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Personal Injury and Probate: Death of a Party or Witness, Settlement With Minors, Hearsay Challenges, Tax Exigencies

WEDNESDAY, SEPTEMBER 29, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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PERSONAL INJURY AND PROBATE ISSUES

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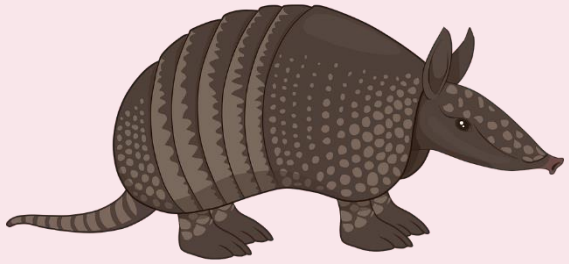
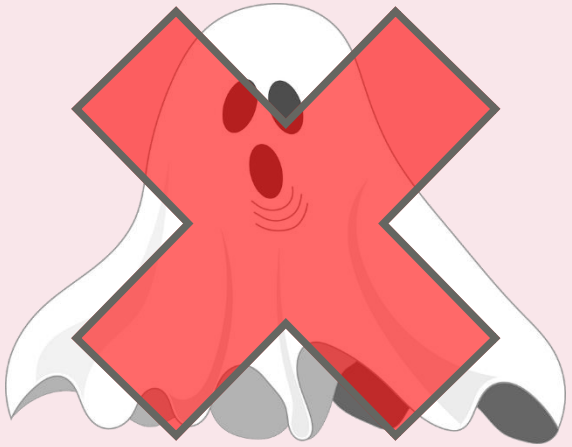


DISCLAIMER:

I practice in Texas. Everything I tell you today is based on Texas law. Based on my investigation, many states have laws similar to those in Texas. More importantly, regardless of whether your state's laws match those of Texas, this presentation should be useful in helping you to determine the questions you need to be asking yourself before filing a lawsuit where one of the parties is deceased.

ESTATES CANNOT SUE OR BE SUED



Why Can't an Estate Sue or be Sued?

In Texas, there is both case law and statutory authority for the rule that estates cannot sue or be sued:

> *"[T]he 'estate' of a decedent is not a legal entity and may not properly sue or be sued as such"*
>
> - *Price v. Anderson's Estate*, 522 S.W.2d 690, 691 (Tex. 1975)
>
> *'[T]he personal representative...is ordinarily the only person entitled to sue for the recovery of property belonging to the estate."*
>
> - *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex.1971)
>
> *"Any person having a debt or claim against the estate may enforce payment of the same by suit against the independent executor"*
>
> -Texas Estates Code § 403.059

A Few Cites for Other States

Pennsylvania:

"The law is clear that all actions that survive a decedent must be brought by or against a personal representative, duly appointed by the Register of Wills." *Finn v. Dugan*, 260 Pa.Super. 367, 369.

New York:

An action to recover estate assets is maintainable by the executors of the estate. "The legatees and beneficiaries thereof have no independent cause of action either in their own right or in the right of the estate to recover estate property." *Wierdsma v. Markwood Corp.,* 384 N.Y.S.2d 836, 837 (App. Div. 1st Dep't 1976).

Florida:

"It is well settled that 'an 'Estate' is not an entity that can be a party to litigation. It is the personal representative of the estate, in a representative capacity, that is the proper party." *Spradley v. Spradley*, 213 So.3d 1042, 1045 (Fla. 2d DCA 2017).

Think About it - the Rule Makes Sense

In the Case of a Dead Plaintiff:

Suppose the son and heir of the dead plaintiff is allowed to pursue a survival claim on behalf of the estate. Son has not been appointed as administrator. You obtain a large settlement or jury verdict only to learn that dead plaintiff had a will that leaves everything to his mistress. What do you do now? You can't give the proceeds to your client who retained you to recover them. **Awkward**.

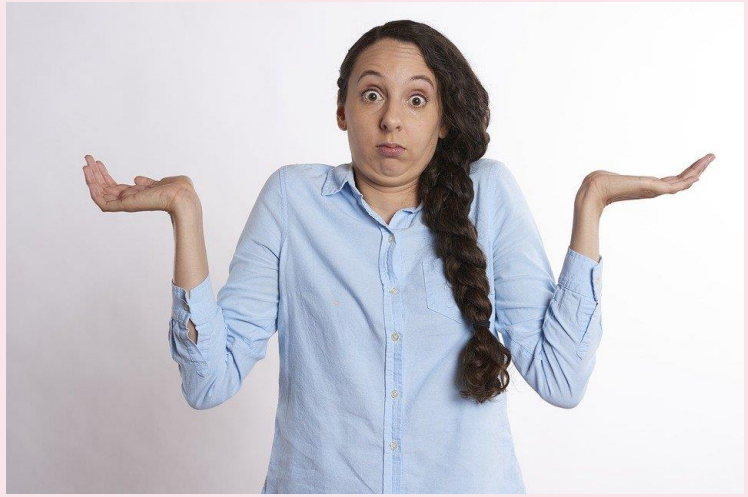
In the Case of a Dead Defendant:

94 year old Defendant causes a terrible accident and the injured victim hires you to file suit. Defendant dies shortly after the accident, leaving behind a son. The son was estranged from Defendant, didn't know about the accident, didn't even know Defendant was still driving. No personal representative has been appointed for Defendant's estate. You file a lawsuit against the son for an accident he didn't cause. **Also Awkward**.

Why is This the One Rule You Should Remember?

This rule, or any variation on it, will allow you to answer some very important questions, including such favorites as:

- Do you have a client?
- Will your case be dismissed?
- Will your judgment be void?
- Is your settlement valid?
- Will you get paid?



DO YOU HAVE A CLIENT?

(Unusual Deaths Edition)

The Golf Widow

Michael Scaglione died after smashing his golf club against a golf cart. The head of the club flew off, struck Michael in the neck, and severed his jugular. Michael's widow comes to you and asks you to represent Michael's estate in its survival claims against the golf club manufacturer. Widow has decided not to pursue her own wrongful death claims because Michael spent all his time playing golf, didn't make any money, and she didn't like him that much anyway – she is *very* OK with this loss of companionship. You have Widow sign an engagement agreement and file the lawsuit. **Do you have a client?**

The Golf Widow – Do you have a client?

No, not unless and until Widow is appointed as personal representative of Michael's estate.

Snuffed out by Schnitzel

Kurt Gödel retains you to pursue claims against the Schnitzel Shack for permanent damage done to his GI tract after contracting food poisoning at one of their restaurants. He signs your engagement agreement and you file suit and serve Schnitzel Shack. During the course of your representation, Kurt becomes increasingly paranoid and insists someone has been trying to poison him. He refuses to eat food prepared by anyone other than his wife. Two months after serving Schnitzel Shack in your lawsuit, Kurt's wife becomes ill and is hospitalized, Kurt starves to death. **Do you have a client?**

Snuffed Out by Schnitzel – Do you have a client?

No, not unless and until someone is appointed as the personal representative of Kurt's estate and that person retains you to continue to pursue Kurt's claims in their capacity as personal representative of Kurt's estate.

***Note, this is true regardless of whether you are able to use your superior lawyering skills to tie Kurt's death to the underlying injury (damage to GI tract caused by bad Schnitzel).

A Sticky Situation

Bridget Clougherty was killed when a large storage tank filled with 2.3 million gallons of molasses burst, flooding her neighborhood and drowning Bridget. Bridget's sister retains you to pursue survival claims against the molasses company. You practice in a jurisdiction where siblings do not have wrongful death claims. Sister brings Bridget's will with her to your first meeting and the will names Sister as executor of Bridget's estate. Sister signs your engagement agreement in her capacity as Executor of the Estate of Bridget Clougherty. **Do you have a client?**

A Sticky Situation – Do you have a client?

