



STEPHENS ANDERSON & CUMMINGS

Let's Win This!

A Monthly Newsletter - What You Need to Know
About Personal Injury Law

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February 2019 - Issue 12



It's February, and that means it's time to say:

Happy Valentine's Day!

You may have heard that Valentine's Day is just an occasion dreamed up by florists, confectioners, and greeting card manufacturers to increase their profits.

That's not correct.

Valentine's Day has been associated with romance and courtly love since as far back as the 1300s.

How does that fit in with the theme of this month's issue of *Let's Win This!*?

It goes to show you how relying on hearsay can be problematic.

It also shows how information from scholarly sources - sometimes called "Learned Treatises" in legal settings - can be considered reliable, even though it's technically hearsay. (Remember the last issue on Evidence when we learned that "hearsay" is an out of court statement offered to prove what was said in the statement?)

Today, we'll delve a bit deeper into Hearsay.

And, while we're at it, let this be a reminder not to let those special people in your life rely on hearsay to learn how you feel about them. Testify from personal knowledge and tell them yourself!



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Recap

Last time, we examined the legal definition of hearsay (*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*). We also looked at the "Rule Against Hearsay," which says hearsay isn't acceptable evidence in court. Most of the time.

In case you missed that issue or just want to brush up a bit before we continue, you can find it [here](#).

When we closed, we were about to start discussing the "exceptions" to the Hearsay Rule - that is, when evidence that normally would be excluded will be admitted by the judge, anyway, because the Rules of Evidence say it's okay to

do so.

Sometimes, an exception will apply only if the person who made the statement - the "declarant" - is not available. Other times, an exception will apply whether the declarant is unavailable or not.

TEXAS RULES OF EVIDENCE 804

EXCEPTIONS TO THE RULE AGAINST HEARSAY WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

Exceptions When the Declarant is Unavailable

So, what does it mean for a witness to be "unavailable"?

The Rules of Evidence say that a witness is unavailable if they cannot be present or cannot testify because they're dead, or because they're suffering from some sort of "infirmity, physical illness, or mental illness."

They also are unavailable if the person wanting to offer the statement has tried but "has not been able, by process or other reasonable means" to get them to come testify. Generally, this applies to witnesses outside the range of the court's subpoena power (in Texas, 100 miles from the courthouse) who just don't want to join the party.

The simply uncooperative are also unavailable. If a person refuses to testify, even though a court has ordered them to do so, they're deemed to be unavailable. (Refusing to obey a court order may get them thrown in jail, but that's a different subject.)

The biggest loophole: if the person simply *doesn't remember* the subject matter of the statement, they're also "unavailable."

What About Those Sneaky Lawyers?

The rules recognize that a less-than-completely-ethical lawyer might, let's say, pay a witness to go on vacation (more than 100 miles away) just about the time the case is called to trial, so that they might offer the witness' prior statement as an exception to the Hearsay Rule.

So, the definition of "unavailable doesn't apply if the party who wants to offer the statement "procured or wrongfully caused" the unavailability.

Kinds of Statements Excepted When the Witness is *Unavailable*

As contrasted to the exceptions that apply whether the declarant is available or not, those that require the witness to be unavailable are very few. They are:

- *Former Testimony*, if offered against a party and that party - or a person with a similar interest - had an opportunity and similar motive to develop the testimony by direct, cross, or redirect testimony. Former testimony includes depositions given in other cases. (Remember that depositions given in the same case are *not hearsay*, according to the Rules.)

- *Statements in Contemplation of Death* - something said by a person who believes they are about to die, if the statement is about the cause of the death or circumstances surrounding it.
- *Statements of Personal History* about the declarant's own birth, adoption, legitimacy, marriage, divorce, relationship by blood, adoption or marriage, or the like, or such statements about a third person by someone related to them by blood, adoption, or marriage (or so "intimately associated with the person's family that the declarant's information is likely to be accurate").

Let's move on to those exceptions to Rule Against Hearsay that *don't* require the declarant to be "unavailable."

Exceptions Even if the Witness Is Available

There are 24 different categories of statements that can be admitted into evidence, even though they technically are hearsay and even though the declarant may be sitting in the courtroom when you introduce evidence of the statement.

Obviously, we don't have the space to go over all of them, so we'll discuss only a few of the most important and common ones.

