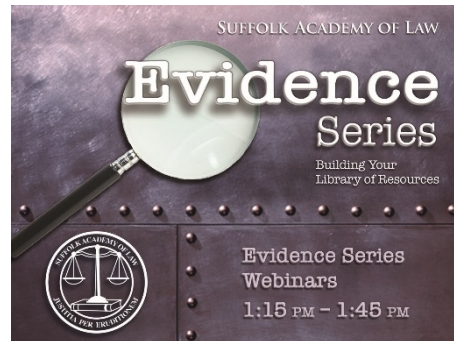




SUFFOLK ACADEMY OF LAW
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ZOOM PROGRAM

EVIDENCE SERIES: DOUBLE HEARSAY

FACULTY

Hon. Mark D. Cohen

Program Coordinators: Hon. John J. Leo J.S.C., & Harry Tilis, Esq.

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Mark D. Cohen is a Judge of the New York State Court of Claims. He serves as an Acting New York State Supreme Court Justice in Suffolk County, New York and is the Supervising Judge of the Superior Criminal Courts for the Tenth Judicial District.

Judge Cohen is a graduate of Columbia College, Columbia University, and the Hofstra University School of Law, where he was a member and editor of the Law Review. Upon graduation from law school, he was an appellate law clerk in Boston, Massachusetts.

Judge Cohen was the Deputy Director and Chief Counsel of the New York State Office of Homeland Security from 2001 to 2006. During that time, he also served as Acting Director for the Office and Assistant Director for its Legal Division and held a Top Secret security clearance.

Judge Cohen was an Assistant District Attorney in the Suffolk County, New York District Attorney's Office from 1976 through 2001 and served as Chief Assistant District Attorney for thirteen years under two elected District Attorneys. He also was Chief of the Office's Appeals Bureau, Deputy Chief of the Special Investigations Unit, and a trial prosecutor in the Felony Trial Bureau. As a prosecutor, Judge Cohen argued more than 200 cases in the Appellate Division, Second Department, more than 20 cases in the New York Court of Appeals and 10 cases in the United States Court of Appeals for the Second Circuit.

Judge Cohen has been an adjunct law professor at the Touro Law Center in Central Islip, New York since 1993. In 2004, Touro named him Distinguished Public Interest Attorney in Residence. In 2009, the law school honored him as its Adjunct Professor of the Year. In 2013, he received Touro's Annual Award "In Recognition of Devoted Service to the Ideals and Purpose of Legal Education," which in the past, had been reserved only for full-time faculty. During that same year, Touro's Moot Court Honors Board presented him with the Annual Hon. George C. Pratt Award in Appellate Advocacy in recognition of his work with the law school's competitive moot court teams. In 2014, 2015, 2018 and 2019, Judge Cohen was voted Touro's Best Adjunct Professor by the law school's Student Bar Association. Judge Cohen has also been a lecturer at the State University of New York at Stony Brook. In 2016, Chief Judge DiFiore named Judge Cohen as a member of the State Judicial Advisory Committee on Evidence and in 2018, she designated him as a member of the State's Continuing Legal Education (CLE) Board. Also in 2018, the Suffolk Criminal Bar Association honored Judge Cohen as "Judge of the Year." In 2019, he was named a member of the court system's statewide New Criminal Legislation Implementation Committee.



Suffolk Academy of Law 2020 Evidence Series

Hearsay Within Documents

Judge Mark D. Cohen

Let's Begin at the Beginning:

- We All Know What's Hearsay:
- New York Guide to Evidence Sec. 8.00 Definitions:
 - “1) Hearsay is an **Out of Court Statement** of a **Declarant Offered in Evidence to Prove the Truth of the Matter Asserted** in the Statement.
 - 2) The Declarant of the Statement is a Person Who is Not a Witness at the Proceeding, or If The Declarant is a Witness, The Witness Uttered The Statement When The Witness Was Not Testifying in the Proceeding.”

Also, Consider That When It Comes to Business Records ...

