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Substantive Track – Session 1

Hearsay

Presenters:
Brian D. Anderson
Everson Law Firm, S.C., Green Bay

Stephen W. Sawyer
Sawyer Law LLC, Stevens Point

About the Presenters...

Brian D. Anderson is a shareholder with The Everson Law Firm in Green Bay, Wisconsin. Mr. Anderson defends physicians and medical providers in civil litigation and administrative actions across Wisconsin. He also represents insurance companies and insureds, litigates insurance coverage issues, and handles appeals in both state and federal courts. Prior to joining The Everson Law Firm, Mr. Anderson was an assistant professor of law teaching international and comparative law subjects, courses in legal research, and a required first-year course at the Pettit College of Law at Ohio Northern University. He was also engaged in law reform projects as a rule of law advisor in eastern Europe, the Balkans, and sub-Saharan Africa. Mr. Anderson earned his B.A. in political science from the University of Wisconsin-Milwaukee, his master's degree in information science from the University of Illinois, and his J.D. and LL.M. from Ohio Northern University.

Stephen Sawyer is a former officer and helicopter pilot in the United States Navy. He grew up in Milwaukee, Wisconsin. After graduating with honors from the University of Notre Dame Law School he practiced corporate finance and financial institutions law in Milwaukee. He left corporate practice after September 11, 2001 to become a criminal law attorney working briefly in the Milwaukee County District Attorney's Office before going out on his own as a criminal defense attorney and sole practitioner. He now practices with his wife, Attorney Julie Sawyer, at Sawyer Law LLC in Stevens Point, and is the current President of the State Bar of Wisconsin.

Hearsay

From the Perspective of a Criminal Defense Attorney

Attorney Stephen W. Sawyer
Sawyer Law LLC – Stevens Point, WI

Summary of what we will cover:
We will talk about the definition of hearsay, the exemptions from the definition, and the two types of exceptions – those that apply only when the declarant is unavailable, and those that apply regardless of the availability of the declarant. We will also talk about what qualifies as "unavailable".

I. Definition of Hearsay

- An out-of-court statement offered in court to prove the truth of the matter asserted

  Two parts:
  1) A statement made outside of the courtroom in the current proceedings, and
  2) It is being offered to the trier of fact (judge/jury) to show that what was said in the statement is true (the truth of the matter asserted in that statement).

  - Note – the person making the out-of-court statement (the declarant) must be making a statement from personal knowledge.
  - A "statement" is not a question or a command but is a sentence or phrase (or non-verbal communication like nodding the head up and down or pointing a finger at someone) that is imparting some information.

II. Statements that are NOT hearsay [§908.01(4)].

- Prior statement by a witness
  - Declarant is in court testifying under oath and subject to cross-examination and statement is:
    1. Inconsistent with declarant's testimony (called prior inconsistent stmt), or
    2. Consistent with declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
    3. ID of a person made soon after perceiving the person, or

  - Admission by a party opponent: a statement offered against a party and is:
    1. The party's own statement, in either the party's individual or a representative capacity, or
    2. A statement of which the party has manifested the party's adoption or belief in its truth, or
    3. A statement by a person authorized by the party to make a statement concerning the subject, or

4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or
5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

*(This is the one of particular importance to a criminal defense attorney.)

Examples of statements that are NOT hearsay:

A. Alleged victim in a domestic abuse case in which the Defendant is charged with Battery testifies that the Defendant did not lay a hand on her that night during their argument. The prosecutor calls the responding officer to the stand and asks the officer what the alleged victim told him happened that night. The officer says the alleged victim told me the Defendant hit her with a closed fist in the left eye, which was consistent with her injuries.

Why is this not hearsay? It is a prior inconsistent statement.

B. During opening statements in a child sexual assault case, the defense attorney tells the jury that they will hear evidence that the alleged victim made up the allegations against her stepfather (the Defendant) when he filed to divorce her mother. The prosecutor calls the alleged victim's best friend as a witness to testify that the alleged victim told her about the assaults six months before the divorce was filed. The witness's account of what the alleged victim told her is the same as the trial testimony of the alleged victim.

Why is this not hearsay? It is a prior consistent statement offered to rebut a recent fabrication or improper influence or motive.

