

Rule 15-58. SDCL 19-19-804. Exceptions to rule against hearsay--when declarant unavailable as witness.

(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 subdivision (b)(1); or
 - (B)** the declarant's attendance or testimony, in the case of a hearsay exception under subdivision (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.

(b) Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former testimony. 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
- (A)** 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.

(2) Statement under the belief of imminent death. In 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.

(3) Statement against interest. 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.

(4) Statement of personal or family history. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) Decedent's statements. In actions, suits, or proceedings by or against the representatives of deceased persons including proceedings for the probate of wills, any statement of the deceased whether oral or written shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.

(6) Statement offered against a party that wrongfully

caused the declarant's unavailability. A statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.