- “Records Made in the Regular Course of Business **Are Hearsay** When Offered For the Truth of the Their Contents” Richardson on Evidence, Sec. 8-301 (Farrell 11th Ed. 1995)

And Always Keep in Mind That The Usual Foundational Prerequisites Always Apply

- As an Example, What About a Screen Shot of a Complainant's Bank Account Proffered in a Scheme to Defraud and Larceny Trial ?
- Admissible Automatically as a Business Record Under CPLR 4518?
- Is It So Reliable That It Is Intrinsicly Trustworthy and Thus, Needs No Business Record Foundation?

People v. Roland Ramos,
13 N.Y.3d 914 (2010)

- Well, The Trial Court Allowed It In Under CPLR 4518 as a Business Record
- The 2nd Dept. Affirmed [60 A.D.3d 1091 (2nd Dept. 2009)] Holding, They Were So “Patently Trustworthy,” The Court Could Take “Judicial Notice” of Them

People v. Roland Ramos, 13 N.Y.3d 914 (2010)

- The Court of Appeals Reversed 7-0 (Memorandum)
Due to Hearsay Error
- While Some Documents May Be Admitted as Business Records Without Foundation Testimony Because They Are So Reliable and Trustworthy [See *People v. Kennedy*, 68 N.Y.2d 569, 577, n. 4 (1986)]
- Nothing on the Screen Shot's Face Indicates That It "Was Made in the Regular Course of Business and That It Was The Regular Course of Business to Make It." C.P.L.R 4518(a)

Further, The New York Evidence Guide Defines “Hearsay or Nonhearsay Within Hearsay” [Sec. 8.21] As:

- “An Out-of-Court Statement That is Included Within an Otherwise Admissible Statement [That] Is Itself Admissible:
- a) Where it is Offered to Prove the Truth of its Contents and the Included Statement Meets the Requirements of an Exception to the Hearsay Rule, or
- b) It Includes a Statement Made by a Declarant That is Not Offered For Its Truth”


So, Evidentiary Foundations Involving
“Hearsay [Or Non-Hearsay] Within
Hearsay” May Have Multiple Layers That
Must Be Considered on Admissibility
Questions

And So, This is True Not Only in New York Practice But in Federal Court as Well

- See, Note, F.R.Ev. 803 Which Provides:
“Hearsay Within Hearsay is Not Excluded By
The Rule If Each Part of the Combined
Statements Conforms to an Exception to the
[Hearsay] Rule”

So Let's First Focus on Hospital Records and Telephone Provider Records

- Foundation For Admissibility, Of Course, Starts With CPLR 4518:
- Hospital Records: CPLR 4518(b)
- Phone Records: CPLR 4518(a)
- Premise: These Records Are an Exception to The Hearsay Rule Because They Are Otherwise Demonstrably Reliable When Kept and Maintained by a Business
- But, They Are, By Definition, Hearsay



People v. Odalys Ortega & Maurice Benston,
15 N.Y.3d 610 (2010)

- *Ortega*: Trial Court Admitted Redacted Hospital Records of Assault CW as Business Records That Contained “Domestic Violence” and “Safety Plan”
- *Benston*: Trial Court Admitted Hospital Records of CW in CPSP Case That Contained Indication CW “Forced to Smoke a White Substance” (D Claimed CW Voluntarily Turned Over Money)

People v. Odalys Ortega & Maurice Benston,
15 N.Y.3d 610 (2010)

- Court of Appeals Affirmed 7-0 (Lippman, C.J.):
Statements Contained in Records Concerning
Medical Diagnosis and Treatment Are Reliable
and Admissible as Business Records
- That Means The Following Rules Were Applied:
Ordinary Business Records (CPLR 4518) + A
Hearsay Exception For Medical Diagnosis and
Treatment

People v. Odalys Ortega & Maurice Benston, 15 N.Y.3d 610 (2010)

- But Judge Smith Noted, Concurring:
- Pursuant to *Johnson v. Lutz*, 253 N.Y. 124 (1930),
**These Medical Records Admitted as Business Records
Contained Hearsay Within Hearsay**
- While Hearsay Cannot Be Transformed Into Non-Hearsay Simply Because a Business Routinely Relies on It and Incorporates it Into Its Own Records ...
- The Hospital Entries, **Relating to What a Patient Tells
His or Her Health Care Professional**, Had a Guarantee of Reliability and Thus Were Admissible Hearsay