C. Joe is sitting in his car with an undercover cop and tells this cop that his buddy, Frank, is getting the drugs from his guy and will be bringing them to the car in a minute. Minutes later Frank comes to the car and hands the drugs to Joe. Joe hands Frank the pre-recorded buy money and hands the drugs to the cop. The cop gives the signal to his backup officers who descend upon them and arrest Joe and Frank. In the trial against Frank, the undercover cop testifies about what Joe told him Frank was doing before coming to the car.

Why is this not hearsay? It is a statement by a coconspirator during the course and in furtherance of the conspiracy.

So, let's say we have an out-of-court statement that is being offered into evidence to prove the truth of the matter asserted – Does this automatically mean it is hearsay, and therefore excluded?

- NO. –

There are two categories of Exceptions to the General Prohibition of hearsay.

1. Those in which the "availability" of the Declarant is immaterial (or "It doesn't matter whether the Declarant is available or not."), and
2. Those in which the Declarant must be "unavailable".

Let's first talk about what it means to be "unavailable" (Wis. Stat. §908.04).

908.04 Hearsay exceptions; declarant unavailable; definition of unavailability.

(1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

(c) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

What are the hearsay exceptions for which the availability of the declarant is immaterial:

(1) PRESENT SENSE IMPRESSION.
(2) EXCITED UTTERANCE.
(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.
(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.
(5) RECORDED RECOLLECTION.
(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY.
(6m) PATIENT HEALTH CARE RECORDS.
(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.
(8) PUBLIC RECORDS AND REPORTS.
(9) RECORDS OF VITAL STATISTICS.
(10) ABSENCE OF PUBLIC RECORD OR ENTRY.
(11) RECORDS OF RELIGIOUS ORGANIZATIONS.
(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES.
(13) FAMILY RECORDS.
(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.
(15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.
(16) STATEMENTS IN ANCIENT DOCUMENTS.
(17) MARKET REPORTS, COMMERCIAL PUBLICATIONS.
(18) LEARNED TREATISES
(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY.
(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY.
(21) REPUTATION AS TO CHARACTER.
(22) JUDGMENT OF PREVIOUS CONVICTION.
(23) JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES.
(24) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

I'm going to highlight a few of these exceptions, remember these are exceptions where the availability of the declarant is immaterial:

First – **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.

I had a case as an Assistant DA in Milwaukee where an off-duty cop witnessed a car run off the highway onto a grassy area, flip over, and come to rest. This off-duty cop witnessed the Defendant get out of the driver's side door of the car and walk around the car in an inch or two of snow. The officer did not observe anyone else get out of the car. Two on-duty officers arrived minutes later, and the off-duty cop described what he saw to the other officers. This off-duty cop was in the Army Reserves and between the accident and the trial for OWI was deployed to Iraq or Afghanistan. At trial, the Defendant took the stand and claimed that a regular at the bar the Defendant owned, whom he only knew as "Tom", was the person driving and that Tom left the scene before any officers showed up. Are the two on-duty officers allowed to testify about what the deployed off-duty officer told them he observed? Yes – it was a Present Sense Impression – a statement describing an event immediately after it happened.

Second – **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.

This is one of the favorite hearsay exceptions of prosecutors in a domestic violence case when the alleged victim does not show up for trial. If the police officers who were called to the scene describe the alleged victim as crying, shaking and visibly upset, they will usually be able to testify about what this alleged victim told them. The alleged victim's behavior is consistent with being under the stress of excitement caused by the event and is, thus, an Excited Utterance.

Be aware that if using Patient Health Care Records without a witness authenticated them, you must either provide a copy or have a copy available for inspection during regular business hours in the county of jurisdiction at least **40 days prior to the hearing or trial.**

Also be aware that if using a Learned Treatise, you must provide notice to opposing counsel at least **40 days before trial, or **20 days** if it is using to rebut the other side's learned treatise. **

Additionally, if the Judgment of Previous Conviction is based upon a plea, the plea must have been a "guilty" plea. If the plea was a "no contest" plea, it cannot be used to prove any fact essential to sustain the judgment.

Now for the hearsay exceptions for which the declarant must be "unavailable".

(1) FORMER TESTIMONY.
(2) STATEMENT OF RECENT PERCEPTION.
(3) STATEMENT UNDER BELIEF OF IMPENDING DEATH.
(4) STATEMENT AGAINST INTEREST.
(5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT.
(5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT.
(6) OTHER EXCEPTIONS.

