

A daughter is prosecuted for the murder of her mother. At trial, the government seeks to introduce a properly authenticated note written by the mother that reads: "My daughter did it." In laying the foundation for admitting the note as a dying declaration, the prosecution offered an affidavit from the attending physician that the mother knew she was about to die when she wrote the note.

Is the admissibility of the note as a dying declaration a question for the judge or the jury?

- A. The judge as a preliminary fact question, and the judge may properly consider the affidavit.
- B. The judge as a preliminary fact question, and the judge must not consider the affidavit.
- C. The jury as a question of weight and credibility, and the jury may properly consider the affidavit.
- D. The jury as a question of weight and credibility, and the jury must not consider the affidavit.

Explanation:

Although a **jury** ultimately determines the **weight and credibility** of evidence, a **judge** must first determine whether that **evidence can be presented** to the jury (ie, admitted) under the Federal Rules of Evidence (FRE) **(Choices C & D)**. Under [FRE 804](#), a dying declaration is admissible hearsay evidence if:

the declarant is unavailable (eg, deceased, no memory, refuses to testify)

the statement was made when the declarant believed that his/her death was imminent *and* the statement pertains to the cause or circumstances of the anticipated death.

When determining if these preliminary facts are met, the court may **consider *any* relevant evidence**—even evidence that is otherwise inadmissible.*

Here, the prosecution seeks to introduce the mother's note as a dying declaration. To establish the note's admissibility, the prosecution offered the physician's affidavit explaining that the mother knew she was about to die when she wrote the note. And since the physician's affidavit is relevant to determining whether the note was a dying declaration, the judge *may* consider the affidavit in determining the note's admissibility **(Choice B)**.

*The Federal Rules of Evidence typically apply to all civil and criminal proceedings before U.S. district courts, U.S. courts of appeal, U.S. bankruptcy courts, the U.S. Court of Federal Claims, and U.S. magistrate judges. Preliminary-question hearings are one [exception](#) to this rule.

Educational objective:

A judge must determine the admissibility of evidence and can consider *any* relevant evidence—even if it is otherwise inadmissible—to do so. But the jury must decide the weight and credibility of the admitted evidence.

References

Fed. R. Evid. 804 (hearsay exceptions declarant unavailable).

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Presentation and evaluation of evidence



Present evidence



**Determine
admissibility**
May consider any
relevant evidence



**Assess weight
& credibility**
May only consider
evidence admitted at trial



Issue verdict