
Hearsay and Circumstances of Its Admissibility

1. Which of the items are admissible on the issue of what description the police officer heard?

The defendant offers three items as evidence. First, the police officer's testimony relating the description he heard. Second, the police dispatcher's testimony relating the description he read over the radio. Third, the note containing the description the police dispatcher testifies he read over the radio. The plaintiff sued a police officer for false arrest. The police officer's defense was that, based on a description he heard over the police radio, he reasonably believed the plaintiff was an armed robber. A police radio dispatcher, reading from a note, had broadcast the description of an armed robber on which the police officer claims to have relied.

- Only the police officer's testimony relating the description he heard
- Only the police officer's testimony relating the description he heard and the note containing the description the police dispatcher testifies he read over the radio
- Only the police dispatcher's testimony relating the description he read over the radio and the note containing the description the police dispatcher testifies he read over the radio
- **All three items offered by the defendant**

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). A statement that would otherwise be inadmissible to prove the truth of the matter asserted may nevertheless be admitted to show the statement's effect on the listener, such as to establish knowledge, notice, or motive.

The best evidence rule is more accurately called the "original document rule." The rule is as follows: In proving the terms of a writing (recording, photograph, or X-ray), where the terms are material, the original writing must be produced. Fed. R. Evid. 1002. The rule only applies when the writing is being offered to prove the terms contained within it.

D is correct. The main determination at trial is what the police officer heard over the police radio, not whether the plaintiff was the actual armed robber. The question specifies this by stating that the police officer's defense was that he reasonably believed the plaintiff was the perpetrator.

Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted. An out-of-court statement is therefore not hearsay and admissible when it is being introduced to show its effect on the listener, not for the truth of its contents. In this case, all three items of evidence (the police officer's testimony, the police dispatcher's testimony, and the note) are relevant and admissible. None of these items are hearsay because they are not being offered for the truth of the matter asserted - what the armed robber actually looked like. Rather, they are being offered to show their effect on the listener - the police officer.

Note that the MBE, in questions that involve statements that are being admitted for the effect they have on their listener instead of the truth of the matter asserted, often specifically states that there is a defense or argument at issue that does not depend upon the statement being admitted for its truth. Here, the question did so by specifying that the police officer's defense was his allegedly reasonable belief.

The best evidence rule requires the production of the original document (if available) when a proponent is seeking to prove the terms of a writing. This rule does not apply the officer's testimony or the dispatcher's testimony because they are not relying on documents, but their own firsthand knowledge. As to the note, although it is a writing, it is not being offered to prove the truth of its terms. It is being offered to establish what the officer heard, regardless of whether the description was accurate. The police officer can testify as to what he believed he heard. The police dispatcher can testify as to what he read over the radio. The note the police dispatcher read from is admissible to show what the police officer heard. Therefore, all three forms of evidence are relevant to aid the fact finder in its determinations, and there are no reasons for their exclusion.

A is incorrect. The police officer's testimony relating to the description that he heard is admissible, but the other two evidence items are admissible as well, for the purpose of showing their effect on the listener. And, as stated above, the best evidence rule does not apply.

B is incorrect. The police officer's testimony regarding the description he heard and the note containing the description are both admissible, but the third piece of evidence, the police dispatcher's testimony, is also admissible to show the effect on the listener.

C is incorrect. As explained above, each of the three items is admissible for the purpose of showing the effect on the listener, and not otherwise excluded as inadmissible hearsay or subject to the best evidence rule.

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2. The plaintiff's testimony is

A plaintiff sued a defendant for copyright infringement for using in the defendant's book some slightly disguised house plans on which the plaintiff held the copyright. The plaintiff is prepared to testify that he heard the defendant's executive copyright assistant say that the defendant had obtained an advance copy of the plans from the plaintiff's office manager.

