, who has been put on notice that the contents of the document would be the subject of proof at trial.

KEY: Rule requiring an Original applies where the contents of the document are DIRECTLY at issue in a case AND the facts do not exist INDEPENDENT of the document.

NOTE: Once the production of an original document is excused, a proponent may offer ANY TYPE of admissible evidence of the contents of the writing (exception: Public Records). It then becomes the job of the fact finder to consider the secondary evidence admitted and give it the weight (if any) he/she deems appropriate.

HEARSAY, NONHEARSAY AND EXCEPTIONS

What is HEARSAY?

-Defined in the Federal Rules of Evidence, Rule 801

-An out of Court statement offered for the TRUTH of the contents of the statement

What does that Mean?

SOMEONE, other than the person sitting on the stand testifying at your trial

SAID OR DID SOMETHING that you are now trying to get into evidence in your trial

TO PROVE THE TRUTH OF that statement or assertive action

What is a Statement:

-Oral or Written Assertion

-Nonverbal Conduct IF it is intended to be an ASSERTION

What is NONHEARSAY?

-it is that same SAID/DID by the SOMEONE, other than the person while testifying from the witness stand at trial (see Hearsay Definition), BUT you are trying to get admitted for a RELEVANT PURPOSE OTHER THAN ITS TRUTH

What are Examples of NONHEARSAY?

-Declarant-Witness's Prior Statement:

-A Prior INCONSISTENT Statement

-Must have been given under OATH at a prior Proceeding or Deposition

-A Prior CONSISTENT Statement

-Rehabilitation of Witness/Rebut attack on Credibility/Recent Fabrication

-the Prior Consistent Statement MUST PREDATE the existence of the alleged Improper Motive/Negative Influence

-Out of Court Statement of IDENTIFICATION

-Statement MUST have been made WHILE VIEWING or SHORTLY after viewing the person/photograph leading to the identification

-NOTE: Declarant MUST be present in Court AND subject to cross-examination.

-Admission by a Party Opponent:

- an out of Court statement made by/attribution to a party in the suit;
- offered AGAINST that party for its TRUTH;
- By the opponent
- NOTE: an "admission" can be vicariously attributed, made by agents and be adopted

If you are NOT offering the Statement for the TRUTH, How can it be RELEVANT?

-Statement is NOT being offered for the TRUTH of the matter asserted but for the FACT that it was said. And the FACT that the Statement was SAID may be RELEVANT to:

- show the EFFECT on the person who heard the statement
- demonstrate a PRIOR INCONSISTENT STATEMENT
- show operative facts or a verbal act
- to demonstrate KNOWLEDGE of the Declarant

How do you determine IF a statement or an act is HEARSAY?

ASK:

-Is the ONLY RELEVANT PURPOSE for the offering or admission of that out of Court statement is its TRUTH

IF THE ANSWER IS A RESOUNDING YES; THE STATEMENT IS HEARSAY

But what if the answer is NOT so clear? What if there are legitimate arguments to be made that the sun does not rise and set on the TRUTH of the statement alone?

THEN ASK:

-Does the CONTENT of the statement NEED to be BELIEVED for that statement to be RELEVANT?

-Does it have to be TRUE to be RELEVANT?

IF ANSWER IS YES, THEN THE STATEMENT IS HEARSAY

WHY IS HEARSAY SUCH A "BAD" THING?

- inability to confront the Declarant
- reliability
- protection of Truthfulness
- risk of fabrication for self-serving, nefarious reasons with inability to probe

And... it gets worse... **Hearsay Within Hearsay:**

-An out of court statement that contains ANOTHER out of court statement within it.

- eg., writings that contain "attributed" statements; a person WRITES down, out of court, what someone else TOLD them

- BOTH statements are admissible ONLY IF EACH statement is admissible (via a Hearsay Exception and/or as Nonhearsay)

HEARSAY EXCEPTIONS:

- There are MANY EXCEPTIONS to the Hearsay Rule:
 - Meaning EVEN THOUGH a Statement IS Hearsay, the Court WILL admit it into evidence.

- WHY??? Because the Law has identified situations/circumstances where there is substantial likelihood of truthfulness in the Statement that outweighs risk posed by an inability to confront the declarant and/or probe into truthfulness

**YOU WILL HAVE TO LAY A FOUNDATION TO DEMONSTRATE THE
APPLICABILITY OF AN EXCEPTION BEFORE YOU WILL BE ABLE TO ASK AND
GET THE HEARSAY STATEMENT ADMITTED**

-HEARSAY EXCEPTIONS are broken down into

- Availability of the Declarant as a Witness is IMMATERIAL
 - Exceptions found in the Federal Rules of Evidence Rule 803

- Declarant is NOT AVAILABLE as a Witness
 - Exceptions found in the Federal Rules of Evidence Rule 804

EXCEPTIONS: REGARDLESS OF AVAILABILITY OF DECLARANT AS WITNESS

- the Federal Rules of Evidence list TWENTY-THREE (23) different categories of exceptions !!!