No, not unless or until Bridget's will has been admitted to probate and Sister has been granted Letters Testamentary.

What Have We Learned?

No one has authority to retain you to represent claims held by a decedent's estate until they have gone through the probate process and been appointed by a court as personal representative (executor or administrator) of the decedent's estate.

Unless you aren't in Texas. In that case, they *may* have the authority to do so, you just need to make sure you know *who* your client can be.

WILL YOUR CASE BE DISMISSED?

Problems with a Deceased Plaintiff

Scenario 1

Debbie Deadgal is killed in a car accident. Debbie's sister Susie hires you to file a survival claim suit against the other driver. Susie has not been appointed as personal representative of Debbie's estate. You file suit naming "The Estate of Debbie Deadgal" as plaintiff. The statute of limitations on the survival claim doesn't run for another year. Defense attorney files a verified denial asserting the long-held rule that estates cannot sue or be sued and asks the Court to dismiss Susie's suit for lack of standing. What is the result?

Result

The Court agrees that estates cannot sue or be sued. Rather than granting Defendant's motion to dismiss, however, the Court abates the case until such time as a personal representative can be appointed for Debbie's estate and can amend the petition to name himself or herself "as Administrator of the Estate of Debbie Deadgal" as the plaintiff.

Why doesn't the Court just dismiss the suit as Defendant requested?

Because it is a question of CAPACITY not STANDING:

The Supreme Court of Texas has determined that failure to properly name plaintiff as a court appointed personal representative is an error in capacity, rather than standing. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005).

STANDING

Standing is tied to a "justiciable interest" – A Plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005).

"A survival claim is wholly derivative of the decedent's rights. The actionable wrong is that which the decedent suffered before his death." *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex.1992).

A survival claim becomes part of a Decedent's estate at his or her death, giving the estate a justiciable interest in the outcome and **conferring standing on the estate**.

CAPACITY

"[a] party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Nootsie, Ltd. V. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 661 (Tex.1996)

The Supreme Court of Texas has found that a personal representative is generally the only person with authority to sue for the recovery of property belonging to the estate. As such, a personal representative has the capacity to institute a survival claim on behalf of the estate. *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998).

Where plaintiff's counsel improperly names "the Estate" as plaintiff, rather than the personal representative, the Court should not dismiss. Abatement or some lesser remedy is more appropriate. *M&M Const. Co. v. Great Am. Ins. Co.,* 747 S.W.2d 552, 555 (Tex. App. – Corpus Christi 1988, no writ.).

In **Scenario 1**, the Court properly abated the case to give Susie an opportunity to be appointed as personal representative and amend her petition.

Scenario 2

Same as Scenario 1 except that instead of naming "The Estate of Debbie Deadgal" as your plaintiff, you name "Susie as Personal Representative of the Estate of Debbie Deadgal." Susie has not yet been appointed as personal representative. Defendant files the same verified denial and asks the Court to dismiss the suit. What is the result?

Result

Same result. Case will be abated to give Susie a chance to cure her lack of capacity.

What if Susie doesn't get appointed as administrator until AFTER the statute of limitations on the underlying personal injury case passes?

You are probably OK. Once she is appointed you will file an amended petition naming "Susie as Administrator of the Estate of Debbie Deadgal" as the plaintiff. Under *Lovato*, the amended petition with the corrected capacity will relate back to the date of filing the original petition which was prior to the statute of limitations.

**Important Point for Defense Counsel : Unlike standing, deficiencies in capacity can be waived. Your failure to move for abatement in the trial court could result in a waiver.

What About Dismissal?

Your case won't be dismissed right out of the gate. The remedy is abatement. However, be careful. There is case law supporting a "reasonable time" requirement. If you don't cure the capacity issue (i.e. get your client appointed by the probate court as personal representative) within a reasonable time, the defendant may be entitled to dismissal with prejudice. *M&M Const. Co. v. Great Am. Ins. Co.,* 747 S.W.2d 552 (Tex. App. – Corpus Christi 1988, no writ.).

WILL YOUR JUDGMENT BE VOID?

Problems with a Deceased Defendant

Scenario 1

Your client was severely injured when Clark Crain, the operator of a crane lifting a piano into a 5th floor apartment, has a heart attack and drops the piano on your client. Clark dies a few hours later as a result of his heart attack. You file suit on your client's behalf against "The Estate of Clark Crain." You serve the insurance carrier for the moving company where Clark worked. The case goes to trial and you obtain a substantial judgment in favor of your client. After the judgment is entered and while you are awaiting payment from the insurance carrier, you receive notice that Clark's wife, Clara, who is also the duly appointed executor of his estate, has filed an appeal seeking to void the judgment. **What is the result?**

Result

Clara wins. The carrier will not pay the judgment.

In Texas, a judgment against the "estate" rather than the personal representative is invalid. The judgment is "void as a matter of law." *In re Coats*, S.W.3d 431, 436 (Tex. App. – Texarkana 2019, no pet.).

Scenario 2

Same situation as Scenario 1 except that Clark Crain holds on for a while after his heart attack. You file suit against him on behalf of your client and you serve him with citation. Clark tenders service to the insurance carrier and demands indemnity and defense. A week later, after one too many cheeseburgers, Clark has another heart attack and dies. Insurance carrier continues to defend the suit, it goes to trial, and you obtain a large judgment in your client's favor. Once again, Clara files an appeal seeking to void the judgment. **What is the result?**

Result

Clara wins again!!! The judgment is void.

It does not matter that Clark lived long enough for you to serve him and for him to tender to his insurance carrier. When a defendant dies, the court loses personal jurisdiction over the defendant. *In re Coats*, S.W.3d 431, 436 (Tex. App. – Texarkana 2019, no pet.).

What the Heck Can I Do About This?

The remedy in this situation is substitution of parties. The personal representative of the defendant's estate must be substituted in and served with citation.

What if no one probates the defendant's estate?

In Texas, we have something called a creditor induced administration. The class of persons with standing to file an application for administration of an estate include a "creditor, or any other having a ... claim against an estate being administered." Tex. Est. Code § 22.018.

CAUTION: creditor induced administrations are something many probate courts are not familiar with. If this is something you need to pursue I advise getting the assistance of a probate attorney who has experience handling creditor induced administrations.

IS YOUR SETTLEMENT VALID?

Validity of Settlements

Suppose in our first example above you represent the wife of the golfer, Michael Scaglione, in the suit against the golf club manufacturer. In this example, Michael was a doctor who earned lots of money and although he played some golf, he spent most of his time with his wife who really loved him. Wife decides to bring both her own wrongful death claim and the estate's survival claim. You file suit on wife's behalf and you enter into a settlement agreement with the golf club manufacturer releasing all wrongful death and survival claims. You get a $1 million lump settlement. Wife was never appointed as personal representative of Michael's estate. A year later, you are served with a lawsuit instituted by Michael's two adult children from a previous marriage. They claim you didn't have authority to settle the suit on behalf of the estate and are suing both you and Wife for damages. Wife long ago fled the country, took her proceeds, and spent them all on lavish gifts for her new Italian boyfriend. She is not returning your calls. **What is the result?**

Get ready to pay up!! Neither your or Wife had the authority to settle estate claims. Only the personal representative of an estate has the power to settle and release claims.

What if you Represent the Defendant in This Situation?