It should be noted that Former Testimony is generally not used in criminal cases because of Confrontation Clause concerns (since *Crawford v. Washington*).

Remember that *Crawford* and subsequent confrontation cases draw the distinction between statements that are "testimonial" in nature and those that are not. The example of the off-duty cop deployed to Iraq or Afghanistan was before *Crawford*. It might be viewed differently post-*Crawford* because the statements of the off-duty cop were arguably "testimonial" and the absence of this witness (the declarant) at trial violated the Defendant's right of confrontation.

I'm going to highlight a few of these exceptions, remember these are exceptions where the declarant must be unavailable:

STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

Annotation to the Statute:

The recent perception exception under sub. (2) is intended to allow more time between the observation of the event and the statement, as opposed to the exceptions for present sense impression and excited utterances. In analyzing the recency of an event under the exception, the mere passage of time, while important, is not controlling but depends on the particular circumstances of the case. *State v. Weed*, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, 01-1476.

The time in the *Weed* case was eight days after the event.

STATEMENT UNDER BELIEF OF IMPENDING DEATH. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

Annotation to the Statute:

The admission of a dying declaration statement does not violate the constitutional right to confront witnesses. The confrontation right does not apply when an exception to that right was recognized at common law at the time of the founding, which the dying declaration exception was. The fairest way to resolve the tension between the state's interest in presenting a dying declaration and concerns about its potential unreliability is to freely permit the aggressive impeachment of a dying declaration on any grounds that may be relevant in a particular case. *State v. Beauchamp*, 2011 WI 27, 333 Wis. 2d 1, 796 N.W.2d 780, 09-0806.

In *Beauchamp* an emergency medical technician and a police officer who were attending to the victim before his death testified that the victim identified the defendant as the shooter.

"The dying declarations, while in this case were assumed testimonial in nature and were not subject to cross-examination, were constitutionally admitted under Crawford because the dying declaration was a recognized exception to the hearsay rule at the founding of the U.S. and Wisconsin Constitutions." – Wisconsin Rules of Evidence: A Courtroom Handbook, 12th Edition.

Hearsay

From the Perspective of a Civil Defense Attorney

Attorney Brian D. Anderson
The Everson Law Firm – Green Bay
banderson@eversonlaw.com

I. GOVERNING STATUTES AND BASIC FRAMEWORK

The principal provisions are in Chapter 908 of the Wisconsin Statutes.

The statutory text and annotations are available in Wisconsin Statutes, Chapter 908 .

A. The basic hearsay test — § 908.01(3)

A statement generally constitutes hearsay when:

1. It is a statement made outside the declarant's testimony at the current trial or hearing.
2. It is offered into evidence.
3. It is offered to prove the truth of what the statement asserts.

Example: A bystander testifies, "Another witness told me that the defendant was texting immediately before the collision."

- If offered to prove the defendant was texting, the testimony is hearsay unless an exclusion or exception applies.
- If offered only to explain why the bystander went to a particular location, it may be offered for a non-hearsay purpose, subject to relevance and unfair-prejudice objections. (*note:* The proponent cannot avoid the hearsay rule merely by labeling a statement "background" if its actual evidentiary use depends on the jury accepting it as true.)

B. Statements that are not hearsay — § 908.01(4)

These are statutory exclusions, rather than exceptions to hearsay.

1. Prior statements by a witness

A witness who testifies and is subject to cross-examination about a prior statement may have that statement admitted as non-hearsay when it is:

- **Inconsistent statements:** The witness's earlier statement conflicts with current testimony.
- **Consistent statements:** May be offered if used to rebut an express or implied charge of recent fabrication or improper influence or motive.

- **Identification:** The statement identifies a person soon after the witness perceived that person.

Example: In a premises-liability case, a store employee testifies that she never saw a spill. Her signed incident statement, made shortly after the fall, says she saw liquid on the floor before the plaintiff fell. The prior statement may qualify as an inconsistent statement under § 908.01(4)(a), assuming the witness testifies and is subject to cross-examination.

Wisconsin's statutory treatment of inconsistent statements allows qualifying statements to be used as substantive evidence, not merely to attack credibility. The other requirements of the rule still must be met.

2. Admissions by a party opponent

Under § 908.01(4)(b), a statement offered *against* a party is not hearsay if it is one of the following:

- The party's own statement.
- A statement the party adopted or manifested belief in.
- A statement by someone authorized to speak for the party on the subject.
- A statement by an agent or employee concerning a matter within the scope of that relationship, made during the relationship.
- A statement by a coconspirator during and in furtherance of the conspiracy.