People v. Odalys Ortega & Maurice Benston, 15 N.Y.3d 610 (2010)

- That Means Ordinary Business Records (CPLR 4518) + A Hearsay Exception For Medical Diagnosis and Treatment May Result in Admission
- Thus, Per NY Guide [Note: Sec. 8.21]: **“The Court Has Recognized That The Hearsay Rule Should Not Exclude an Out-of-Court Statement Which Includes Another Out of Court Statement When Each Part of the Combined Statements is Separately Admissible” [Emphasis Supplied]**

And Keep in Mind, The Hearsay Within Hearsay Must Be Admissible Considered Alone on Its Own Ground

- So, If It's "Diagnosis and Treatment" As An Exception – It Must Be Just That: For Diagnosis and Treatment
- Thus, In *Ivan Gomez v. Kitchen & Bath by Linda Burkhardt*, 170 A.D.3d 967 (2nd Dept. 2019), Certified Medical Records Were Not Properly Admissible Where "None of the Notations Were Germane to Diagnosis and Treatment" and Moreover Were Not Admissible as a Party Admission

And Just As an Aside, What About Police Testimony That Contains Statements of Witnesses?

- Can The Testimony Be Properly Presented Where the Officer is Available and Testifying?
- Even Though The Testimony Relates “Double Hearsay”?

Flynn v. Man. & Bx. Surface Tr. Op. Auth., 61 N.Y.2d 769 (1984)

- NYC Bus Hit a Bicyclist
- At Time of Trial, Bus Driver Was Deceased
- Plaintiff Presented Testimony of Responding Police Sergeant That Bus Driver Told Him That An Unidentified Passenger Had “*Come up to ... [The Bus Driver] After He Had Passed the Guy on the Bike, and the Unidentified Passenger Said That He Had Struck the Person on the Bike*”
- Good or No Good?

Flynn v. Man. & Bx. Surface Tr. Op. Auth., 61 N.Y.2d 769 (1984)

- Per Court of Appeals: NG – Error to Admit
- The Testimony of the Sergeant Regarding What the Driver Told Him Contained “Double Hearsay” and Was Inadmissible Because It Did Not Fit Within Any Exception to Hearsay
- But Error Was Held Harmless Due to Sufficient Other Proof of Liability

Next, Assume Telephone Records Offered by a Proponent Are Admissible as Business Records Under CPLR 4518

- Is The Subscriber Information (i.e., Name of Subscriber, Address and DOB) Contained Within Them, Also Admissible Hearsay (i.e., Hearsay Within Hearsay)?
- Or Maybe Something Else?

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- Daichele Goree (The Defendant's Accomplice) is Invited to a Party at the Victim's Apartment
- Goree Makes Call on Cell and Shortly Thereafter, The Defendant and Another Perpetrator Arrive Wearing Bandanas and With Guns
- They Rob the Victim After Taping His Wrists, Mouth and Ankles

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- NYPD Arrived and Victim Gave Them a General Description of Robbers and Also, Goree's Phone Number
- Goree's Phone Records Indicated That Just Before Robbery, She Called a Cell Phone Connected to Account of a "Darnell Patterson"
- That Cell Phone Number Also Matched the Pedigree Information (His Name, Address and DOB) The Defendant Provided to Police During Arrest Processing and Also in NYPD Databases
- The Defendant Was Arrested and ID'ed in a Lineup by the Victim

People v. Darnell Patterson,
28 N.Y.3d 544 (2016)

- The Subscriber Information of The Defendant's Cell Phone Record (With the Number Called by Goree) Maintained by His Service Provider, Sprint, Also Matched The Information He Provided to the Police
- The Defendant Moved to Preclude, Arguing The Subscriber Information Was "Hearsay Within Hearsay"

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- The Defendant Conceded Sprint Records Were Admissible, But Argued that Information in Them Was Provided by a Subscriber, (Whoever That May Have Been) Was NOT Admissible Since The Information Was Provided to Sprint by Someone Without Any Business Duty to Do So
- How Ingenious!!
- Therefore, It Was NOT a Business Record That Is Admissible

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- The People Claimed It “Completes the Narrative” and Was Relevant to Show That the Phone Number Goree Called Just Before the Crime Was Registered to Someone Using the Name Darnell Patterson (With His Date of Birth and Address)
- But, Is It Inadmissible Hearsay?
- Or Something Else?

