

14. HEARSAY

A. INTRODUCTION

1. What is the Hearsay Rule?

Hearsay is a statement that was made outside of the courtroom, asserts facts, and is now offered in court to prove the truth of the facts asserted. The statement may have been oral, written, or even nonverbal. Hearsay works like this:

- Hearsay is defined in the first part of Rule 801. The definition is quite specific, and many things people say or write down do not fit the definition and are not subject to the hearsay rule at all.
- The second part of Rule 801 arbitrarily excludes a second bunch of things people say or write down from the definition of hearsay, so they are not subject to the hearsay rule either.
- Those out-of-court statements that are defined as hearsay are declared inadmissible by Rule 802, unless they fall within an exception
- Rules 803 and 804 contain thirty exceptions that cover just about every kind of statement a person is likely to make that would be relevant at trial.

This leads us to Tanford's two rules of hearsay

RULE NUMBER ONE: Almost everything that looks like hearsay is eventually admissible if you are clever enough to find the right loophole among the several hundred created by the rules and by court decisions. The hearsay rule is a lawyer's dream. It is a rule consisting almost entirely of loopholes.

RULE NUMBER TWO. No matter how hard you try, you will never actually understand hearsay. Luckily, neither will anyone else, including the judge, so you will not be at a disadvantage. Indeed, many students get an A on the exam without getting a single one of the hearsay questions right.

2. How the Game is Played

Step (1). Everything in the trial is running smoothly until some idiot witness mentions something the witness heard or read. The opposing lawyer, in compliance with rule #2, makes a hearsay objection. If the lawyer actually understood hearsay, of course, he or she would not make a hearsay objection because the lawyer would know that the evidence was in fact admissible through some loophole under rule #1.

Step (2). Now it's your job to come up with a reason why your evidence should be admitted -- the game is to "name that loophole." There are four types of loopholes:

a) Definitional. The evidence does not fit the definition of hearsay under Rule 801(a)-(c).

b) Exclusions. The evidence is simply excluded from the definition of hearsay by Rule 801(d) for no particular rational reason.

c) Exceptions. The evidence falls into one of the specific exceptions listed in Rules 803-804 Step (3). The objecting attorney responds that the proponent has picked the wrong loophole. The two sides argue about the loophole, not the hearsay rule itself.

Step (4). The judge gets tired of the whole thing, invokes rule #2, and rules randomly, sometimes admitting the evidence and sometimes excluding it. Good judges generally admit the hearsay because of rule #1.

3. Hearsay Within Hearsay

And just in case you thought this was going to be easy, we have the hearsay within hearsay rule. If one hearsay statement includes additional hearsay (e.g., witness heard it from John who heard it from Aretha who heard it through the grapevine and wrote the whole thing down), the proponent must find a loophole for each declarant. A written document is almost always hearsay within hearsay because the document itself is a statement, and it contains factual statements from actual human beings.

4. Distinguishing Hearsay from Lack of Personal Knowledge.

A hearsay objection is made when a witness relates the actual content of an out-of-court communication. When a witness's testimony is "based on hearsay," e.g., based on having read a document or heard others recite facts, the proper objection is that the witness lacks personal knowledge.

5. A Witness's Own Prior Statements are Usually Hearsay

A witness's own prior statements are treated the same as anyone else's statements. A witness on the stand may not testify to what she previously told the police any more than the police could testify to what she previously told them. The best context in which to understand this strange concept is with written documents. For example, if an eyewitness testifies at trial, her diary, her signed statement to the police, and her deposition are not automatically admissible. Each is a unique out-of-court utterance that is subject to a hearsay objection.

B. RESPONSES TO HEARSAY OBJECTIONS

1. First Line of Defense: What the Witness Said or Wrote Does Not Fit the Definition of Hearsay.

To be hearsay, testimony must describe the content of an utterance that asserts facts and is offered to prove that the facts are true.

A. No content. Evidence is hearsay only if it has substantive content. Testimony by a witness that she heard Bill shout or saw a document in his hand does not describe the content of the shout or

document and is therefore not hearsay.

B. The utterance does not assert facts.

(1) *In general*. Utterances are only hearsay if they assert facts. An assertion of fact is a description by a person of something the person perceived or thought. If Clarence witnesses a shooting and tells Ruth about it (either in person or in an email), it is an assertion of fact. Simple enough. It gets a little less clear if Clarence also says that he was frightened for his own safety. This is not a fact he observed, it is a present emotion (fear) and a look into the future (something might happen to him). We stretch the concept of perception to include a declarant's own emotions -- Clarence knows what emotion he is feeling -- but not his look into the future.

You can respond to a hearsay objection by arguing that the content of the utterance is not an assertion fact, but is something else, such as:

- a) A prediction of the future.
- b) A question
- c) A command or request
- d) A label, sign or price tag

However, the form of the utterance is not controlling. Questions and commands often contain implicit factual assertions. For example:

- The question "You think we ain't got guns, too?" asserts that the declarant has guns and is hearsay.
- The command "Find the gun and get rid of it" asserts the existence of a gun and the declarant's knowledge of it.