Suppose Michael's adult daughter gets appointed as personal representative and files survival claims against your client, the golf-club manufacturer, on behalf of her father's estate. You respond by saying you already settled with the estate. **What is the result?**

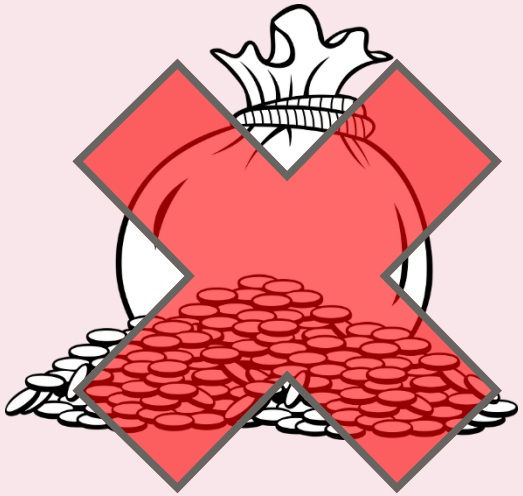
Settlement invalid as to estate claims → i.e. estate claims never actually settled. Defendant is potentially on the hook to pay the duly appointed personal representative. Defendant's may be entitled to indemnity from the original plaintiff – have fun tracking her down and getting the money back!

WILL YOU GET PAID?

No Client, No Fee

Only the attorney representing the personal representative gets to collect their fees from the survival claim proceeds.

CAUTION: In Texas, a contingent fee over 1/3 has to be approved by the probate court.



MISCELLANEOUS

How Can you Make Probate Work for YOU?

Probate has the power to give you an additional client (the estate). More clients, more claims. More claims, more fees.

Discharge of debts. In Texas, the probate process has certain mechanisms in place to help in the discharge of debts. This is particularly useful if there are liens/claims directly against settlement proceeds (think Medicaid/Medicare or insurance subrogation claims).

- You may be able to use the probate process to limit what proceeds are subject to the lien.

- In some cases you can throw up roadblocks that may prevent a creditor from collecting at all, if the creditor is not diligent.

Approval of settlement allocation – provides security to you and your client.

Pay Attention to the Minutiae

In Texas, we have some poorly written and conflicting rules and case law that, if you fail to dig a bit deeper, could land you in hot water.

Texas Rules of Civil Procedure 152: Death of Defendant
Where the defendant shall die, upon the suggestion of death being entered of record in open court, or upon petition of the plaintiff, the clerk shall issue a scire facias for the administrator or executor **or heir** requiring him to appear and defend the suit and upon the return of such service, the suit shall proceed against such administrator or executor or heir.

BUT ALSO SEE:

Texas Civil Practice and Remedies Code § 71.008: Death of a Defendant
(a) If a defendant dies while an action under this subchapter is pending or if the individual against whom the action may have been instituted dies before the action is begun, the executor or administrator of the estate may be made a defendant, and the action may be prosecuted as though the defendant or individual were alive.
(b) A judgment in favor of the plaintiff shall be paid in due course of administration.

More Minutiae

The Supreme Court of Texas, in *Shepherd v. Ledford*, found that Plaintiff's heirs can only "maintain a survival suit during the four-year period the law allows for instituting administration proceedings if they allege and prove that no administration is pending and none necessary."

Administration frequently necessary:

- Decedent had more than one creditor. Tex. Est. Code § 306.002(c)(1)
- Real property owned by Decedent that was not the Decedent's homestead OR for which ALL heirs of such real property were not homesteading with Decedent on his date of death.

If you read TRCP 152 and stop there, and then use an heir of Decedent as your plaintiff, your case is likely to be abated. → Know what you don't know and ask an expert!!

Minor and Incapacitated Parties

Minor and incapacitated parties can raise significant issues:

Capacity to enter contracts (including your fee agreement)

Use of a "next friend" under Texas Rule of Civil Procedure vs. appointment of guardian.

Next friend not necessary when parent suing on behalf of minor child – parent IS the legal guardian.

Statutory Durable Powers of Attorney – When can they be used?

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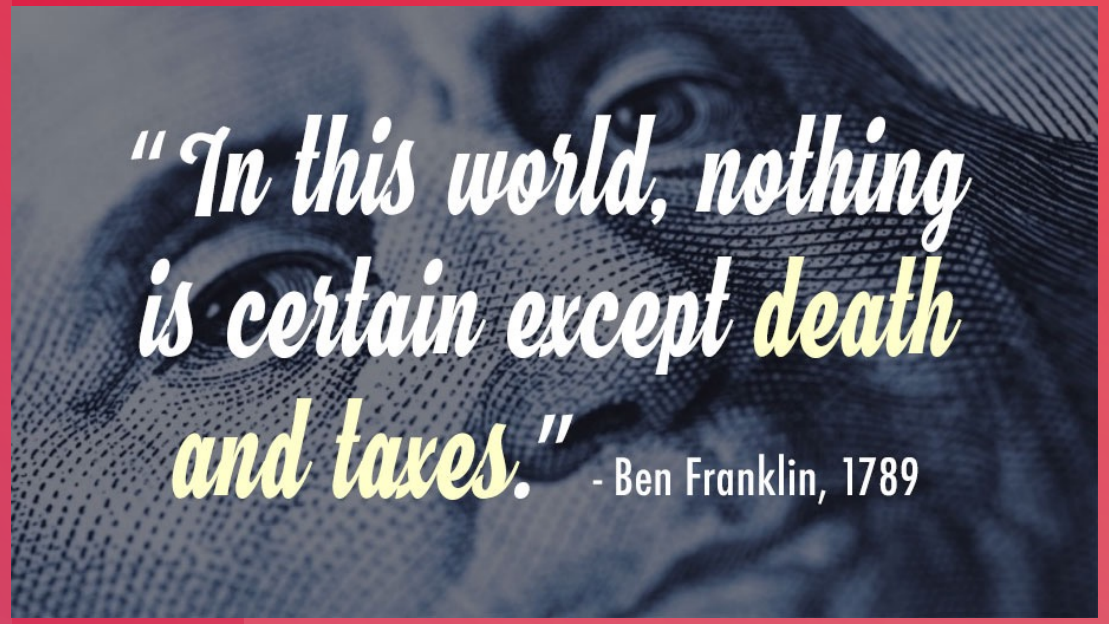

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LET'S GET RIGHT INTO TOPIC #1:

Death of a party or key witness

- What do you do if a witness or party-witness dies before trial?
- What can you do to mitigate the effects of this risk?
- Can you admit their testimony or other out-of-court statements?
- Are a decedent's statements admissible against their estate?
- Can the decedent's attorney testify?

PLAINTIFF DIES BEFORE TRIAL

WHAT DO YOU DO AS **PLAINTIFF'S ATTORNEY**? In addition to substituting the Executor or Personal Representative as Plaintiff, as Emily discussed, consider the following:

- Amend complaint to change from injury to wrongful death, and adjust damages; be mindful of your statute of limitation (i.e., in New York: 2 years for wrongful death, and 3 years for personal injury and survival claims)
- Consider how this could affect your ability to present Plaintiff's testimony on pain and suffering, an important element of damages in a survival action, and negligence liability
- You may have to find additional witnesses
- The surviving family members may have an independent action under state law

PLAINTIFF DIES BEFORE TRIAL

WHAT DO YOU DO AS **DEFENDANT'S ATTORNEY**? In addition to being mindful to negotiate settlement only with persons legally authorized to act on behalf of the Estate, as Emily discussed, consider the following:

- Move to dismiss claims that do not survive Plaintiff's death (i.e., reputational harm / defamation)
- Certain damages may be excluded (i.e., in California)
- The injured party's testimony is often an important aspect of the defense; you may have to find additional witnesses
- The surviving family members may have an independent action against your client for wrongful death in addition to the executor's continuing claim for negligence and new survival action.

THE *TURNER* CASE EXAMPLE:

A cause of action that begins as a claim for medical malpractice by the patient can evolve into a survival action and a claim for wrongful death and can have a significant impact on damages.