- **Admissible as reporting a statement of an employee of a party-opponent**
- Admissible as a statement of a co-conspirator
- Inadmissible, because it is hearsay not within any exception
- Inadmissible, because there is no showing that the assistant was authorized to speak for the defendant

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

Under FRE 801(d)(2), a statement by an opposing party (traditionally known as an "admission by a party-opponent") is not hearsay. Under this Rule, when the opposing party's statement is offered against that same opposing party and was made in either an individual or representative capacity, it is admissible. Statements by an agent or employee concerning any matter within the scope of her agency or employment, made during the existence of the agency or employment relationship, are admissible against the principal.

A is correct. A statement made by a party's employee concerning a matter within the scope of the employment, during the existence of the relationship, is excluded from the definition of hearsay as a vicarious admission of a party-opponent. Such vicarious admissions are admissible as substantive evidence against the principal. Because the statement the plaintiff is seeking to testify about was made by an executive assistant who was working on copyright matters, the statement is admissible against the defendant.

B is incorrect. This answer reaches the correct answer with the wrong reasoning. There is no indication that the executive copyright assistant is part of a conspiracy. No evidence suggests that the assistant was involved in obtaining a copy of the plans or in the alleged infringement, so the assistant should not be considered a co-conspirator. In addition, the assistant did not make the statement in furtherance of a conspiracy. Therefore, the statement is not admissible as a co-conspirator statement but as a vicarious admission by a party-opponent.

C is incorrect. Although the testimony was made out-of-court, it is considered non-hearsay under FRE 801(d)(2) because it was made by the defendant's employee during the course and scope of employment, and is therefore admissible against the defendant as a vicarious admission.

D is incorrect. This is a misstatement of the law. There is no requirement that the employee had to have been authorized to speak for the principal to be considered an admission. Because it was made by the defendant's employee in the scope of employment, the statement is not hearsay and is admissible against the defendant.

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3. The office manager's testimony that the invoices show ten deliveries is

A corporation sued a defendant for ten fuel oil deliveries not paid for. The defendant denied that the deliveries were made. At trial, the corporation calls its office manager to testify that the corporation's employees always record each delivery in duplicate, give one copy to the customer, and place the other copy in the corporation's files; that he (the office manager) is the custodian of those files; and that his examination of the files before coming to court revealed that the ten deliveries were made.

- Admissible, because it is based on regularly kept business records
- Admissible, because the office manager has first-hand knowledge of the contents of the records
- **Inadmissible, because the records must be produced in order to prove their contents**
- Inadmissible, because the records are self-serving

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, is admissible as proof of that act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make it at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. Fed. R. Evid. 803(6).

The best evidence rule is more accurately called the "original document rule." The rule is as follows: In proving the terms of a writing (recording, photograph, or X-ray), where the terms are material, the original writing must be produced. Secondary evidence of the writing, such as oral testimony regarding the writing's contents, is permitted only after it has been shown that the original is unavailable for some reason other than serious misconduct of the proponent. Fed. R. Evid. 1002.

If the proponent cannot produce the original writing or recording in court, he may offer secondary evidence of its contents in the form of copies, notes, or oral testimony about the contents of the original if a satisfactory explanation is given for the non-production of the original.

C is correct. Although the business records themselves would be admissible under FRE 803(6), the manager's oral testimony about the records would only be admissible in the event that the records themselves were shown to be unavailable, pursuant to the best evidence rule.

A is incorrect. This question asks whether the testimony about the records is admissible, not whether the records themselves are admissible. The business records exception to the hearsay rule would permit the records to be introduced for their contents. However, the best evidence rule precludes the testimony about the records as improper secondary evidence.

B is incorrect. The office manager's firsthand knowledge of the records may provide the authentication and identification of the records themselves, but his testimony about what is contained in the records must be shown by the original document if it is available.

D is incorrect. This answer reaches the correct answer with the wrong reasoning. The fact that the records are self-serving is irrelevant to the admissibility of the office manager's testimony, which is inadmissible because of the best evidence rule.