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- Trial Court Allowed It, Not to Complete the Narrative But “For the Purpose of Showing That This is The Information That Was Given, The Fact That The Information Was Given at a Time That Well Preceded the Crime Itself.”
- So, It Came In For the Non-Hearsay Purpose of Showing the Phone was Activated by Someone Who Gave that Identifying Information of the Defendant, Thus “Providing Corroborating Evidence for the Victim’s Identification of the Defendant in a Line-Up.”

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- App Div Affirmed: Subscriber Information was Akin to Pedigree Information and “Did Not Constitute Assertions of Fact...But Was...Properly Admitted as Circumstantial Evidence of the Defendant’s Identity as The Purchaser of the Phone... [Proving that The] Declarant Was in All Likelihood The Defendant.”
- “ALTHOUGH THE PURCHASER OF THE PHONE WAS NOT UNDER A BUSINESS DUTY TO PROVIDE THE PEDIGREE INFORMATION, THE REQUIREMENT OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE DID NOT APPLY, BECAUSE THE INITIAL DECLARATION WAS INDEPENDENTLY ADMISSIBLE.”

People v. Darnell Patterson, 28 N.Y.3d 544 (2016)

- Court of Appeals Agreed With App. Div.
- The Subscriber Information Was **Not Hearsay** . . . Because It Was Not Admitted For its Truth and Was “Relevant to the People’s Argument . . . That it Was Not Coincidental that Someone – Regardless of Who – Provided Pedigree Information Associated With the Defendant Activating the Cellphone.”
- The Subscriber Information Thus was Properly Admitted For the Jury to Consider As a “Piece of the Puzzle.”
- Thus, **Non-Hearsay Within Hearsay**

As the New York Evidence Guide to Evidence Note to 8.21 Points Out:

- *Patterson* References Several Appellate Cases That Have Ruled on “Hearsay Within Hearsay” or “Non-Hearsay Within Hearsay” Documents:
- They Include:
- *Splawn v Lextaj Corp.*, 197 AD2d 479, 480 (1st Dept. 1993) [Hotel Logbook Entries Reporting Burglaries Not Admissible to Prove the Crimes Occurred But Permitted to Show Hotel Had Notice of Activity] = Hearsay (?) Within a Hearsay Document

And Two More ...

- *People v Blanchard*, 177 AD2d 854, 855 (3rd Dept. 1991) [Police Blotter Entry Showing Phone Call Made by Someone Purporting to be Defendant's Father Properly Received Not for Truth, But to Impeach Father, Who Testified That He Did Not Make Call] = **Non-Hearsay Within Hearsay Document**
- *Donohue v Losito*, 141 AD2d 691, 691-692 (2nd Dept. 1988) [Portion of Police Report Indicating Trial Witness Stated that Defendant had Punched Plaintiff in Face Not Admissible For Truth Under CPLR 4518, But to Impeach Witness] (Per *Patterson*, 28 NY3d at 551) = **Non-Hearsay Within Hearsay Document**

So, The People Want to Introduce “Sprint” Reports That Reflect 911 Calls in a Reckless Endangerment and Falsely Reporting an Incident Prosecution

- OK?
- Yes, Per *People v. Ronald E. Deshields*, 169 A.D.3d 823 (2nd Dept. 2019)
- They Were CPLR 4518(a) Business Records Under *Johnson v. Lutz and Patterson*
- See Also *People v. Lloyd Kurth*, 82 A.D.3d 905 (2nd Dept. 2011) [Sheriff’s Firearms Receipt Logbook Properly Admitted as Business Record Under CPLR 4518(a), Even Though It Contained Hearsay Information; No Deprivation of Right to Confrontation]

And Put Aside Hearsay, What About Confrontation Concerns in Criminal Cases?

- We Know That Testimonial Hearsay is Inadmissible Under *Crawford v. Washington*, 541 U.S. 36 (2004)
- And We Also Know There's Extensive Caselaw in New York on This: Most Recently: *People v. John*, 27 N.Y.3d 294 (2016), *People v. Austin*, 30 N.Y.3d 98 (2017) *People v. People v. Tsintzelis/Velez*, 35 N.Y.3d 925 (3/24/20)
- So, Do Medical Records Violate *Crawford*, Even If They're OK as Exceptions to the Hearsay Rule?