Under Illinois law, if a plaintiff dies in the course of litigation, his or her estate may step in and continue the suit on behalf of the decedent under the Illinois Survival Act (755 ILCS 5/27-6). Damages include medical expenses, lost earnings, and pain and suffering, but pain and suffering damages are only calculated through the date of death.

In addition, if the plaintiff's cause of death was the defendant's underlying negligence, the estate may sue for damages through an action under the Illinois Wrongful Death Act (740 ILCS 180/1). Damages include pecuniary injuries, such as loss of economic support, services, and grief, sorrow and/or mental suffering.

THE *TURNER* CASE (CONTINUED):

In the *Estate of Turner v. Mercy Hospital & Medical Center*, 2018 IL App (1st) 162219, a medical malpractice case, counsel for plaintiff advised the court two days before closing arguments that his client fell and sustained an injury that required brain surgery. The jury was not advised about the fall or subsequent injuries.

Plaintiff died the night before the jury returned a verdict awarding $22 million in damages to plaintiff, which included $15 million in future damages.

The court of appeals vacated the future damages award under the statute limiting damages through the date of death, stating, if plaintiff "died even one minute after the jury returned a verdict, Mercy [Hospital] would have been liable for the full amount of future damages."

DEFENDANT DIES BEFORE TRIAL

WHAT DO YOU DO AS **PLAINTIFF'S ATTORNEY**? In addition to making sure the Executor or Personal Representative is substituted as Defendant, as Emily discussed, consider the following:

- How do you admit Defendant's prior admissions?
- Your statute of limitation may be impacted.
- IF YOU HAVE A JUDGMENT, BE MINDFUL OF COLLECTABILITY.
- Secure your judgment and file a claim against the estate within the short claim period (usually 6 months under state law). If unsecured, you could be out of luck if the assets are distributed without notice of your judgment or claim.
- If assets are improperly distributed, you may have to proceed against beneficiaries to claw-back the assets or against the Executor or Personal Representative personally to collect.

EXPERT WITNESS DIES BEFORE TRIAL

NOW WHAT?!

- Timely move to substitute your expert, and do not seek to expand or alter the opinions of the original expert.
- Opposing party should seek leave to depose the new expert and should object to any opinions not presented by the original expert.
- Should you move to admit the original expert's prior deposition? (FRCP 32). Should you have video taped the deposition?

LAY WITNESS DIES BEFORE TRIAL

THERE IS ALWAYS A RISK OF LAYWITNESS NO-SHOW.

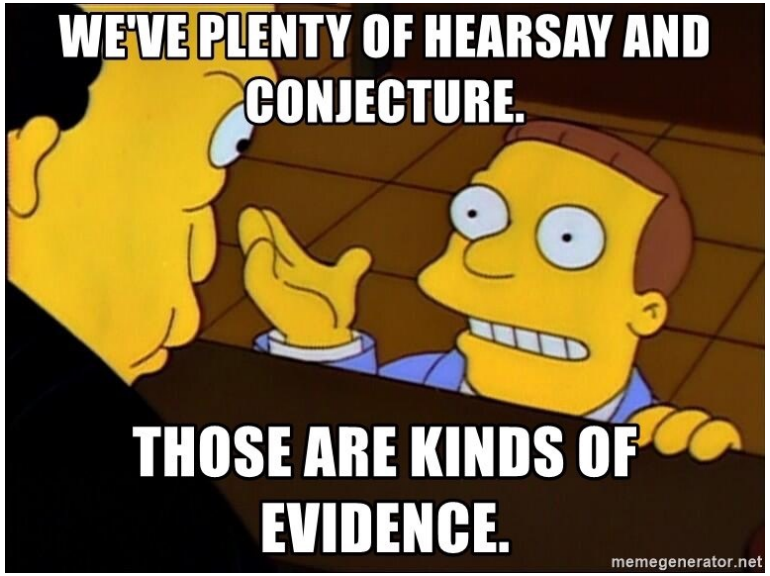
- Be prepared with alternative evidence and witnesses.
- Take depositions early.

PRACTICAL GUIDANCE TO PREPARE FOR AND RESPOND TO THIS RISK

IDENTIFY	IDENTIFY AND DISCLOSE ALL POSSIBLE KEY WITNESSES EARLY; IDENTIFY CORROBORATING DOCUMENTS FOR IMPORTANT TESTIMONY
RECORD	TAKE WITNESS STATEMENTS AND AFFIDAVITS EARLY; VIDEOTAPE DEPOSITIONS TO SHOW PHYSICAL CONDITION OF WITNESS; TAKE DE BENE ESSE DEPOSITIONS AS WARRANTED; TAKE PRE-LAWSUIT DEPOSITIONS IF NECESSARY TO PRESERVE EVIDENCE
REPLACE	PROMPTLY MOVE TO DISCLOSE NEW WITNESSES AND SEEK LEAVE AS REQUIRED UNDER DISCOVERY RULES SO NEW EVIDENCE IS NOT EXCLUDED
EXTEND	MOVE TO EXTEND DISCOVERY IF NECESSARY

WITHOUT YOUR VICTIM'S TESTIMONY, HOW CAN YOU PROVE YOUR CASE?

- On the issue of negligence, only the eyewitnesses may testify in court as to what happened.
- This means that a passerby who came upon the scene after the incident cannot describe what they think happened in the crash.
- Depending on where your court is located, this may also mean that an accident reconstructionist hired by one of the parties cannot conduct an analysis and describe what they think happened in the crash.
- Not even the police officer who was dispatched to the scene can describe what they think happened in the crash.
- The testimony of the witness must be based on personal knowledge.



FROM A DEFENSE PERSPECTIVE

- The decedent's testimony is important to the defense, as it may implicate the defendant (i.e., contributory negligence), describe the decedent's medical condition before his death, provide essential information relating to damages, or create sympathy for the plaintiff.

- The testimony of a decedent, as an out-of-court statement, generally constitutes inadmissible hearsay where it is offered to prove the truth of the matter asserted. Seek to this evidence exclude as hearsay if there was no opportunity to cross-examination the witness prior to passing.

HOW CAN I ADMIT A DEAD WITNESS'S PRIOR STATEMENTS AS EVIDENCE?

This evidence can be essential to a negligence claim or defense.

IT DEPENDS…

YOU ALREADY KNOW THIS. AN OUT OF COURT STATEMENT MADE TO PROVE THE TRUTH OF THE MATTER ASSERTED IS INADMISSIBILE HEARSAY. FED. R. EVID. 801, 802.

THIS APPLIES TO GESTURES, ORAL STATEMENTS, AND WRITINGS.

UNLESS THERE IS AN EXCEPTION.

BEFORE WE GET INTO HEARSAY EXCEPTIONS, LET'S MAKE SURE IT'S HEARSAY

- First, check that the out-of-court statement fits the definition of "hearsay" under the Rule:
  - Is it an "assertion?" (F.R.E. 801(a)).
  - Is it offered to prove the truth of the matter asserted? (F.R.E. 801(c)(2)).
  - Is it non-hearsay? (F.R.E. 801(d)).
- Recommended: read the advisory committee notes.
- Example: Consider bodycam and dashcam video footage. Is it demonstrative, or an assertion due to a cognitive bias?