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4. The document is

In a medical malpractice suit by a patient against his doctor, the patient seeks to introduce a properly authenticated photocopy of the patient's hospital chart. The chart contained a notation made by a medical resident that an aortic clamp had broken during the plaintiff's surgery. The resident made the notation in the regular course of practice, but had no personal knowledge of the operation, and cannot remember which of the operating physicians gave him the information.

- **Admissible as a record of regularly conducted activity**
- Admissible as recorded recollection
- Inadmissible as a violation of the best evidence rule
- Inadmissible, because it is hearsay within hearsay

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). The most crucial determination is whether the statement is being offered to prove the truth of the matter within it, because if so, an exception must apply for it to be admissible.

A statement that contains hearsay within hearsay may be admissible as long as each part of the combined statement conforms to a hearsay exception. Fed. R. Evid. 805.

Although traditionally called a "business record," an exception applies to records kept by any "business, organization, occupation, or calling, whether or not for profit." Thus, the definition includes records made by churches, hospitals, schools, etc. Fed. R. Evid. 803(6). The record must have been made in the course of a regularly conducted business activity, and it must have been customary to make that type of entry (i.e., that the entrant had a duty to make the entry). The record itself must also have been maintained in conjunction with a business activity. Hospital records are generally admissible to the extent that they are related to the medical diagnosis or treatment of the patient (which is the primary business of the hospital).

Witnesses are permitted to refresh their memories by looking at almost anything - either before or while testifying. However, if a witness's memory cannot be revived, a party may wish to introduce a memorandum that the witness made or adopted at or near the time of the event. Use of the writing to prove the facts contained therein raises a hearsay problem; but if a proper foundation can be laid, the contents of the memorandum may be introduced into evidence under the past recollection recorded exception to the hearsay rule. Fed. R. Evid. 803(5).

The best evidence rule requires that, when proving the terms of a writing, where the terms are material, the original writing must be produced. However, duplicates are admissible to the same extent as originals in federal court unless a genuine question is raised about the original's authenticity, or under the circumstances, it would be unfair to admit the duplicate in the place of the original. Fed. R. Evid. 1003.

A is correct. The hospital chart is admissible as a record of regularly conducted activity. The chart is a record of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, that was kept in the course of a regularly conducted business activity. In addition, it was the regular practice of that business to make medical records in order to maintain a memorandum, report, record or data compilation. Although the resident may not be able to recall which physician gave him the information, the resident knew that the statement was made. Therefore, the document is admissible.

B is incorrect. The medical record is not a recorded recollection, it is a record of regularly conducted activity. A recorded recollection exception applies when a witness's memory cannot be revived and he requires examination of the document to testify further. Here, the facts do not indicate that the resident is testifying and needs the introduction of the chart to testify further. Rather, the patient simply wanted to "introduce the authenticated photocopy" into evidence. If the patient were using the copy to refresh the recollection of the witness, it would be seen by the witness only, not by the jury, and would not need authentication or introduction.

C is incorrect. The best evidence rule is not violated because the rule allows for the introduction of photocopies or duplicates unless some sort of genuine question as to the authenticity of the original is raised, which is not the case here.

D is incorrect. Although a hearsay statement within another hearsay statement requires grounds for each statement to be otherwise admissible, that rule is satisfied here. The business record exception applies to both the chart and the notation itself contained within it.

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5. The witness's testimony is most likely to be admitted if the witness is

In a prosecution of a defendant for assault, a witness is called to testify that the victim had complained to the witness that the defendant was the assailant.

- A doctor, whom the victim consulted for treatment
- A minister, whom the victim consulted for counseling
- **The victim's husband, whom she telephoned immediately after the event**
- A police officer, whom the victim called on instructions from her husband

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

A declaration made by a declarant during or soon after a startling event is admissible as an exception to the hearsay rule. The declaration must be made under the stress of excitement produced by the startling event. The declaration must concern the immediate facts of the startling occurrence. Fed. R. Evid. 803(2).

