

HEARSAY CHART

This chart was prepared by Children's Law Center as a practice aid for attorneys representing children, parents, family members and others in the neglect system. This chart does not constitute or substitute for legal advice. Attorneys should always do their own independent research and analysis before deciding how or whether to use the information in this chart. A complete discussion of all Hearsay-related issues in D.C. and Federal law is beyond the scope of this chart, which includes common hearsay issues and a sampling of related supports in D.C. and Federal law. This chart is intended as a practice aid and is not necessarily comprehensive. Instead, it aims to provide information on a number of the most common hearsay issues. Also, please note that the Federal Rules of Evidence (FRE) have not been formally adopted or incorporated by the D.C. Superior Court and the D.C. Court of Appeals, although D.C.'s controlling case law and statutes on evidence largely model the Federal Rules. In addition, many of the cases listed below are criminal cases, and attorneys should conduct their own analysis as to whether they can be applied to the civil context. Cases which apply the rule at issue to proceedings in Family Court have been provided in some cases, if available. Additional resources on the law of evidence include The Law of Evidence in the District of Columbia (5th Ed.) by Hon. Steffen W. Graae, Hon. Henry F. Greene, and Brian T. Fitzpatrick (which includes numerous relevant case citations) and Trial Techniques by Thomas A. Mauet.

Introduction: Hearsay is generally defined as 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. Hearsay statements are subject to proper objection¹ unless they are 'non-hearsay' or fall into one of the enumerated exceptions to the hearsay rule, some of which are discussed below.²

¹ Jones v. U.S., 17 A.3d 628 (D.C. 2011) (On proper objection, the party seeking admission of the out-of-court statement has the burden to identify the appropriate exception and to explain how it is applicable).

² Hearsay statements may also be admitted if they are being offered for a purpose other than to prove the truth of the matter asserted. Further discussion of this issue and analysis is beyond the scope of this Practice Kit.

NON-HEARSAY

Type	Elements	Statute/Case/Rule
Admission by a Party Opponent	Statement of a party is admissible if offered by an adverse party	<p><u>Harris v. U.S.</u>, 834 A.2d 106 (D.C. 2003); <i>see also</i> FRE 801(d)(2)</p> <p><u>Wilson v. U.S.</u>, 995 A.2d 174 (D.C. 2010) (considering what constitutes an “adoptive admission”)</p> <p><u>In re K.J.</u>, 11 A.3d 273 (D.C. 2011) (although the respondent was a party to the proceedings, her statements were not against interest, and thus were properly excluded as hearsay)</p> <p><u>Bridges v. Clark</u>, 59 A.3d 978 (D.C. 2013) (an affidavit attached to a pretrial motion is admissible as an admission of a party-opponent)</p>
Prior Identification	<ul style="list-style-type: none"> ▪ Prior statement of identification made after perceiving person identified ▪ Identifying witness must be available for cross-examination ▪ The exception applies to statements of identification, but not to detailed accounts of the actual crime 	<p>D.C. Code §14-102(b)(3); <i>see also</i> <u>Brown v. U.S.</u>, 840 A.2d 82 (D.C. 2004), FRE 801(d)(1)</p> <p><u>Sparks v. U.S.</u>, 755 A.2d 394 (D.C. 2000) (prior identifications are admissible even when, at trial, the witness recants or is uncertain of identity)</p>
Prior Consistent Statement by Witness	<ul style="list-style-type: none"> ▪ Statement consistent with witness’ testimony ▪ Prior statement being used to rebut express or implied charge of recent fabrication of witness or improper motive ▪ Declarant testifies, subject to cross-examination 	<p>D.C. Code §14-102(b)(2); <i>see also</i> FRE 801(d)(1)</p>
Prior Inconsistent Statement by Witness	<ul style="list-style-type: none"> ▪ Statement inconsistent with witness’ testimony ▪ Prior statement given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ▪ Declarant testifies, subject to cross-examination 	<p>D.C. Code §14-102(b)(1); <i>see also</i> FRE 801(d)(1)</p> <p><u>Diggs v. U.S.</u>, 28 A.3d 585 (D.C. 2011) (witness’s memory loss at trial is sufficient basis to admit his grand jury testimony)</p> <p><u>Ford v. U.S.</u>, 487 A.2d 580 (D.C. 1984) (omission of a material circumstance is an inconsistency that can open the door to impeachment)</p>