"NON-HEARSAY" UNDER FRE 801(d)

This one is interesting for our discussion

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

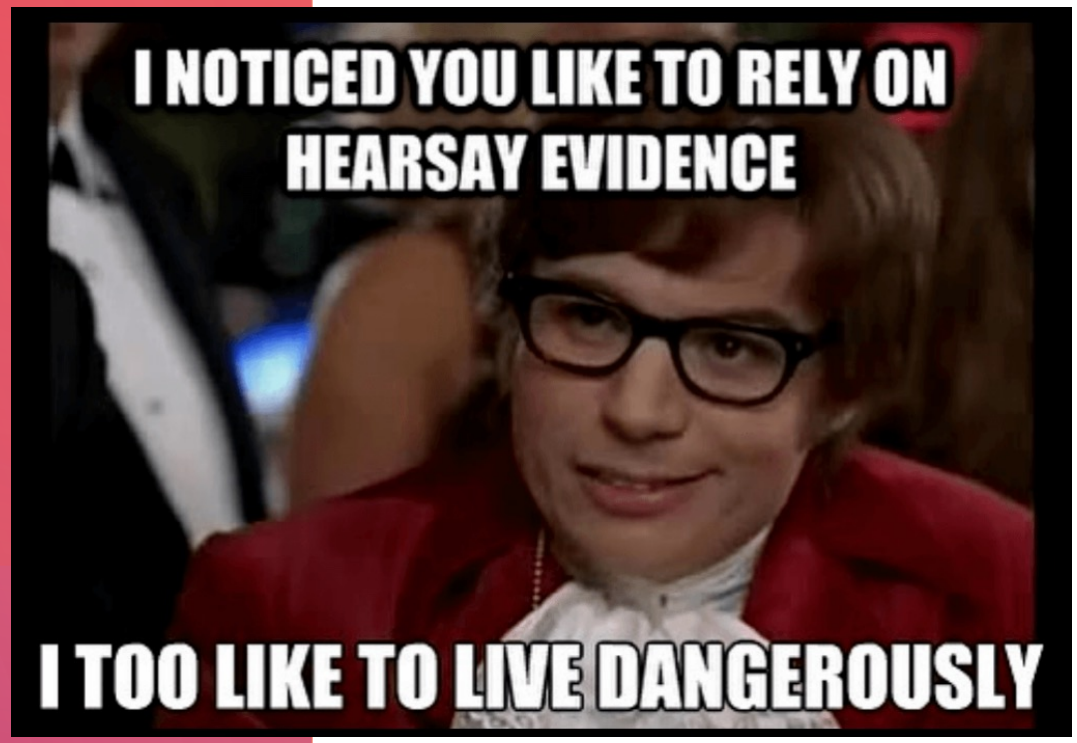
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

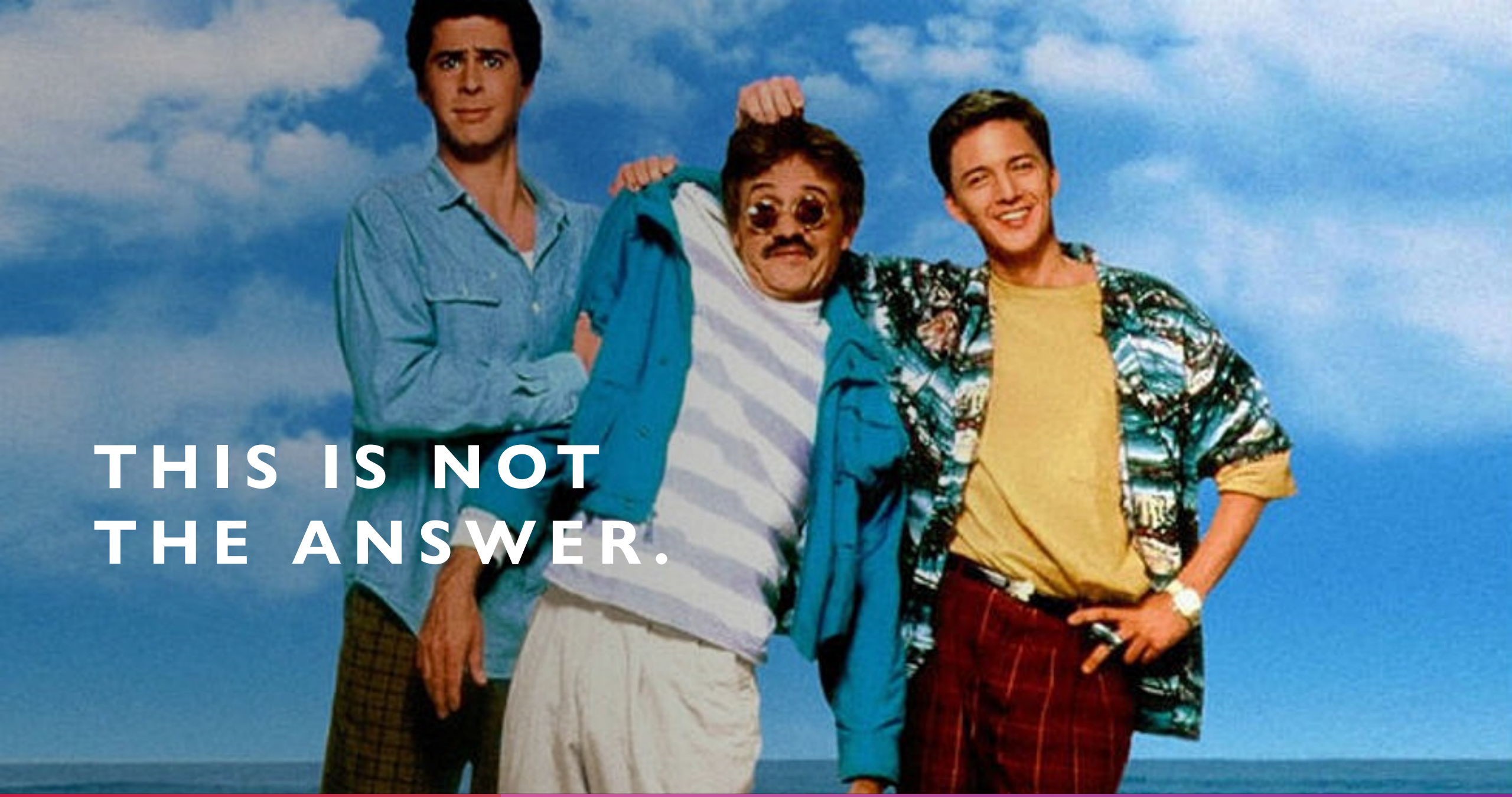
IS A DECEASED PARTY'S STATEMENT ADMISSIBLE AS A NON-HEARSAY PARTY-OPPONENT STATEMENT?

- There is a circuit split as to whether a decedent's statements can be entered into evidence under the exclusion from hearsay provided for party-opponent statements under Federal Rule of Evidence 801(d)(2)(A).
- The split is because the courts disagree as to the best characterization of decedents' statements—whether they should be understood as privity-based admissions that, while admissible under the common law, are no longer admissible under the Federal Rules of Evidence, or if the decedent should be considered a party to the litigation, in which case the statements are admissible under Rule 801(d)(2)(A).
- Example: Police testimony, or any witnesses' testimony as to what the defendant said, if offered against the defendant constitutes an admission against interest Rule 801(d)(2)(a).

Excerpts taken from the handout law review article by Matthew W. Tieman of NYU Law School, "The Talking Dead: Should Decedent's Statements Fall Under Rule 801(D)(2)(A)?"

BUT WHAT IF IT IS HEARSAY AND I NEED TO ADMIT IT AS EVIDENCE?




THIS IS NOT
THE ANSWER.

HEARSAY EXCEPTIONS UNDER FEDERAL RULES OF EVIDENCE

RULE 803

- Applies whether declarant is available or unavailable
- 23 exceptions

RULE 804

- Requires declarant unavailability
- 5 exceptions

LOOK TO RULE 804 IF YOUR WITNESS IS UNAVAILABLE DUE TO DEATH, INJURY, OR MEMORY LOSS DUE TO INJURY

Rule 804. Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

HEARSAY EXCEPTIONS

If one of these exceptions is met, the declarant does not have to come into court to testify, and what the declarant said can be proved either by the testimony of another witness or documentary evidence.