A statement that describes a person's medical history, past or present symptoms, or their inception or general cause is admissible as an exception to the hearsay rule if it was made for - and was reasonably pertinent to - medical diagnosis or treatment. Fed. R. Evid. 803(4). The cause or source of the injury must be reasonably pertinent to diagnosis or treatment to be admissible, and statements assigning fault or identifying a perpetrator are generally not considered pertinent. Statements by family members and bystanders may be admitted under this exception as long as the statements were clearly made to obtain a diagnosis or treatment for the patient.

C is correct. The victim's statement to the witness that the defendant was the assailant is an out-of-court statement being offered for the truth of the matter asserted - that the defendant assaulted the victim - and is thus hearsay. However, the victim's statement will be admissible if it was a statement relating to a startling event or condition made while the victim was under the stress of excitement caused by the event. If immediately after being assaulted, the victim telephoned her husband and identified the defendant as the assailant, her statement should be admissible under the excited utterance exception to the hearsay rule.

A is incorrect. A statement to a doctor identifying the assailant would not be made for the purposes of medical diagnosis or treatment and therefore, would be inadmissible for this purpose. Even if the identification were offered during the course of obtaining treatment, it was not made for the purpose of diagnosis or treatment.

B is incorrect. A statement to a minister during a counseling session identifying the assailant would not satisfy a hearsay exception, and moreover, such a statement may even be privileged based on the relationship between clergy-penitent.

D is incorrect. The statement to the police officer would have been made after the victim had the chance to consult her husband and therefore, it would not constitute an excited utterance. Only if the victim's statement was made immediately after the event would it be likely that her statement would be admissible.

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6. The witness's testimony is

A defendant was prosecuted for the murder of a victim, whose body was found one morning in the street near the defendant's house. The state calls a witness, a neighbor, to testify that during the night before the body was found he heard the defendant's wife scream, "You killed him! You killed him!"

- Admissible, as a report of a statement of belief
- **Admissible, as a report of an excited utterance**
- Inadmissible, because it reports a privileged spousal communication
- Inadmissible on spousal immunity grounds, but only if the wife objects

Note:
B is correct. The defendant's wife's statement is an out-of-court statement that is being offered for the truth of the matter asserted - that the defendant killed the victim - so it is hearsay. However, the statement related to a startling event or condition made while the wife was under the stress of excitement caused by the event or condition, and is thus admissible as an excited utterance. Therefore, the witness's testimony is admissible.

A is incorrect. There is no statement of belief exception to the hearsay rule that applies to the wife's statement. In addition, the statement is clearly being offered for the truth of the matter asserted (that the defendant did kill the victim) and is not merely being offered to show the wife's belief.

C is incorrect. The wife's statement is not a privileged communication. It was not confidential and was said loudly enough that the neighbor heard it. Non-confidential statements are not covered by any form of spousal privilege.

D is incorrect. Although spousal immunity may allow a wife not to testify against her husband, it does not extend to the witness's testimony regarding what he overheard the wife say. The witness is the person testifying, not the defendant's wife, so even if the defendant's wife objects, the witness can still testify about what he heard.

7. The witness's testimony is

A man and his friend were charged with conspiracy to dispose of a stolen diamond necklace. The friend jumped bail and cannot be found. Proceeding to trial against the man alone, the prosecutor calls the friend's girlfriend as a witness to testify that the friend confided to her that "[the man] said I still owe him some of the money from selling that necklace."

- Admissible, as evidence of a statement by party-opponent
- **Admissible, as evidence of a statement against interest by the friend**
- Inadmissible, because the friend's statement was not in furtherance of the conspiracy
- Inadmissible, because the friend is not shown to have firsthand knowledge that the necklace was stolen

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). A statement that contains hearsay within hearsay (or "double hearsay") may be admissible as long as each part of the combined statement conforms to a hearsay exception. Fed. R. Evid. 805.