Examples:

- **Contract:** A defendant emails the plaintiff, “I received the equipment but have not paid the remaining $25,000.” The email can be offered against the defendant as a party admission.
- **Employment:** A supervisor tells an employee, “I reduced your hours because you complained about safety.” If offered against the employer, the statement may qualify as an employee or agent admission, depending on the scope of the supervisor's duties and the circumstances.
- **Insurance or corporate litigation:** An employee's statement is not automatically admissible against the company simply because the person works there. The statement must meet the statutory agency requirements.

Note: a party admission need not have been against the speaker's interest when originally made. But a party's statement generally cannot be used under this provision by that same party simply to prove the party's own case.

C. Exceptions where the declarant's availability does not matter — § 908.03

These exceptions may apply whether or not the person who made the statement is available to testify. The key is to establish the particular exception's foundation.

1. Present sense impression — § 908.03(1)

A statement describing or explaining an event or condition made while the person is perceiving it, or immediately afterward.

Example: A pedestrian says to a companion, as a vehicle enters an intersection, "That truck is turning into the bike lane." The statement may qualify if it was made contemporaneously with the perceived event.

Note: The closer in time the statement is to the event, and the more directly it describes what the speaker perceived, the stronger the foundation. A later account made after discussing the event with others is less likely to qualify.

2. Excited utterance — § 908.03(2)

A statement relating to a startling event made while the declarant remains under the stress of excitement caused by that event.

Example: Immediately after a shelving unit collapses in a retail store, an injured customer cries out, "The shelf came down on her and she was just standing there!" The statement may qualify if the customer was still under the stress of the event.

Note: As with a present sense impression, the closer in time the statement is made, the more likely it will be admissible. They further away in time, the proponent must establish the circumstances supporting continued stress, or what made it an excited utterance. The fact that a statement was made shortly after an event is relevant but not necessarily dispositive to this test.

3. Then-existing mental, emotional, or physical condition — § 908.03(3)

This exception covers statements of the declarant's then-existing state of mind, emotion, sensation, or physical condition, including intent, plan, motive, pain, and bodily health. It generally does not allow a person to prove a past event simply by recounting a memory or belief about it.

Examples:

- **Intent:** "I plan to move out next month" may be relevant to show the declarant's then-existing intent.
- **Pain:** "My back hurts" may be admissible to establish the speaker's condition at that time.

- **Limitation:** "My back hurts because the defendant hit me last week" raises a separate issue. The statement of present pain and the assertion about the cause of that pain must be analyzed separately.

Note: Courts will distinguish a statement showing a person's then current state of mind from a statement offered to prove that an earlier event actually occurred.

4. Statements for medical diagnosis or treatment — § 908.03(4)

Statements describing medical history, symptoms, pain, sensations, or the inception or general character of an injury's cause may qualify when reasonably pertinent to diagnosis or treatment.

Example: A personal-injury plaintiff tells an emergency-room physician, "My neck started hurting when I was rear-ended this morning." The statement may be admissible to explain symptoms and the cause of injury for treatment purposes.

Important distinction: A statement made for treatment is not automatically proof of every disputed fact about fault. Statements identifying a particular person as responsible, assigning legal blame, or recounting details irrelevant to treatment require separate analysis. For example, under Wisconsin law a medical record containing a diagnosis or opinion is admissible but may be excluded if the entry requires explanation or a detailed statement of judgmental factors. See *Pophal v. Siverhus*, 168 Wis. 2d 533, 484 N.W.2d 555 (Ct. App. 1992).

A trial judge is to use sound judicial discretion in determining whether the circumstances dictate that the particular record should be admitted. *Noland v. Mutual of Omaha Insurance Co.*, 57 Wis. 2d 633, 641, 205 N.W.2d 388, 392 (1973). The factors a trial judge should follow in determining whether to admit a hearsay medical opinion or diagnosis are:

> If it is a routine diagnosis, readily observable, and one which in the judgment of the trial court competent physicians would not differ, the time and inconvenience of requiring the author to testify outweighs the need for producing him. If the entry requires explanation and is a matter of discriminating judgment, then the author should be present for cross-examination.

Id. at 641, 2056 N.W.2d at 392.