- Rule 803(1): PRESENT SENSE IMPRESSION
- Rule 803(2): EXCITED UTTERANCE
- Rule 803(3): THEN-EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION
- Rule 803(4): MEDICAL DIAGNOSIS
- Rule 803(5): RECORDED RECOLLECTION
- Rule 803(6): BUSINESS RECORDS
- RULE 803(8): PUBLIC RECORDS EXCEPTION
- Rule 804(b)(1): FORMER TESTIMONY
- Rule 804(b)(2): DYING DECLARATION
- Rule 804(b)(3): STATEMENTS AGAINST INTEREST
- Rule 807: RESIDUAL EXCEPTION

RULE 803(1): PRESENT SENSE IMPRESSION

F.R.E. 803(1) provides that "Present Sense Impressions" not excluded by the rule against hearsay.

The Rule defines "present sense impression" as "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."

- This includes statements indicating how the declarant perceived something via his senses, or his impression of a condition at the time the statement was made. For example, "He appeared to be staggering; it looked like he was drunk."

RULE 803(2): EXCITED UTTERANCE

F.R.E. 803(2) provides that an "Excited Utterance" is not excluded by the rule against hearsay.

The Rule defines "excited utterance" as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

- In other words, an "Excited Utterance," is a statement someone blurted out on the spur of the moment, such as an exclamation made by the victim after an accident or trauma.

RULE 803(3): PRESENT SENSE CONDITION

F.R.E. 803(2) exempts from the rule against hearsay "a statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."

- For example, in *Morrison v. Bradley*, 655 P.2d 690 (Colo. 1971), a wrongful death case, the Colorado Supreme Court permitted testimony from the decedent's son that his father wished to pay for his vocational training and a truck. This evidence was introduced and admitted to support the son's claim for damages against the father's murderer by proving that the father intended to provide financial support. The Supreme Court upheld the trial court's ruling admitting the decedent's statement's as evidence indicative of the father's then existing state of mind to assist his son.
- Also, statements by a defendant in the vicinity of the police may fall under this "state of mind" exception, if the police officer testifies.

RULE 803(4): MEDICAL DIAGNOSIS

F.R.E. 803(4) provides that a Statement Made for Medical Diagnosis or Treatment is not excluded by the hearsay rule.

The Rule defines this as "[a] statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

- **For example,** the doctor could testify that the "patient complained of heart palpitations."
- The doctor must testify in court to introduce the medical opinion into evidence. The doctor cannot simply read a medical record to the jury.

RULE 803(5): RECORDED RECOLLECTION

F.R.E. 803(5) exempts from the hearsay rule "[a] record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party."

- This may be a useful exception in the event your witness suffers memory loss.

RULE 803(6): BUSINESS RECORDS

F.R.E. 803(5) exempts from the hearsay rule business records with proper foundation.

- For example, invoices and receipts, and other entries that are routine and made at or near the time of the transaction.
- This exception may be used to admit medical records.

RULE 803(8): PUBLIC RECORDS EXCEPTION

F.R.E. 803(8) excepts "a record or statement of a public office" if the statement meets the requirements enumerated in the Rule.

- For example, a police officer's accident report may be admitted under this exception.
- Note that portions of the report containing the police officer's opinion of what caused the accident will likely be excluded.
- Also note that the Rule provides a presumption of admissibility and shifts the burden on the opponent to challenge "a lack of trustworthiness."

RULE 804(b)(1): FORMER TESTIMONY

F.R.E. 804(b)(1) provides that "Former Testimony" is not excluded by the rule against hearsay, if the declarant is unavailable. The Rule defines "former testimony" as

"Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination."

- In other words, court transcripts in another court proceeding are admissible against a party where the party (or its predecessor in interest) had an opportunity and similar motive to develop the testimony at the former proceeding.
- This may include deposition transcripts of a deceased witness so long as the other party had the opportunity to cross-examine the witness. *See* Fed. R. Civ. P. 32(a)(1).
- It may also include testimony prior to filing an action, pursuant to a petition and notice as required in Rule 27. *See* Fed. R. Civ. P. 27(a).

RULE 804(b)(2): DYING DECLARATION

F.R.E. 804(b)(2) exempts from the hearsay exclusion rule a "statement under the belief of imminent death," if the declarant is unavailable. Also known as "dying declarations," the Rule provides, "[i]n a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."

- Under the "dying declaration" exception, an unavailable witness's testimony is admissible where it: (1) was made under the belief of "imminent" or "impending" death; and (2) concerned the cause or circumstances surrounding the death.
- This analysis turns on "trustworthiness," and assumes the person has no incentive to lie when facing imminent death.
- For example, "[Defendant] shot me!"
- In *Quackenbos v. Am. Optical Corp*., No. PC 04-6504, 2008 WL 914390 (R.I. Super. Ct. Jan. 17, 2008), the court admitted the decedent's prior videotaped deposition in an asbestos action on the dying declaration exception, although Defendant did not have the opportunity to cross-examine decedent. The Court explained, "when the hearsay declarant is not present for cross-examination, the admissibility of an out-of-court statement turns on whether the statement bears adequate `indicia of reliability.'".

RULE 804(b)(3): STATEMENTS AGAINST INTEREST

F.R.E. 804(b)(3) provides and exception to hearsay rule based on an unavailable declarant's "statement against interest," defined as "[a] statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary 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; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."

- For example, "I'm totally drunk" could be admissible where alcohol is alleged to have contributed to the injury. On the other hand, evidence of alcohol consumption without evidence of intoxication may be excluded as more prejudicial than probative if there is no other evidence that alcohol contributed to the injury.
- In *Caminiti v Extell West 57th Street LLC*, 2018 WL 5914129, 2018 N.Y. Slip Op. 07667 (1st Dep't 2018), the decedent in a wrongful death suit made a statement to his wife in the ER after an accident that he "should have known better" than to use a ladder as he did. He later died. The husband's statement was admissible as a declaration against interest in order to establish his wife's *prima facie* case under Labor Law §240(1). The statements showed, as a matter of law, that the ladder started to move while he was working on it, and when he tried to stabilize the ladder, it tipped and struck him in the chest.

  (source: https://www.wcmlaw.com/2018/12/decedents-statements-to-his-wife-admissible-as-hearsay-exception-defeating-estates-msj-ny/)

TYING IT ALL TOGETHER

In general, a police officer or any other witness including a party may testify about out-of-court statements made by persons other than the party against whom the evidence is offered if statements:

(i) are not offered for their truth (i.e., not hearsay); or

(ii) if offered for their truth, fit a hearsay exception such as an excited utterance under 803(2), present sense impression under 803(1), or state of mind under 803(3).

RULE 807: RESIDUAL EXCEPTION

Finally, when all else is lost, federal courts have applied Rule 807 to admit "trustworthy" hearsay evidence. Rule 807 provides:

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

- In the case *Grimes v. Employers Mutual Liability Insurance Co.*, 73 F.R.D. at 611, the Court determined that depictions in a "day in the life" video crossed the threshold into substantive evidence, acknowledging the assertive intent of the plaintiffs supposed demonstrative evidence (thus, hearsay), and admitted the video's contents under the residual exception to hearsay because of the "[g]uarantees of trustworthiness" present. Central to this decision, however, is that the plaintiffs were available for cross-examination.