A statement of a person, now unavailable as a witness, can be admissible if it was against that person's pecuniary, proprietary, or penal interest when made. To be admissible under the statement against interest exception, the statement must have been so against the declarant's pecuniary or proprietary interest, or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability, that a reasonable person in the declarant's position would have made the statement only if she believed it to be true. Fed. R. Evid. 804(b)(3). The statement against interest differs most significantly from an opposing party's statement in that, under the statement against interest exception, the statement must be against interest when made, and the declarant whose statement is admitted may be a stranger to the litigation rather than a party.

To qualify as a statement against interest, the following requirements must be met: (i) the statement must have been against pecuniary, proprietary, or penal interest when made, such that a reasonable person in the declarant's position would have made it only if she believed it to be true; (ii) the declarant must have had personal knowledge of the facts; (iii) the declarant must have been aware that the statement was against her interest and she must have had no motive to misrepresent when she made the statement; and (iv) the declarant must be unavailable as a witness. Fed. R. Evid. 804(b)(3).

Under FRE 801(d)(2), a statement by an opposing party (traditionally known as an "admission by a party-opponent") is not hearsay. Under this Rule, when the opposing party's statement is offered against that same opposing party and was made in either an individual or representative capacity, it is admissible.

B is correct. When testimony involves two different out-of-court statements, there may be an issue of double hearsay, or hearsay within hearsay. For the testimony to be admissible, both statements must meet a separate hearsay exception or exemption. The testimony in this case involves two statements: (i) the statement made by the man (the defendant) to the friend; and (ii) the statement made by the friend to his girlfriend. The first statement by the man is admissible as an admission by a party-opponent because it was made by, and is being used against, the man. The second statement by the friend is admissible as a statement against interest. A statement against interest must be made: (i) against the declarant's pecuniary, proprietary, or penal interest; (ii) with knowledge of the facts; and (iii) by an unavailable declarant. The declarant does not have to be a party or a co-conspirator and may even be a stranger to the litigation. Here, the declarant made the statement against his financial and penal interest, with knowledge of the facts, and he is now unavailable. Therefore, the statement is admissible.

A is incorrect. This answer reaches the correct answer with the wrong reasoning. Statements made by a co-conspirator in furtherance of a conspiracy may be admitted against a defendant as an admission by a party-opponent. These statements must be made in furtherance of the conspiracy at a time when the declarant was still participating in the conspiracy. In this case, the statement the friend made to his girlfriend was not made in furtherance of the conspiracy or at a time when the conspiracy was still occurring. The friend is also not on trial in this case, which is solely against the man. Therefore, the friend's statement is not admissible as an admission by a co-conspirator.

C is incorrect. It is true that the friend's statement was not made in furtherance of the conspiracy, which means that exemption would not apply as to this specific statement. However, it is still admissible as a statement against the friend's interest. The declarant does not have to be a co-conspirator to meet the exception for statements against interest.

D is incorrect. It is not required that the declarant have knowledge that the necklace was stolen. A statement against interest requires the declarant to have personal knowledge of the facts, such that a reasonable person in the declarant's position would not have made the statement unless he believed it was true. In this case, the declarant has knowledge that he and the man are involved in exchanging money for the necklace. This is a statement the friend would not have made unless it was true because the man's accusation that the friend owes him money from selling the necklace could implicate the friend in a crime, and is also against his pecuniary interest.

8. The evidence of the friend's statement is

A man and his friend were charged with burglary of a warehouse. They were tried separately. At the man's trial, the friend testified that he saw the man commit the burglary. While the friend was still subject to recall as a witness, the man calls the friend's cellmate to testify that the friend said, "I broke into the warehouse alone because [the man] was too drunk to help."