Note: Also review the exception under §908.03(6m) for patient healthcare records, which allows records to be admitted provided Notice is properly given. Notice must be made to allow the party to inspect the records *in the county where the trial is located* and the are separately provided to the opposing party *with a record custodian certification*.

If there is no certification of the records under §908.03(6m) they will not be admissible under this exception.

5. Recorded recollection — § 908.03(5)

A memorandum or record may be used if:

- The witness once had knowledge of the matter.
- The witness now has insufficient recollection to testify fully and accurately.
- The record was made or adopted when the matter was fresh in the witness's memory.
- The record is shown to reflect the witness's knowledge correctly.

Examples:

- A delivery driver cannot remember the precise time a shipment arrived but testifies that he accurately completed and adopted a delivery log immediately afterward. The log may qualify as a recorded recollection.
- A plaintiff in a personal injury action kept a contemporaneous log of pain, physical limitations, and other symptoms. (*Note:* this is different from a list that was created years after the facts documented, which were not made when the issues were fresh in the memory of the declarant.)

Note: This is different from refreshing recollection. If reviewing a document restores the witness's memory, the witness ordinarily testifies from the refreshed memory; the document does not become admissible automatically.

6. Business records — § 908.03(6)

One of the most important and useful exceptions in civil litigation.

A record may qualify when it records acts, events, conditions, opinions, or diagnoses and was:

- Made at or near the relevant time.
- Made by, or based on information transmitted by, a person with knowledge.
- Kept in the course of a regularly conducted activity.
- Made as a regular practice of that activity.

The foundation may be supplied by a custodian or other qualified witness, or by a statutorily compliant certification. The record may still be excluded if its sources or other circumstances indicate a lack of trustworthiness.

Examples:

- **Debt collection:** A lender offers account statements showing payments and the outstanding balance.
- **Employment:** An employer offers payroll records to establish wages and hours.

- **Personal injury:** A hospital offers routine treatment records documenting symptoms, examination findings, and treatment. (There are other, better, rules/exceptions to admit medical records into evidence.)
- **Commercial dispute:** A company offers regularly maintained inventory records to establish what goods were shipped.

Wisconsin-specific caution: In *Palisades Collection LLC v. Kalal*, 2010 WI App 38, and *Bank of America NA v. Neis*, 2013 WI App 89, the Wisconsin Court of Appeals addressed the foundation required for business records, including records originating with third parties. A witness must have sufficient knowledge of how the records were created or maintained to establish the statutory foundation. Merely receiving a file or possessing it in the ordinary course of business is not necessarily enough. In *Kalal* the court noted:

> Wis. Stat. § 908.03(6) does not require that the "custodian or other qualified witness" be the original owner of the records. However, under the plain language of this exception, being a present custodian of the records is not sufficient. The language is "as shown by the testimony of the custodian *or other qualified* witness." The only reasonable reading of this language is that a testifying custodian must be *qualified* to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.

Id at ¶20.

For records imported from another company, a proponent should be prepared to establish both how the records were created and how the receiving business integrated and relied on them. The better, or easier route, is to establish a foundation from the business that created the record in the first place.

7. Absence of a business record — § 908.03(7)

The absence of an entry in a qualifying business record may, in appropriate circumstances, be used to show that an event did not occur or that a matter did not exist.

Example: A contractor's regularly maintained delivery logs contain no record of the materials the supplier claims were delivered on a disputed date. The absence may support the contractor's position if the proponent establishes that deliveries of that kind would ordinarily be recorded.

The absence of an entry is not conclusive proof that the event never occurred.

8. Public records and reports — § 908.03(8)

Qualifying records or reports of public offices may be admissible when they set out activities of the office, matters observed under a legal duty to report, or certain factual findings from legally authorized investigations.

Examples:

- A party offers a qualifying government inspection report concerning a damaged public structure.
- NOAA weather records to establish snowfall on a particular date and a particular time; or to establish wind speed on a given day and time.

Note: A public record is not automatically admissible in its entirety. The court must examine the statutory category, the nature and source of the findings, and any applicable exclusion. A police report, for example, may contain several layers of statements requiring separate analysis.