IF THE STATEMENT IS ADMITTED, IMPEACH THE HEARSAY WITNESS

F.R.E. 806 provides:

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

STRATEGIES AND PRACTICE TIPS FOR ADMITTING OR EXCLUDING HEARSAY FROM EVIDENCE

Proponent

- ✓ Corroborate where possible
- ✓ Remember to lay foundation
- ✓ Know your rules and exceptions
- ✓ Take early video depositions where necessary to preserve evidence, so witness is subject to cross-examination

Opponent

- ✓ Motion to Strike the statement
- ✓ Motion *in Limine* to Exclude witness, testimony, or evidence (i.e., bar under Deadman's Statute)
- ✓ Objections at Trial and in Discovery (depositions)
- ✓ Motion for protective order preventing a deposition from going forward if plaintiff's counsel insists on proceeding with the deposition without adequate discovery.
- ✓ Attack reliability of "uncorroborated, unsworn, uncross-examined, out-of-court statement"
- ✓ Try to impeach declarant if admitted

Since such evidence is admitted to prove the truth of its contents, a trial judge must be satisfied that it is **reliable** for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or . . . the **probative value** of a hearsay statement will depend upon the context and character of the evidence in question. The **absence of the opportunity to cross-examine** the person who made the statements, and **whether the hearsay is 'first-hand'** or more removed, are also **relevant to the probative value** of the evidence.

Note: this is an excerpt from an international tribunal, but the principles expressed in the opinion are the same.

CONSIDER THE JUDGE'S CONCERNS AND FRAME YOUR ARGUMENT ACCORDINGLY

THE CIVIL TRIAL FOR THE WRONGFUL DEATH OF NICOLE BROWN SIMPSON AND RON GOLDMAN

- The heirs and estate representatives of Nicole Brown Simpson and Ronald Goldman sued O.J. Simpson for wrongful death. Following civil trial, the jury awarded plaintiffs $33.5 million dollars in damages. See *Rufo v. Simpson*, 86 Cal. App. 4th 573 (2001).
- Various prior oral and written statements by Nicole were admitted during trial, including: (1) a telephone call made to a battered women's shelter five days before the murder, (2) diary entries, and (3) a letter to O.J. Simpson in which Nicole describes their breakup and his angry reaction.

Note: excerpts taken from: https://www.evidenceattrial.com/blog/o-j-simpson-and-the-hearsay-rule

NICOLE'S CALL TO THE SHELTER

A director of a battered women's shelter received a call on June 7, 1994—five days before the murders—from a woman who identified herself as "Nicole." "Nicole" said that she was in her thirties, had two children under age ten, was living in West Los Angeles, and that her ex-husband was famous. During the June 7th conversation, "Nicole" shared the following:

- "Nicole" was frightened;
- Her ex-husband had been calling her begging her to come back to him;
- Her ex-husband had been stalking her;
- Her ex-husband had beaten her throughout their marriage, and he told her, on a few occasions, that if he ever caught her with another man he would kill her;
- "Nicole" asked whether it would be safer for her and the kids to move back in with him, but later "Nicole" concluded that it would not be safer for her to move in with him; and
- "Nicole" was invited to call back again a week later, but did not do so.

NICOLE'S DIARY ENTRIES

Edited pages from Nicole's diary were admitted into evidence, including the following:

- May 22, 1994: "We[']ve officially split[.]" Nicole then describes the intended arrangements for child visitation;
- June 3, 1994: The entry states that when Simpson came to her house to pick up the children, he said: "'You hung up on me last nite, you're gonna pay for this b----, you're holding money from the IRS, you're going to jail you f------ c---. You think you can do any f------ thing you want, you've got it coming—I've already talked to my lawyers about this b----they'll get you for tax evasion b---- I'll see to it. You're not gonna have a f------ dime left b----.'" Nicole's entry then adds, "I just turned around and walked away."

NICOLE'S LETTER TO O.J. SIMPSON

Portions of an undated letter in Nicole's handwriting to Simpson included the following:

- "I think I have to put this all in a letter ....
- "There was also that time before Justin [was born and a few months] after Sydney [was born] I felt really good about how I got back in shape [and] we were out[,] you beat the holy hell out of me [and] we lied at the x-ray lab [and] said I fell of a bike. Remember!??"
- "And since Justin['s] birth is the mad New Years Eve beat up .... I just don't see how that compares to infidelity, wife beating, verbal abuse....
- "I called the cops to save my life whether you believe it or not."

ALL ADMISSIBLE!

The Court explained:

"[T]he statements made in the telephone call to the battered women's shelter were *not* admitted *to prove*: (a) that her ex-husband had been calling her, begging her to come back.... The statements in the diary were *not* admitted *to prove* that Nicole evaded taxes. The statements in the letter were *not* admitted *to prove*: (a) that Simpson beat Nicole and they lied to the X-Ray lab that she fell off her bike...."

Rufo, at 591

With respect to statements that directly expressed her state of mind (e.g., statements that she was frightened), they were hearsay. But the statements were admissible under the state of mind exception.

NEXT QUESTION:

ARE A DECEDENT'S STATEMENTS ADMISSIBLE AGAINST THEIR ESTATE?

- The Decedent's authenticated written statements are generally admissible against their estate as a matter of state statute (i.e., a Will or other testamentary instructions).

- But what about the admissibility of a surviving witness' testimony about the Decedent's oral statements? Are those admissible against the Estate?

THE INFAMOUS

MARSHALL v. MARSHALL

In *Marshall v. Marshall*, Anna Nicole Smith was awarded $450 million dollars in damages against her step-son Pierce Marshall on the claim that he had tortiously interfered with an *inter vivos* gift from the late J. Howard Marshall II to leave her half of his estate by Will if she married him. (This was later overturned by the Chief Justice of the U.S. Supreme Court).

Imagine Anna's challenges to proving her case if she could only rely on her own, uncorroborated, self-interested testimony that her late husband promised to leave her half of his estate in a will that was never written, because his son precluded him from doing so.

The decedent is not there to talk about his side of what happened. That's a hearsay problem.

WHICH BRINGS US TO…

THE DEADMAN'S STATUTE

KNOW TO LOOK FOR IT UNDER STATE LAW.

For example, in a medical malpractice case against a deceased doctor-defendant, the Virginia Court decided that the testimony of the nurse on behalf of plaintiff did not require corroboration under the Dead Man's Act, because the nurse was not an interested party iin the action. *See Jones v. Williams*, 280 Va. 635, 701 S.E.2d 405 (2010),

A Dead Man's Statute (or Act or Rule) is a rule of evidence that states that in a civil action, **a party with an interest in the litigation may not testify against a dead party about communications with the dead party**. Thus, if a party invokes the Deadman's Statute, an interested party is barred from testifying about conversations or transactions with a deceased person in a civil case to advance their own interests.

Since Dead Man's Statutes are created under state law, the specific terms of the rule vary among states. More than half of the states have done away with the Dead Man's Statute altogether and generally allow testimony about statements made by a deceased person.

DOES THE DEAD MAN RULE APPLY IN FEDERAL COURT?

- Although there is no federal "Dead Man's Act." some federal courts sitting in diversity will apply a Dead Man's Statute if one exists under the applicable state law.
- Many courts have held that Dead Man's Statutes govern witness competency and apply in federal court pursuant to Federal Rule of Civil Procedure 601. *See Rosenfeld v. Basquia*t, 78 F.3d 84, 89-90 (2d Cir. 1996) (discussing New York Dead Man's statute); *Estate of Genecin ex rel. Genecin v. Genecin,* 363 F. Supp. 2d 306, 313-14 (D. Conn. 2005) (discussing Maryland Dead Man's statute).
- Some federal courts have also applied the Dead Man's statute as creating a hearsay exception that allows for the admissibility of a decedent's testimony, where the courts determine the rule is substantive and applicable. However, the courts are not consistent on whether state Dead Man's Statutes apply in federal court, and whether these rules are substantive or procedural.
    - For example, in a negligence action, the U.S.D.C. for the District of Connecticut held that a decedent's statements were admissible against the defendant assisted living facility under the Connecticut Dead Man's Statute, which the Court determined was substantive. *See Larsen v. Sunrise Senior Living Management, Inc.*, 7:08-CV-455 (WWE), 2010 WL 4340468, at *1 (D. Conn. Oct. 20, 2010).
    - On the other hand, in a product liability action,, the District of Massachusetts granted a motion *in limine* to exclude the testimony of two witnesses regarding the decedent's statements of how the accident occurred, finding the statute is not substantive. *See Donovan v. Sears Roebuck & Co.*, 849 F. Supp. 86 (D. Mass. 1994) (reasoning that "if this hearsay exception were deemed "substantive," then all state hearsay exceptions would apply in federal court, which would be contrary to Congress's intent).

