

## **In-Class Materials: Hearsay Issues in Child Victim Cases**

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### **Selected Hearsay Exceptions**

#### **Rule 803. Hearsay exceptions; availability of declarant immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present Sense Impression. – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) Excited Utterance. – A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) Then Existing Mental, Emotional, or Physical Condition. – A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (4) Statements for Purposes of Medical Diagnosis or Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- ....
- (24) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

#### **Rule 804. Hearsay exceptions; declarant unavailable.**

....  
(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- ....
- (5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

## Case Scenario: State v. Defendant

Defendant is charged with assault inflicting serious injury, first-degree rape, and indecent liberties. The victim is a five-year-old female ("Child"). Defendant is the live-in boyfriend of Child's mother. The following additional facts flesh out the case.

Suspecting that Defendant is abusing Child, Grandmother confronts Mother and tells her to kick Defendant out of the house. Mother doesn't believe that Defendant is abusing Child and does nothing. Later, Child visits Grandmother. While bathing Child, Grandmother sees that Child's bottom is cut and bruised. When Grandmother asks what happened, Child says: "Last night I been whipped with a belt until my bootie bled." Grandmother hugs Child and says, "Tell me everything. If mommy won't fix this, I will. We'll go to the police and end this forever. I will take care of you." Child then tells Grandmother that Defendant hurt her.

Two hours later, Grandmother takes Child to Pediatrician I's office. Pediatrician I examines Child, who is withdrawn and frightened. Pediatrician I provides treatment, including disinfecting and bandaging the wounds and giving a tetanus shot. While conducting an examination and in order to provide treatment, Pediatrician I asks Child what happened. Child, crying, says that Defendant hurt her with a belt. Pediatrician I makes a report to DSS, and a DSS Social Worker sees the Child and Grandmother that day. DSS files a petition and obtains a nonsecure custody order giving DSS custody and approving placement with Grandmother. Social Worker makes arrangements to take Child and Grandmother to the Care Bear Child Advocacy Center ("the Center"), a multidisciplinary child abuse center. Simultaneously with this, the police are notified and Officer begins a criminal investigation. A child abuse team consisting of Officer, Social Worker, a nurse, and a pediatrician with expertise in child abuse discusses Child's case in preparation for Child's interview and medical examination the next day.

Social Worker takes Grandmother and Child to the Center the next day where Child is interviewed by Social Worker and Nurse. According to Center protocol, the interview is taped and Officer watches through one-way glass. Social Worker is in regular "street" clothing, wearing a name badge; Nurse is in a uniform. The room is a child-friendly room, with child-sized furniture and toys. Social Worker introduces Nurse to Child and explains that Child will be examined by a doctor after they are done talking. Social Worker says that they need to get some information "for the doctor so that she can take care of your hurt parts." When Social Worker starts asking questions, Child is non-responsive, hides her face, and cries. Social Worker then gives Child anatomically correct dolls and asks Child to show her what happened. Child undresses an adult male doll and a female child doll. Child shows the male doll engaging in vaginal intercourse with the child doll and then beating the child doll when the child doll cries. Social Worker asks Child to identify the child doll and the Child says, "Me." Social Worker asks Child to identify the male doll and Child says, "Defendant." No leading questions are used. However, Social Worker did not discuss the need for truthfulness with Child.

Social Worker and Nurse brief Pediatrician II on the interview. Child is taken to a medical examination room, where Pediatrician II tells Child that she needs to do another examination to "check out some parts that the other doctor didn't look at so that we can take care of any part of you that is hurt." Pediatrician II also tells Child that she wants "to look at the boo-boos the other doctor took care of to see how they are doing." Pediatrician II is wearing a white medical coat. While examining Child, Pediatrician II asks Child what happened to her. Child repeats what she told Social Worker and Nurse, exhibiting the same demeanor as in the prior

interview. Pediatrician II's examination reveals injuries consistent with vaginal penetration, including the absence of a hymen and bruising and notching at six o'clock on the vaginal opening. Pediatrician II orders medical testing for sexually transmitted diseases, applies an antibiotic to the wounds on Child's buttocks, and provides Grandmother with instructions to treat Child's wounds at home. Pediatrician II schedules a follow-up appointment for 3 days later. Child then goes home with Grandmother.

Social Worker arranges for mental health treatment for Child by Psychologist, which begins the next week. Child's weekly appointments with Psychologist continue until present. At Child's first appointment with Psychologist, 5 days after the alleged abuse, Child described the alleged conduct, identifying Defendant as the perpetrator. At the time, Child was crying, shaking, and clearly frightened.

At trial, Social Worker testifies that the purpose of the interview was "forensic" and to determine if further medical treatment was necessary. Psychologist testifies that as a result of the abuse, Child suffers nightmares, is withdrawn, exhibits inappropriate sexual behavior with other children, and is extremely frightened by men. Psychologist further testifies that Child would be further traumatized by having to face Defendant in court and discuss the abuse and that requiring Child to do so would set back her treatment and recovery by months. Thus, the prosecutor seeks to establish that Child was abused without her testimony. Specifically, the prosecutor seeks to introduce Child's statements to Grandmother, Pediatrician I, Social Worker, Pediatrician II, and Psychologist.

**Hinnant Worksheet**

**803(4) – Statement for Purposes of Medical Diagnosis and Treatment**

**In order to admit evidence under this exception the judge must find that the 2 prongs of the *Hinnant* test are satisfied. Those prongs are:**

**Prong (1)**

**Prong (2)**

**Factors considered when determining whether Prong (1) is satisfied:**

- (1) \_\_\_\_\_  
\_\_\_\_\_
- (2) \_\_\_\_\_  
\_\_\_\_\_
- (3) \_\_\_\_\_  
\_\_\_\_\_
- (4) \_\_\_\_\_  
\_\_\_\_\_

**Does a child victim's identification of the alleged perpetrator satisfy this prong?**

**Yes**

**No**

## **Applying the *Hinnant* Test**

### **Statements to Pediatrician I**

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

### **Statements to Social Worker**

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

**Statements to Pediatrician II**

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

**Statements to Grandmother**

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

## Residual Hearsay Exception Worksheet

The 6-prongs of the test for admissibility under the Rule 803(24) & 804(b)(5) residual exceptions are:

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

4. \_\_\_\_\_

5. \_\_\_\_\_

6. \_\_\_\_\_

The 3<sup>rd</sup> prong requires  
you to look at:

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

4. \_\_\_\_\_

\*

\* Note: For this factor watch out for:

The following occurs at a voir dire on Child's competency.

PROSECUTOR: Do you know why you are here today?

CHILD: Because of my story

PROSECUTOR: Your story?

CHILD: My story about Boyfriend

PROSECUTOR: If I told you that a unicorn was standing beside me right here and now, would that be a true story or a made up story?

CHILD: It could be real.

PROSECUTOR: Is there a unicorn standing beside me right now?

CHILD: There could be a magical no see you unicorn.

PROSECUTOR: When you told your story about D, was that a made up or a real story?

CHILD: I don't know.

PROSECUTOR: A real story is a story about something that really and truly happened. Do you understand that?

CHILD: Or it could be from a dream.

PROSECUTOR: Was your story about D from a dream or what really and truly happened.

CHILD: I believe in both.