People v. Luis Cosme,
173 A.D.3d 445 (1st Dept. 6/6/20)

- There, “Limited Portions” of a Non-Testifying Victim’s Medical Records In Which He Reported He Had Been Struck With a Gun Were Admitted in Evidence as Relevant to Diagnosis and Treatment Under *Ortega*
- 1st Dept. Affirmed
- These Records Were **Not Testimonial** In Nature Since They Were Not Prepared in Anticipation of Litigation Per *People v. Rawlins*, 10 N.Y.3d 136 (2008)

And What If a Police Accident Report, Is Not Certified?

- Is It Still Admissible As a Business Record Under CPLR 4518?

Thus ...

- “A Hearsay Statement, Admissible Under an Exception, May Contain Several Out-of-Court Statements.
- Theoretically, Under the Rule Such a Statement is Admissible, Provided Each Statement Conforms to an Exception or ... is Offered for a Non-Truth Purpose, As the Rule Contains No Limit.”

However,

- “The Trial Court Has the Discretion to Exclude an Otherwise Admissible Statement with Multiple Out-of-Court Statements **Upon a Determination That The Statement With So Many Layers of Other Statements is Unreliable, or Gives Rise to Confusion, or is Otherwise More Prejudicial than Probative.**”
- Guide to New York Evidence, 8.21, Note

So What if in an Action to Foreclose Brought by a Bank ...

- It Submitted, as Plaintiff, an Affidavit of an Employee of Its Attorney, Kyra Schwartz, The Manager of Group of Law Firm Employees Responsible to Receive Mortgage Documents That Stated:
- That These Business Records Were Maintained by Her Employer, Along With ...
- An Attachment to That Affidavit That The Plaintiff Bank's Attorneys Were in Possession of The Original Note Endorsed in Blank on the Mortgage Prior to the Commencement of the Action and a Printout That Indicated That the Computer Records of Her Employer Reflected The Receipt of the Original Note on a Specific Date

After the Bank Moved For Summary Judgment ...

- The Defendant Cross-Moved For Summary Judgment On Grounds of Standing, And, In Particular ...
- That the Schwartz Affidavit Failed to Lay a Proper Foundation For the Admissibility of the Business Records Attached to It
- The Nassau Supreme Court Granted Summary Judgment to the Plaintiff Bank

Bank of New York Melton v, Durshaun Gordon, 173 A.D.3d 197 (2019)

- 2nd Dept. Affirmed
- First: Business Records Are Admissible Under CPLR 4518(a) When Offered For the Truth of Their Contents
- Next: Admissible Business Records May Be Electronic in Nature Under *People v. Kangas*, 28 N.Y.3d 984 (2016)

And Further ...

- Of Course, To Establish Admissibility of a Business Record Under CPLR 4518(a), The Proponent Must Establish That The Record Was:
- Made in the Regular Course of Business,
- That It Reflects a “Regularly Conducted Business Activity and That It Be Needed and Relied on in the Performance of Functions of the Business” [Quoting *People v. Kennedy*, 68 N.Y.2d 569 (1986)],
- That It’s The Regular Course of Business to Make the Record Routinely, Habitually and Systematically

And Finally ...

- The Proponent of the Business Record Must Establish The Reliability and Accuracy of the Record by a Demonstration That It Was Made Contemporaneously With the Event in Question
- The Bank, as Plaintiff, Made The Required Showing That The Records Were **Indeed Business Records Under CPLR 4518(a) and Their Contents Thus Were Admissible Hearsay Sufficient to Prevail on the Summary Judgment Motion**

Oh, and What If The Business Record is a Police Report and It's Not Certified?

- What If It Contains a Party's Admission Following an Motor Vehicle Accident?
- Is It Admissible?

