

Hearsay and Its Exceptions—Quick Tips

The key to understanding hearsay is grasping its purpose—the right to cross-examination. To avoid impermissible hearsay, opposing counsel must be able to test the out-of-court statement at the time it was made against the four dangers of testimonial evidence:

- faulty perception
- inaccurate memory
- ambiguity
- insincerity (bias, prejudice, interest, corruption)

The witness or source of information must be available for cross-examination *at the time* the information is given on these issues.

Three-Step Analysis

To determine whether evidence is hearsay, ask yourself these three questions:

- Is the statement out of court?
- Is it an assertive statement?
- Is it being offered for the truth of the matter being asserted?

To qualify as hearsay, all three parts of the hearsay equation must be met. [Evid C §1200]

Out of Court?

Even if declarant is in court, his or her prior statement is out of court for hearsay purposes since it was made at a time other than while testifying at this trial. Any writing and audio or video segment will be considered out of court for hearsay purposes. [Evid C §1200.]

Assertive Statement?

According to Evid C §225, “ ‘Statement’ means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended as a substitute for oral or written verbal expression.”

Has information been conveyed in the out-of-court statement? A question or directive is usually not a “statement” unless it contains an implied assertion, *e.g.*, “Why were you driving so fast?”

Conduct, *e.g.*, pointing out a suspect in a lineup, can be an assertive statement if intended as such. Without intent, conduct is not assertive and therefore not hearsay, *e.g.*, the victim fainting when the defendant walks into the room.

Offered for the Truth?

Operative Words: An out-of-court statement may be permissible nonhearsay if the words themselves have legal significance just by being uttered, such as exchange of name, address, and insurance information as mandated by the Vehicle Code. What matters is whether the words were actually spoken. [Evid C §1200.]

When the Hearsay Rules Do and Do Not Apply:

The Hearsay Rules *Do* Apply During:

- Juvenile dependency hearings. Exception: child witnesses, if certain requirements concerning reliability, availability, and notice have been met. [*In re Cindy L* (1997) 17 C4th 15, 29–30.]

The Hearsay Rules *Do Not* Apply During:

- Small-claims trials and any subsequent trials *de novo* in Superior Court. Trial judge should still take Evid C §352 into account when deciding whether to admit such statements. [*Houghtaling v Superior Court* (1993) 17 CA4th 1128, 1138–1139.]
- Sentencing hearings, if evidence seems reliable. [*People v Lamb* (1999) 76 CA4th 664, 682.]
- Probation-violation hearings, if evidence seems reliable. [*People v Arreola* (1994) 7 C4th 1144, 1160.]
- SVP hearings. [*People v Otto* (2001) 26 Cal. 4th 200.]

Hearsay Exceptions

Exceptions to the hearsay rule appear in statutes, decisional law, and the Constitutions of California and U.S.

Hearsay Exceptions That Apply Whether or Not Declarant Is Available

- ***Spontaneous Statements***: Statements relating to startling events or condition made while the declarant was under the stress of excitement caused by the event or condition. A statement made even days after the startling event can be excited utterance, so long as the declarant is still under the stress of the startling event. [Evid C §1240.]
- ***Business Records***: Records created during the ordinary course of business are considered reliable and can usually be brought in under this exception if the proper foundation is laid.
The business records exception restricts admissible entries to those of an “act, condition, or event.” For purposes of this exception, California trial judges generally restrict permissible “condition[s]” to those which are fairly easy to diagnose and do not require cross-examination—*e.g.*, simple fractures, bruises, lacerations, and patient complaints rather than medical diagnosis requiring interpretation and expert opinion. [Evid C §1271.]
- ***Party Admissions***: A party can adopt another’s statement by his or her “words or other conduct” including silence. Risk: may be relying on Fifth Amendment. [*People v Castille* (2003) 108 CA4th 469.]

- ***Prior Inconsistent Statements:*** A prior inconsistent statement need not be under oath. [Evid C §1235.]
- ***Prior Consistent Statements:*** A prior consistent statement must precede either the inconsistent statement that has been admitted or precede any alleged motive to lie. [Evid C §1236.]
- ***Prior Identifications:*** The Prior Identification exception applies only to prior statements of witnesses who actually testify at the trial. [Evid C §1238.]

Hearsay Exceptions That Apply Only if Declarant Is Unavailable

- ***Statements under belief of impending death.*** The declarant need not actually die, just believe he or she is about to. [Evid C §1242.]
- ***Declaration Against Interest:*** Regarding a statement that would incriminate or expose the declarant to liability or ridicule such that it can be assumed he would make such a statement only if it were true. [Evid C §1230.]
- ***Former Testimony:*** If the testimony was given under oath and the party against whom the testimony is being proffered was present and had the opportunity to cross examine the witness at that time. [Evid C §1290.]