-HINT: the Foundation you will have to lay is set forth in the text of each of the Exceptions

PRESENT SENSE IMPRESSION:

- out of court statement which describes/explains and occurrence/condition made AT THE TIME the declarant PERCEIVED the occurrence/condition; or IMMEDIATELY THEREAFTER
- Reliability derives from CONTEMPORANEITY of the out of court statement and the event described
- risk of deliberation or conscious misrepresentation negated by proximity of statement and event; therefore MUST be very close in time
- does NOT have to be shocking, surprising, exciting
- comes in for the truth and is LIMITED to the impression/description of the event perceived
- FOUNDATION: close temporal relationship between the occurrence of the event and the statement

EXCITED UTTERANCE:

- SPONTANEOUS out of court statement relating to a startling/surprising event made WHILE declarant is UNDER THE STRESS caused BY the event
- Reliability comes from CONNECTION between the statement and the STRESS
- spontaneity of statement lacks time or mindset to have been less than truthful
- time frame must be close enough that likelihood statement was mulled over and self-serving is removed
- FOUNDATION: spur-of-the moment nature of statement due to stress of the event

THEN-EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION:

-To qualify the Out-of-Court Statement must set forth Declarant's PRESENT state of mind or condition when the statement was made or communicate the physical condition

-ONLY pertains to statements regarding a mental/emotional/physical condition/state AT THE TIME THE STATEMENT WAS MADE

-Such as???: Intent, Plan, Motive, Design, Mental Feeling, Pain and Bodily Health

-DOES NOT include statements regarding PAST emotional/mental/physical conditions

-Reliability derives from best evidence of the existing mental/emotional/physical state/condition of a declarant is declarant's own statement

-FOUNDATION: Contemporaneity of the Statement and the State of Mind/Condition that is described by the declarant

BUSINESS RECORDS:

-Writing that records activities and is

MADE in the ordinary course of regularly conducted business, AND KEPT in the ordinary course of regularly conducted business, AND Created by a person with PERSONAL KNOWLEDGE of the contents AT OR NEAR the time the event was recorded

-Generally requires testimony of the Custodian or other qualified witness OR by CERTIFICATION that complies with the Federal Rules of Evidence Rule 902

-Admission by CERTIFICATION requires proponent to provide sufficient notice to opponent to allow opportunity to challenge the record

-Reliability comes from the REGULARITY of RECORD KEEPING which is an ordinary and necessary part of daily business/transactions. If a Business Record is good and reliable enough for the company to depend on in the conduct of its business, it should be reliable enough for admission at trial.

-OFTEN there is an OVER RIDING concern by the opponent, despite proper foundational questions being asked, as to the reliability and trustworthiness of the record

SEE THE "GET OUT OF ADMISSIBILITY FREE" CLAUSE in FRE 803(6)(E): "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."

-NOTE: "Business Records" made SOLELY for the purpose of litigation are GENERALLY excluded from evidence.

-Business Record FOUNDATION:

-Activity recorded is NORMALLY conducted by the Business and the making of the record is GERMANE to the business

-Person supplying the information recorded must have a BUSINESS DUTY imposed by the business to provide the information

-Record must be made AT OR NEAR THE TIME of the business event reflected

_NOTE: Where a Business Record has been admitted, you MAY demonstrate the LACK of an entry to show that an event, HAD it occurred, WOULD have been recorded and that its absence from the record demonstrates that the event, therefore, did NOT take place.

REPUTATION AS TO CHARACTER:

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

-Witness testifying MUST have had occasion to OVERHEAR a discussion as to a person's character among the person's (whose reputation is being commented about) associates OR in the "community."

-LIMITED Admissibility- subject to RELEVANCE REQUIREMENTS of FRE 404, 405 and 608. If Reputation testimony clears an objection pursuant to those sections; it is unlikely a "hearsay" will succeed in keeping it out.

-Therefore, FOUNDATION really must be laid to satisfy FRE 404, 405 or 608.

EXCEPTIONS: REQUIRING UNAVAILABILITY OF DECLARANT AS A WITNESS

-Note: SPECIFIC CRITERIA determine whether or not a Declarant is "AVAILABLE AS A WITNESS"

-There are only a total of 5 of these Exceptions

FORMER TESTIMONY:

-ANY testimony, given under oath, by an UNAVAILABLE DECLARANT in an earlier proceeding

-Party against whom it is being offered had to have an opportunity and similar motive to question and develop Declarant's testimony when that former testimony was given.

-Reliable because it was made under oath and party against whom it is being offered had an opportunity to examine and confront the witness.

NOTE: the opposing counsel need not be the same when the former testimony was taken as that which is at trial. What matters is that the "opponent" had the opportunity and a general, similar motive to develop testimony at the former proceeding.

-ex) Use of Deposition Transcripts for Unavailable Witnesses in Civil Cases

DYING DECLARATION:

-Statement by an UNAVAILABLE DECLARANT with sufficient reason to believe the Declarant's death was IMMINENT relating to the CAUSE or CIRCUMSTANCE of that IMMINENT death

-NOTE: under the FRE, person is NOT required to actually die

-Reliable under the notion that someone who legitimately believes and thinks he/she is about to die is substantially unlikely to lie and make up the cause of their death and the individual at fault.

-FOUNDATION: Must demonstrate Declarant had Reasonable belief of impending death

How?? Type and seriousness of wounds; someone at scene tells declarant survival is unlikely

Admissible statements limited ONLY to statements about the CAUSE and/or CIRCUMSTANCES of the "impending death"

WHAT DO YOU DO IF YOU JUST CAN'T GET AROUND THE HEARSAY OBJECTION?

-Redaction- physically remove the Hearsay (inadmissible) portion of the Exhibit

-In Testimonial Evidence, ask the Witness:

"Without Telling us what was said (the inadmissible Hearsay), What happened next...?"

-The "Hail Mary": the Residual Exception; the Objection of Last Resort.

Note: you better have a darn good argument as to:

How the proffered hearsay has the requisite guarantees of trustworthiness AND

How the proffered hearsay is MORE PROBATIVE of the fact for which it is offered than ANY OTHER available evidence (CANNOT BE CUMULATIVE)

Why the "interests of justice" will be served by admission of the statement

-To rely on this catch-all exception, proponent MUST provide notice to opponent of intention to offer the statement, including the name and address of the Declarant

NYSBA Trial Academy, March 2015 - Civil Evidence
Hon. Paul G. Feinman & Mary Beth Ott, Esq.

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