- Admissible, as a declaration against penal interest
- **Admissible, as a prior inconsistent statement**
- Inadmissible, because it is hearsay not within any exception
- Inadmissible, because the statement is not clearly corroborated

Note:
When a witness tells a story at trial, the opposing lawyer will often confront him with a previous out-of-court statement in which the witness told a different story. Such an impeachment use of an out-of-court statement is not hearsay, because the out-of-court statement is introduced not for the purpose of showing that it contains the truth, but rather, to suggest that a witness who changes his story is not credible.

To impeach the credibility of a witness, a party may show that the witness has, on another occasion, made statements that are inconsistent with some material part of his present testimony. Under the Federal Rules of Evidence (FRE), an inconsistent statement may be proved by either cross-examination or extrinsic evidence. Generally, extrinsic evidence of a witness's prior inconsistent statement is admissible only if: (i) the witness is given an opportunity to explain or deny the allegedly inconsistent statement; and (ii) the adverse party is given an opportunity to examine the witness about the statement. See Fed. R. Evid. 613.

In most cases, prior inconsistent statements are hearsay, admissible only to impeach the witness. This is in contrast to the hearsay exemption for prior inconsistent statements, when the prior statement was made under oath at a trial, hearing, or another proceeding, or in a deposition, and may then be admitted as substantive proof of the facts stated. See Fed. R. Evid. 801(d)(1)(A).

A statement of a person, now unavailable as a witness, can be admissible if it was against that person's pecuniary, proprietary, or penal interest when made. To qualify as a statement against interest, the following requirements must be met: (i) the statement must have been against pecuniary, proprietary, or penal interest when made, such that a reasonable person in the declarant's position would have made it only if she believed it to be true; (ii) the declarant must have had personal knowledge of the facts; (iii) the declarant must have been aware that the statement was against her interest and she must have had no motive to misrepresent when she made the statement; and (iv) the declarant must be unavailable as a witness. Fed. R. Evid. 804(b)(3).

B is correct. A prior inconsistent statement may be admissible to impeach the witness or substantively as non-hearsay. When an out-of-court statement is being offered to impeach in-court testimony of a witness who has the chance to explain or deny it, as well as be cross-examined about it, such evidence is admissible for impeachment purposes (i.e., not for the truth of the matter asserted). In this case, the prior statement is inconsistent (it contradicts the friend's earlier testimony that he saw the man commit the burglary), and the friend is still subject to recall and thus may be given a chance to explain or deny it. See Fed. R. Evid. 613; Fed R. Evid. 801(d).

The prior inconsistent statement exemption to the hearsay rule, however, applies only to previous out-of-court statements made under oath, which are then admissible as substantive evidence. Here, the prior statement was not made under oath, and therefore, this exemption does not apply.

A is incorrect. This answer reaches the correct answer with the wrong reasoning. Under FRE 804(b)(3), a statement against one's penal interest may be admissible, but only when the declarant is unavailable to testify. In this case, the friend, as the declarant, is available to testify. Therefore, this hearsay exception is inapplicable.

C is incorrect. If the friend's statement to the cellmate, as testified to in court by the cellmate, were being offered for the truth of the matter asserted, it would be inadmissible hearsay. However, the testimony is being introduced solely to impeach the friend by his prior inconsistent statement, not as substantive evidence.

D is incorrect. There is no rule requiring clear corroboration of a prior inconsistent statement that is being used to impeach a witness. Although corroborating evidence may be required when a statement against interest exposes the declarant to criminal liability, that requirement does not apply when using a prior inconsistent statement merely to impeach the witness. See Fed. R. Evid. 804. As explained above, the cellmate's testimony containing the friend's prior statement is exclusively being used for impeachment, not as substantive evidence, rendering it admissible.

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9. The witness's testimony is

In the prosecution of a defendant for murdering a victim, the defendant testified that the killing had occurred in self-defense when the victim tried to shoot him. In rebuttal, the prosecution seeks to call a witness, the victim's father, to testify that the day before the killing, the victim told her father that she loved the defendant so much she could never hurt him.