Jehad Yassin v. Lyndon Blackman, 2020 NY Slip Op 05090 (2nd Dept. 9/23/20)

- Rear-End Collision MVA Involving Taxi and Truck; Plaintiff Was Taxi Driver
- Plaintiff Moved For Summary Judgment on Issue of Liability, Submitting Copy of Uncertified Police Accident Report
- Report Indicated Statement Attributed to Operator of Defendant's Car That:
- "HE WAS ATTEMPTING TO PASS [The Plaintiff's Vehicle] TO CONTINUE ON WEST 48th STREET SIDE SWIPING [The Plaintiff's Vehicle.]"

Jehad Yassin v. Lyndon Blackman,
2020 NY Slip Op 05090
(2nd Dept. 9/23/20)

- Defendant's Affidavit Stated:
- “As I Was Driving ... I Observed a Green Taxi Double Parked to the Right of My Vehicle. As I Attempted to Pass the Taxi, The Plaintiff Who Operated the Taxi Suddenly Moved Forward and Cut Me Off to Get in Front of My Vehicle In Order to Make a Right Turn.”
- Brooklyn Supreme Court Granted Plaintiff's Summary Judgment Motion

Jehad Yassin v. Lyndon Blackman,
2020 NY Slip Op 05090
(2nd Dept. 9/23/20)

- 2nd Dept. Reversed, Per Connelly, J.
- “An Uncertified Police Accident Report Does Not Constitute Admissible Evidence Absent a Proper Foundation for Admissibility”
- Other Cases That Suggested to the Contrary Should No Longer Be Followed

Jehad Yassin v. Lyndon Blackman,
2020 NY Slip Op 05090
(2nd Dept. 9/23/20)

- “The Use of a Statement Recorded in a Police Accident Report Involves **Two Levels of Hearsay, Each of Which Must Fit Within a Hearsay Exception to Render the Statement Contained Within the Report Admissible**”
- A Properly Certified Police Report is Admissible Under CPLR 4518(c)

Jehad Yassin v. Lyndon Blackman,
2020 NY Slip Op 05090
(2nd Dept. 9/23/20)

- Assuming Admissibility as a Business Record, Any Statement Contained Within the Report Must Also Satisfy a Hearsay Exception to Be Admitted For Its Truth
- Thus, That Portion of the Report That Contained The Defendant's Purported Admission Was Not Properly Admissible
- Order Reversed, Plaintiff's Summary Judgment Denied

So, To Put This All Together, Let's Try This ...

- Is an Insurance Claims Consultant's Report That Captures a Wife's Hearsay Statement Her Husband, The Insured, Used Drugs Admissible in an Action to Recover the Benefits on the Policy?
- The Issue Was, Is The Claimed Drug Use in the Report Admissible to Demonstrate a Material Misrepresentation, as Claimed by the Defendant, Insurance Company?

Global Energy Efficiency Holdings, Inc. v.
William Penn Life Ins. Co. of New York,
180 A.D.3d 624 (1st Dept. 2/27/20)

- First, Is the Report of The Insurance Claims Rep a Business Record?
- Yes, Under CPLR 4518(a)
- Second, Are The Hearsay Statements Reportedly of the Wife Contained Within the Report Admissible Under Some Exception to Hearsay?

Global Energy Efficiency Holdings, Inc. v.
William Penn Life Ins. Co. of New York,
180 A.D.3d 624 (1st Dept. 2/27/20)

- The Insurance Company First Claimed The Wife's Statements Admissible Because She Was Under Some Business Duty to Report This
- **Rejected!**
- The Insurance Company Also Argued Excited Utterance
- **Rejected! Not Close in Time**

Global Energy Efficiency Holdings, Inc. v. William Penn Life Ins. Co. of New York, 180 A.D.3d 624 (1st Dept. 2/27/20)

- Last, The Insurance Company Said They'd Seek to Add Wife as a Party and Thus, Her Statements Would Be an "Admission"
- Lower Court Rejected This Too [2016 WL 11409863] and 1st Dept. Did Not Reach This Directly
- **Upshot: Bench Trial Judgment For Plaintiff Judgment Affirmed – Report Properly Excluded**

In Sum, For Hearsay Within Hearsay Documents:

- Make Sure the Document Satisfies The First Hurdle For Admissibility as a Business Record Under CPLR 4518
- Next, If the Document Contains a Hearsay Statement, Be Sure to Identify What Hearsay Exception or Non-Hearsay Exception The Statement Is Allowed

The End

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