HEARSAY EXCEPTIONS

Type	Elements	Statute/Case/Rule
Business records	<ul style="list-style-type: none"> ▪ Recorded writing or record made as memorandum or record of any act, transaction, occurrence, or event ▪ Report must have been made at or near time of the regularly conducted business activity ▪ Report was prepared in the regular course of business ▪ Either the original maker of the business record must have personal knowledge of the information in the record or must have received the information from someone with such personal knowledge and who is acting in the regular course of business 	<p>D.C. Super. Ct. Civ. R. 43-I; D.C. Family Ct. R. Q; <u>Clyburn v. D.C.</u>, 741 A.2d 395 (D.C. 1999) (with important clarification of personal knowledge requirement in Rule 43-I and Family Court Rule Q); <i>see also</i> FRE 803(6)</p> <p><u>Dutch v. U.S.</u>, 997 A.2d 685 (D.C. 2010) (Under the business records exception to the hearsay rule, it is the data, not the particular format in which the data are stored or presented, that constitutes a business record)</p> <p><u>Note:</u> Be aware of hearsay within hearsay and remember that the record still needs to meet the authenticity requirement.</p>
Excited Utterance	<ul style="list-style-type: none"> ▪ Presence of a serious occurrence which causes a state of nervous excitement or physical shock in the declarant ▪ Declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it ▪ Presence of circumstances which in their totality suggest spontaneity and sincerity of the remark 	<p><u>Nicholson v. U.S.</u>, 368 A.2d 561 (D.C. 1977) (sets out three-part test); <i>see also</i> FRE 803(2)</p> <p><u>Melendez v. U.S.</u>, 26 A.3d 234 (D.C. 2011) (when a declarant is a child, statements need not be as contemporaneous as in the case of an adult)</p> <p><u>Brown v. U.S.</u>, 27 A.3d 127 (D.C. 2011) (declarant was conscious and able to deliberate after the attack and before he was found, but evidence supported inference that utterances were not likely deliberative)</p> <p><u>Mayhand v. U.S.</u>, 2015 WL 4113379 (D.C. July 9, 2015) (recent case applying the <i>Nicholson</i> three-part test, and concluding that declarant's accusatory statements about the defendant during a seventeen-minute 911 call are inadmissible as excited utterances because none of the three <i>Nicholson</i> factors are met)</p>
Statements Made for Purposes of Medical Diagnosis or Treatment	<ul style="list-style-type: none"> ▪ Statement made by a patient, family member, or person with special relationship to declarant ▪ Statement made to medical personnel ▪ Statement reasonably related to medical diagnosis, and not merely made to elicit evidence for use at trial 	<p><u>Sullivan v. U.S.</u>, 404 A.2d 153 (D.C. 1979) (statement may include cause of injury)</p> <p><u>Galindo v. U.S.</u>, 630 A.2d 202 (D.C. 1993) (statement may include child's report of sexual abuse)</p> <p><u>Jones v. U.S.</u>, 813 A.2d 220 (D.C. 2002) (statement may refer to psychological and emotional consequences of abuse)</p> <p><u>In re Kya.B.</u>, 857 A.2d 465 (D.C. 2004) (statements made to medical workers about the cause of injuries fall within the medical diagnosis exception to the hearsay rule because explaining the cause of injuries may facilitate treatment)</p>

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		<p><i>But see In re Ca.S.</i>, 828 A.2d 184 (D.C. 2003) (limiting application when physician secured by the Gov't for litigation); <i>In re N.P.</i>, 882 A.2d 241 (D.C. 2005) (limiting application when statements made at Children's Advocacy Center during court-ordered examination)</p> <p><i>See also</i> FRE 803(4); Improper Opinion (including Expert) in Common Objections chart</p>
Recorded Recollection	<ul style="list-style-type: none"> ▪ Witness had first-hand knowledge of event ▪ Statement made at or near the time of the event while declarant had clear and accurate memory of event ▪ Witness lacks present recollection of the event ▪ Witness must adopt the statement and attest to accuracy 	<p><u>Mitchell v. U.S.</u>, 368 A.2d 514 (D.C. 1977)</p> <p><u>Isler v. U.S.</u>, 824 A.2d 957 (D.C. 2003)</p> <p><i>See also</i> FRE 803(5)</p> <p><u>Note</u>: This is contrasted with refreshing the recollection of a witness on the stand. [<u>Wilkins v. U.S.</u>, 582 A.2d 939 (D.C. 1990); <u>Jones v. U.S.</u>, 579 A.2d 250 (D.C. 1990)]</p>
Present Sense Impression	<ul style="list-style-type: none"> ▪ A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter ▪ Declarant need not be available for cross examination ▪ Important that the statement was truly spontaneous and not subject to conscious reflection or recall from memory 	<p><u>Hallums v. U.S.</u>, 841 A.2d 1270 (D.C. 2004); <i>see also</i> FRE 803(1)</p> <p><u>Note</u>: Narrower in scope and subject to fewer infirmities than the exception for excited utterances.</p>
State of Mind	<p>Statement concerns the declarant's state of mind and declarant's state of mind is at issue. Types:</p> <ul style="list-style-type: none"> ▪ then-existing emotional state ▪ declarant relates to past bad act of defendant ▪ statement conveys intent of declarant to perform an act in the future <p><u>Note</u>: The factfinder is not permitted to consider these statements for their truth, but only to show the state of mind of the declarant</p>	<p><u>Clark v. U.S.</u>, 412 A.2d 21 (D.C. 1980); <i>see also</i> FRE 803(3)</p> <p><u>Evans-Reid v. D.C.</u>, 930 A.2d 930 (D.C. 2007)</p> <p><u>Jones v. U.S.</u>, 17 A.3d 628 (D.C. 2011)</p>
Statement Against Interest	<p>Statement which at the time it was made was against the declarant's pecuniary, proprietary or penal interest such that a reasonable declarant would not have made the statement unless he believed it to be true</p> <ul style="list-style-type: none"> ▪ available only when declarant is unavailable 	<p><u>U.S. v. Hammond</u>, 681 A.2d 1140 (D.C. 1996); <i>see also</i> FRE 804(b)(3)</p>