- **Admissible within the hearsay exception for statements of the declarant's then existing state of mind**
- Admissible, because the victim is unavailable as a witness
- Inadmissible as hearsay not within any exception
- Inadmissible, because the victim's character is not at issue

Note:
The Federal Rules of Evidence (FRE) define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered into evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). When an out-of-court statement is introduced for any purpose other than to prove the truth of the matter asserted, there is no need to cross-examine the declarant, so the statement is not hearsay. One example of this includes statements offered to show the effect on the listener, such as knowledge. Another example is when statements are offered as circumstantial evidence of the declarant's state of mind. Statements that reflect directly (as opposed to circumstantially) on the declarant's state of mind are hearsay but are admissible under the FRE 803(3) exception. Many courts have used this "state of mind exception" to admit all declarations that reflect on the declarant's state of mind without regard to the fact that they could simply be admitted as non-hearsay. As a practical matter, the distinction makes little difference as the admissibility is the same.

A is correct. The witness's testimony regarding the victim's statement to him that she loved the defendant and could never hurt him is admissible as a hearsay exception: a statement of then-existing mental or emotional condition. The purpose of introducing this statement is to reflect directly on the victim's state of mind - that she could not hurt him, thus supporting the contention that she was less likely to have subsequently attempted to shoot the defendant, as he claimed.

B is incorrect. This answer reaches the correct answer with the wrong reasoning. The victim's unavailability is irrelevant to the admissibility of the statement. The testimony is admissible under the then-existing mental or emotional state of mind exception to the hearsay rule, as explained above.

C is incorrect. It may be true that the statement is considered hearsay because it is an out-of-court statement offered for the truth of its contents - that the victim could never hurt the defendant. However, it nevertheless is admissible as a then-existing state of mind exception to the hearsay rule, as previously stated.

D is incorrect. This is an incorrect statement of the issues. The victim's character, as far as the self-defense claim goes, is at issue given that the defendant has raised a self-defense claim and is arguing that the victim was the initial aggressor. Nevertheless, the statement goes to the victim's then-existing state of mind and not to her general character for violence or non-violence.

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10. The son's testimony is

The son is now suing the insurance company for the proceeds of his mother's policy. At trial, the son offers to testify that his mother told him that she planned to write her next novel under a pen name. The pen name she chose was the same name that appeared on the plane's passenger list. A famous author had a life insurance policy with an insurance company. Her son was the beneficiary. The author disappeared from her residence in a major city two years ago and has not been seen since. On the day that the author disappeared, a plane, which took off from the only airport in the city where the author lived, disappeared while flying over the ocean. The plane's passenger list included a passenger with the same first name as the author, but a different last name.

- **Admissible as circumstantial evidence that the author was on the plane**
- Admissible as a party admission, because the author and her son are in privity with each other
- Inadmissible, because the author has not been missing more than seven years
- Inadmissible, because it is hearsay not within any exception

Note:
A is correct. The son's testimony concerning his mother's statement that she planned to write her next novel under the pen name, which appeared on the plane's passenger list, is not hearsay and is admissible as circumstantial evidence that the author was on the plane. Although it is an out-of-court statement, the author's statement is not being offered for the truth of the matter asserted - that she planned to write her next novel using the pen name. Instead, the statement is being offered to show that the person on the plane under the pen name was, in fact, the author. Since the statement is not being offered for the truth of the matter asserted, it is admissible as relevant evidence.

B is incorrect. The statement is not an admission, and it is not from a party to the suit.

C is incorrect. The length of time the author has been missing has no relevance to the determination of the admissibility of the statement.

D is incorrect. The statement is not being offered to prove the author's next book was going to have the pen name, so it is not being offered for the truth of the matter asserted. The statement is not hearsay.