TEXAS RULES OF EVIDENCE 803

EXCEPTIONS TO THE RULE AGAINST HEARSAY REGARDLESS OF WHETHER THE DECLARANT IS UNAVAILABLE AS A WITNESS

- *Statement made for medical diagnosis or treatment.* When you go to the doctor for treatment of injuries you received in an accident, whatever you tell the doctor or the medical staff about your medical history, your symptoms or sensations, and when and how they started is all admissible.
- *Records of a Regularly Conducted Activity* - sometimes called the "Business Records Exception." Information contained in records of a regularly conducted activity, whether it's conducted for profit or not, are admissible if the records meet certain criteria - and virtually all such records do.
- *Records of Public Offices and Vital Statistics.* Information contained in governmental records of virtually any description, or birth, death, and marriage records are all admissible.
- *Statements in Learned Treatises, Periodicals, of Pamphlets.* This information is admissible *if an expert witness* says that it is reliable.
- *Excited Utterance.* A statement about a "startling event or condition" may be admissible, if it's made while the declarant is still excited about it. If you say things about an accident that you were just in, like, maybe, "It was all my fault!" the jury will be able to hear about it.
- *Statement Against Interest* - something that is probably true because it is

against the personal or monetary interest of the person saying it, or would tend to subject them to "hatred, ridicule, or disgrace" under the circumstances.

Wrapping Up Hearsay

So, what's the point of this? Simply that courts are concerned with whether or not the evidence that gets to the jury is generally reliable - if, on balance, it *might* be true and is worthy of being considered.

While the starting point is that hearsay - statements by people made in the past, not under oath, now being offered to prove what they said back then - is usually not reliable enough to permit the jury to consider it, there are a LOT of exceptions to that rule.

One of the most important things that good lawyers do when preparing cases for trial is examine all of the possible evidence - both in support of and against your case - and determine how to either get that evidence in front of or keep it away from the jury. They simply can't do that unless they know the ins and outs of the Rule Against Hearsay and all of the exceptions to it.

Coming Up

We have at least one more crucial area to cover under the general category of Evidence: *Expert Witnesses*.

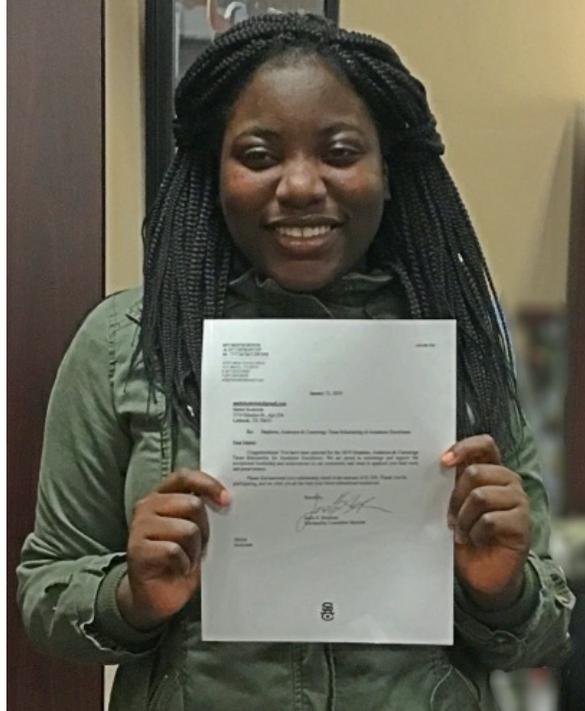
Experts play a huge role in modern litigation. It probably will take two or three issues to even hit the high points of Expert Witnesses. And that's where we'll start the next time we turn to Evidence in

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***Stephens Anderson & Cummings Awards the
2019 Texas Academic Excellence Scholarship
to Mabel Sodeinde***



Stephens Anderson & Cummings is thrilled to award its 2019 Texas Academic Excellence Scholarship to Mabel Sodeinde.

This scholarship is awarded annually to a full-time college or university student who submits an essay and who has demonstrated excellence in leadership and ethical standards on campus or in their local community. Sodeinde truly exemplifies these qualities.

A hard-working Political Science and History major (projected graduation date of 2022) at Texas Tech University where she maintains a 3.5 GPA, Ms. Sodeinde has represented the Tech Pre-Law community as an ambassador since May 2018, recruiting and organizing events aimed at connecting students with practicing attorneys.

Sodeinde also acted as Pac Leader for Texas Tech's Mentor Tech Protégé Advisory Committee, mentoring incoming Freshmen and transfer protégés through study groups, networking, professional workshops, and volunteer events.

Between August 2017 and May 2018, Sodeinde was chair on the Complex Council Health Affairs, where she presented ideas for student well-being in campus residence halls and coordinated events with the Council to address critical issues on campus, including alcohol abuse and sexual assault.

In August 2017, Sodeinde became a member of Texas Tech's Black Student Association, where she has participated in meetings, debates, and events to educate the public and address issues in the black community on campus. She led a "Die in" to create awareness about police brutality and show the similarities between the Black Lives Matter and March for Our Lives movements.

A coordinator for Texas Youth and Government between 2015 and 2017, Sodeinde introduced high school students to the fundamentals of politics and lawmaking, and recruited minority students to debate issues facing their

communities.

SAC chose Sodeinde for the 2019 Texas Scholarship of Academic Excellence because we believe she exemplifies the values and determination needed to be a leader in the community. We are honored to provide her with this scholarship, and wish her the best of luck in her future endeavors.

You can find Ms. Sodiende's wonderful essay [here](#).

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