GENERAL LIMITATIONS

Many states recognize the exception that the testimony can be admitted if corroborated by other evidence.

The Dead Man's Rule **applies only to oral testimony and not written evidence**. It does not preclude admission of written documents signed by the decedent before his or her death, which are typically admissible on statutory grounds or as exceptions to the hearsay rule.

The Personal Representative must object to bar the testimony or it is waived! The PR may waive the protections through, among other things, failing to object to invoke the Act, by offering evidence of the decedent's careful habits, or by responses in deposition or discovery that waive the Act.

EXAMPLE:

D.C. DEADMAN'S STATUTE

D.C. Code Sec. 14-302 provides,

(a) In a civil action against:

> (1) a person who, from any cause, is legally incapable of testifying, or
>
> (2) the committee, trustee, executor, administrator, heir, legatee, devisee, assignee, or other representative of a deceased person or of a person so incapable of testifying, a judgment or decree may not be rendered in favor of the plaintiff founded on the uncorroborated testimony of the plaintiff or of the agent, servant, or employee of the plaintiff as to any transaction with, or action, declaration or admission of, the deceased or incapable person.

(b) In an action by subsection (a) of this section, if the plaintiff or his agent, servant, or employee, testifies as to any transaction with, or action, declaration, or admission of, the deceased or incapable person, any entry, memorandum, or declaration, oral or written, by the deceased or incapable person, made while he was capable and upon his personal knowledge, may not be excluded as hearsay.

By MICHAEL WALSH
NEW YORK DAILY NEWS |
JUN 15, 2013

NYDAILYNEWS.COM

Judge allows Michael Jackson's ghost in shocking courtroom testimony: Dr. Murray's innocent!

MY NEXT WITNESS IS… MICHAEL JACKSON'S GHOST?

AS REPORTED BY *THE NEW YORK DAILY NEWS*:

(CAN YOU CROSS-EXAMINE A GHOST?)

- Michael Jackson's family filed a wrongful death action against AEG Live, the concert promoter behind his comeback tour, claiming they negligently hired and supervised the physician, Conrad Murray, who prescribed and utilized dangerous tactics to help Mr. Jackson sleep on tour, including injection of large amounts of sedatives that caused his fatal overdose.
- At trial, Lionel Richie's ex-wife Brenda testified that the King of Pop's spirit visited her to clarify that he unintentionally took his own life.
- The Jackson family's attorney objected to the unusual statement, dismissing it as triple hearsay: Phillips spoke to Brenda, who likely spoke to a mystic, who claims she can communicate with Jackson.
- Her testimony that Michael Jackson's ghost declared his own death an accident was actually heard in an eerie courtroom testimony — and the judge inexplicably let it stand.

CAN THE DECEDENT'S ATTORNEY TESTIFY?

As the attorney, you know what your client, the injured party, told you about how they felt, what they wanted, and what happened. Can you testify?

This raises the question of whether an attorney's communications with the decedent are protected by the attorney-client privilege. An attorney cannot testify in violation of this privilege, which survives the former client's death.

It also raises questions under the professional rules on attorney-as-witness. You generally cannot testify at trial as a witness if you are the attorney trying the case, because you'll confuse the jury.

NOW, ABOUT THOSE TAXES…

PAYING INCOME TAXES ON SETTLEMENTS

The law views most legal settlements as a form of income to the recipient, and most settlement taxes fall under the category of income taxes.

However, personal injury and wrongful death settlements are considered exempt from income taxes.

THE "PURPOSE" OF THE DAMAGES

IRC Section 104 provides an exclusion from taxable income with respect to personal injury and wrongful death lawsuits, settlements and awards.

However, not all amounts awarded are tax-exempt, and exemption depends on the purpose for which the money was received, or what the payments are intended to replace or compensate.

- All damages of a civil nature that compensate for a physical injury or wrongful death are exempt from income taxes — including recovery for lost wages, future earning capacity, pain, suffering, mental anguish, loss of consortium, and other compensatory damages.
- Punitive damages, emotional damages, and interest may be taxable, unless there is an exception in the Revenue Code. For example, punitive damages are taxable, except where applicable State law provides only punitive damages may be awarded in wrongful death actions (i.e., Alabama). *See* I.R.C. § 104(c).

https://www.irs.gov/government-entities/tax-implications-of-settlements-and-judgments

EXCEPTIONS

If the settlement or award pushes the estate over the inheritance tax threshold, now $11.58 million. When the settlement amount pushes the total value of the decedent's estate over the federal or state threshold for the estate tax exemption.

If medical expenses were claimed as tax deductions on a previous year's income taxes. In situations where deductions were made in the past for certain medical expenses, the IRS instructs:

- *"If you receive a settlement for personal physical injuries or physical sickness, you must include in income that portion of the settlement that is for medical expenses you deducted in any prior year(s) to the extent the deduction(s) provided a tax benefit. If part of the proceeds is for medical expenses you paid in more than one year, you must allocate on a pro rata basis the part of the proceeds for medical expenses to each of the years you paid medical expenses."*
- On the other hand, *"[i]f you receive a settlement for personal physical injuries or physical sickness and did not take an itemized deduction for medical expenses related to the injury or sickness in prior years, the full amount is non-taxable. Do not include the settlement proceeds in your income."*
- Thus, prior out-of-pocket medical expenses that were previously claimed as tax deductions are taxable.
- Review the decedent's prior years' tax returns to calculate the total medical expense deductions and any tax benefit obtained from these deductions.

Interest on the damages may be taxable. Any portion of the award that represents accrued interest on the award is taxable, which may impact some cases with long appeals processes.

Attorneys' fees. Legal fees can only be deducted if they were incurred to produce or collect taxable income, according to IRS publication 529. Because the settlement or award in wrongful death and personal injury cases are generally tax-free, attorneys' fees cannot be deducted for personal injury lawsuit or wrongful death case.

TACTICS TO MINIMIZE TAXES ON WRONGFUL DEATH SETTLEMENTS

- **Ensure proper allocation of damages:** In states that tax punitive damages, ensure that the settlement or judgment award allocates the categories of damages.
- **Think long-term to minimize taxes:** Be mindful in investing monetary awards that the award from a wrongful death recovery is only tax-free when it comes directly from the annuity funded at the time of the settlement. Changing the nature of the money, for example, in purchasing stocks, real estate, or other investments, may remove the tax exclusions.
- **Consider whether a Special Needs Trust may be warranted.** A plaintiff who receives a litigation recovery should be advised of his or her ability to preserve needs-based public benefits and preserve the use of the litigation recovery. Be careful not to pay your fees from a special needs trust without prior court approval.

CONSIDER WHETHER A SPECIAL NEEDS TRUST MAY BE NEEDED

- A plaintiff who receives a litigation recovery should be advised of his or her ability to preserve needs-based public benefits and preserve the use of the litigation recovery.
- Be careful not to pay your fees from a special needs trust without prior court approval.

PARTING WORDS ON TAXES

As I always advise my clients, consult a licensed accountant for the bottom line!

We can flag the tax issues, but we do not give tax advice.

Please note your handout on guidance issued by the IRS for taxes assessed against settlements and awards on personal injury and wrongful death claims.

THANK YOU!