9. Other notable exceptions under § 908.03

- (9) Records of vital statistics
  Example: A qualifying birth or death record in an estate dispute
- (10) Absence of a public record
  Example: No required permit appears in properly searched official records
- (11) Records of religious organizations
  Example: A qualifying record of marriage or other religious activity
- (12) Marriage, baptismal, and similar certificates
  Example: A qualifying certificate used to establish a family relationship
- (13) Family records
  Example: A family Bible entry concerning a person's birth
- (14) Records of documents affecting an interest in property
  Example: A qualifying recorded instrument in a title dispute
- (15) Statements in documents affecting an interest in property
  Example: A relevant statement in a deed or other property instrument
- (16) Ancient documents
  Example: An authenticated document at least 20 years old
- (17) Market reports and commercial publications
  Example: A generally relied-upon market price listing
- (18) Learned treatises
  Example: A qualifying scientific or technical publication, subject to statutory notice and foundation requirements
- (19) Reputation concerning personal or family history
  Example: Community or family reputation concerning ancestry
- (20) Reputation concerning boundaries or general history
  Example: Established community reputation concerning a longstanding property boundary
- (21) Reputation as to character
  Example: Reputation evidence where character is admissible under the applicable rules

- (22) Judgment of previous conviction
  Example: A qualifying felony conviction offered to prove an essential fact, subject to the statute's limitations
- (23) Certain judgments concerning history or boundaries
  Example: A qualifying judgment concerning a family relationship or boundary
- (24) Other exceptions
  Example: A statement with comparable circumstantial guarantees of trustworthiness, subject to the statutory requirements

Note: These provisions are not interchangeable. Some are rarely relevant to ordinary commercial or personal-injury cases; others, particularly business records and medical records, arise frequently.

D.. Exceptions requiring an unavailable declarant — §§ 908.04 and 908.045

Wisconsin law also permits certain statements when the declarant is unavailable, provided the specific exception is satisfied. Unavailability is a statutory concept, not simply a conclusion that the witness would be inconvenient to call.

1. What counts as unavailable? — § 908.04

The statute includes circumstances such as:

- A court-recognized privilege prevents the declarant from testifying about the subject.
- The declarant refuses to testify despite a court order.
- The declarant testifies to a lack of memory concerning the subject.
- The declarant is unable to be present or testify because of death or a then-existing physical or mental illness or infirmity.
- The declarant is absent, and the proponent has been unable to procure the declarant's attendance or testimony through process or other reasonable means.

The statutory requirements and any applicable limitations must be established. A witness who lives out of state, for example, is not automatically unavailable merely because obtaining testimony is difficult.

2.. Principal exceptions — § 908.045

a. Former testimony — § 908.045(1) & § 804.07

Former testimony from a deposition, prior hearing, or other qualifying proceeding may be admissible if the declarant is unavailable and the party against whom the testimony is offered had an opportunity and a similar motive to develop the testimony through examination.

Example: In an earlier lawsuit concerning the same construction defect, an engineer testified under oath about the defect. The engineer subsequently dies. The earlier deposition may be

admissible in a later related action if the statutory requirements, including the opportunity and similar motive to examine the engineer, are met.

Note: In Wisconsin a medical expert deposition can be used at trial for any purpose, under Sec. 804.07(1)(c)2 (“The deposition of a medical expert may be used by any party for any purpose, without regard to the limitations otherwise imposed[.]”)

b. Statement of recent perception — § 908.045(2)

A qualifying statement describing or explaining an event or condition made shortly after the declarant perceived it may be admissible *if the declarant is unavailable*.

Example: An unavailable witness made a prompt statement describing a vehicle's movement immediately before a collision. The proponent must establish the requirements of this particular exception; it is not enough that the statement sounds reliable.

c. Statement under belief of impending death — § 908.045(3)

A statement made while the declarant believed death was imminent may qualify when it concerns the cause or circumstances of what the declarant believed to be impending death.

Example: In a wrongful-death case, a victim's statement about the cause of the fatal injury may qualify if the statutory conditions are met.

d. Statement against interest — § 908.045(4)

A statement may qualify when, at the time it was made, it was sufficiently contrary to the declarant's pecuniary or proprietary interest, tended to expose the declarant to civil or criminal liability, or otherwise met the statutory criteria.

Example: A now-unavailable former business partner stated, “I diverted the client's payment into my own account.” If the statement was genuinely against the declarant's interest when made and the other requirements are met, it may be admissible in a civil fraud or accounting dispute.

A statement is not admissible merely because it is damaging to someone. The relevant question is whose interest it harmed when the declarant made the statement.

e. Personal or family history — § 908.045(5)

Certain statements about birth, adoption, marriage, divorce, death, ancestry, and family relationships may qualify.

Example: In an inheritance dispute, an unavailable family member's qualifying statement about a family relationship may be admissible.

f. Other qualifying statements — § 908.045(6)

The statute provides a residual category for qualifying statements not specifically covered by the preceding exceptions when the declarant is unavailable and the required guarantees of trustworthiness and other statutory conditions are present.

This is not a general license to admit any statement that appears credible. The proponent should identify the statutory elements and explain why the circumstances provide the required guarantees of trustworthiness.

A note about the dreaded "hearsay within hearsay" **— § 908.05**

It's not as hard as you think! A document may contain multiple layers of hearsay. Each layer must independently satisfy an applicable exclusion or exception.

Example: A business record containing a customer's statement

A trucking company regularly maintains an incident report. The report was prepared by a dispatcher in the ordinary course of business, but it includes this entry: "Customer reported that the driver admitted he was speeding."

There may be three separate layers:

1. The dispatcher's report, potentially admissible as a business record.
2. The customer's statement to the dispatcher, which needs its own basis for admissibility if offered for its truth.
3. The driver's alleged admission, which may qualify as a party-opponent statement if offered against the driver.

The fact that the dispatcher regularly creates reports does not automatically make every statement recorded in them admissible.

Another common example is a hospital record that repeats a patient's account of how an accident occurred. The record itself and the patient's statements within it require separate analysis.

II. COMMON EXAMPLES OF WHEN HEARSAY ISSUES ARISE IN CIVIL CASES

The following examples illustrate how the rules may operate in practice.

A. Personal injury and negligence

A plaintiff offers a 911 recording in which a caller describes a collision.

- The caller's contemporaneous description may qualify as a present sense impression or excited utterance, depending on the circumstances.
- The caller's own observations may be admissible if the applicable foundation is established.
- A secondhand statement within the call—for example, "someone told me the driver was drunk"—requires separate analysis.

Practical issue: Identify who made each statement, when it was made, and whether the speaker personally perceived the event.

B. Breach of contract and unpaid invoices

A plaintiff offers emails, invoices, and account ledgers to prove delivery and nonpayment.

- An opposing party's email acknowledging receipt may be a party admission.
- A contract offered to establish the parties' legal rights and obligations is not necessarily hearsay merely because it is a written document.
- An account ledger may qualify as a business record, subject to foundation and trustworthiness.
- A supplier's invoice does not automatically prove that the invoiced goods were actually delivered.

Practical issue: Distinguish a document's legal effect from the truth of factual assertions contained in it.

C. Employment discrimination or retaliation

An employee offers a manager's email discussing the employee's termination.

- A statement by the manager may qualify as an admission against the employer if the agency and scope requirements are met.
- An employee's own statement offered by the employee to prove the employee's case does not automatically qualify as a party-opponent admission.
- A coworker's account of what another employee said may involve additional hearsay layers.

Practical issue: Establish the speaker's role, authority, and relationship to the issues in the case.

D. Medical expenses and injury causation

A plaintiff offers medical records to establish treatment, symptoms, and injury.

- Routine records may qualify under the business-record exception.
- Statements made for diagnosis or treatment may independently qualify.
- A medical opinion may raise additional expert-evidence issues.
- Statements repeating what another person said about the accident may require a separate hearsay analysis.

Practice Guide: Hearsay Evidence Admissibility Checklist

1. Identify the exact statement and the person who made it.
2. Specify the proposition the statement is offered to prove.
3. Determine whether it is hearsay under Wis. Stat. § 908.01(3).
4. Identify a non-hearsay purpose, statutory exclusion, or specific exception.
5. If relying on unavailability, establish the requirements of §§ 908.04 and 908.045.
6. Analyze every additional layer under § 908.05.
7. Prepare the necessary foundation, authentication, witness testimony, or certification.
8. Check relevance, unfair prejudice, privilege, and other evidentiary objections.
9. Confirm compliance with discovery, summary-judgment, and pretrial deadlines.

Practical Tip: Be prepared for the most critical or important statements you want to have admitted at trial, or that are important for another evidentiary purpose (e.g. summary judgment). Have a response ready for a hearsay objection, or preemptively assert the basis for admissibility. Expect that the mere objection of ‘hearsay’ will come up at any given time when offering an out of court statement or document into evidence.