(2) *Silence as an assertion*. There can even be an assertion when no words are spoken at all. Three examples:

- (1) After the police ask where the suspect went, a witness points down an alley.
- (2) After a shoplifting suspect claims he paid for a watch, the cash register inventory for the day contains no record of a watch purchase.
- (3) If a statement accuses a person of wrongdoing in a context in which it would ordinarily be denied by an innocent person, anything other than a clear denial constitutes a tacit acknowledgment of the truth of the accusation. The accusation and its tacit admission are treated as a statement by the person accused. There must be some evidence that the person heard and understood the accusation and had a realistic opportunity to deny it.

(3) *Only humans can make assertions*. Warning barks from dogs and receipts from ATMs are not assertions by humans, and therefore not hearsay. In the case of "statements" by machines, this can get complicated because people use machines to help them create all kinds of factual documents. The line can be hard to see. For example, a boarding pass generated by an airline's online reservation system is not an assertion, but a boarding pass obtained at the airport generated by the gate agent is an assertion because a human being made it. Are we having fun yet?

(4) *Words Offered for Their Legal Significance*. Words that have independent legal

significance, sometimes called “verbal acts,” are not considered hearsay. They assert legal duties and liabilities, not facts. For example:

- a) The words constituting slander or libel.
- b) The words in a contract.
- c) Words by which a conspiracy was furthered.
- d) Statements that help establish probable cause to make an arrest.
- e) A felony judgment entered in a criminal case.

C. The Statement is Not Being Offered to Prove the Truth of the Facts Asserted.

(1) In general. Even if an utterance contains a factual assertion, it is only hearsay if the evidence is offered to prove the truth of that factual assertion. You can therefore respond to a hearsay objection by arguing that the statement helps prove a material fact other than the fact asserted in the statement. The difficulty is articulating exactly what alternative relevant issue a statement helps prove. You can't just mutter "Not for its truth." Common examples:

- a) *Impeachment*. A prior inconsistent statement is not hearsay if offered to impeach a witness by showing he can't keep his story straight. For all we know, both statements are false. A statement giving a reason the witness is hostile toward a party is not hearsay if we don't care if it's true but only that it shows the declarant's bias. We're pretty sure someone doesn't like Obama is they claim he is Kenyan Muslim, regardless of whether the facts are true or false.
- b) *Rehabilitation*. If a prior inconsistent statement was used to impeach a witness, other pertinent parts of it may be used on redirect for the purpose of rehabilitation. The original testimony was offered for its truth, the cross-examination made credibility an issue, and the consistent statements are offered to show credibility.
- c) *State of mind*. If a person's state of mind is relevant, statements by other people that may have affected it are admissible. For example, if a defendant pleads self defense, a threatening statement by the victim is relevant to show his reasonable belief in the need to use force, even if the threat was false.
- d) *Insanity*. When insanity or mental competence is an issue, statements that demonstrate rational or irrational thought are relevant to the question of mental state. If a person constantly repeats the statement, “I am the keymaster” while wearing a colander on his head, it tells us more about his sanity than whether he is in fact a keymaster.
- e) *Identification*. A document whose content is relevant circumstantial evidence of identity is not hearsay. For example, a note to the defendant from his wife saying “The school called and Jamie's in trouble again,” found inside a briefcase containing drugs is relevant to prove the defendant possessed the case.
- f) *Notice and knowledge*. A statement describing a problem may be admissible to show a defendant had notice of unsafe conditions. For example, a work order dated a year before an accident describing broken pavement may be admissible not to prove the

pavement's actual condition but to show the city had notice of a dangerous condition.

g) *Other half of a conversation.* A statement designed to elicit a response, whether in the form of a question or comment, is generally not hearsay when it is the response that is important. For example, statements by a police informant in a controlled drug buy that he wants to buy drugs may be primarily designed to prompt the defendant to speak and act, and so are not offered for the truth of whether the informant actually wanted to buy drugs.

h) *Rule of Completeness.* When one side offers part of a document or conversation into evidence, the other side may introduce any remaining relevant, nonprejudicial parts which ought in fairness to be considered, in order to prevent distortion or taking a statement out of context. See Rule 106. The remainder is not hearsay.

(2) *Limiting instruction.* The party against whom a hearsay is entered is entitled to an instruction to the jury that the statement may not be considered for its truth.

(3) *Rule 403.* If a statement is offered for a limited purpose other than its truth, there is a high likelihood that jurors will consider it for its truth anyway. This a Rule 403 problem of confusing the issues and misleading the jury. If the probative value is low and the prejudicial effect high, a separate objection based on Rule 403 can be made. For example, if statements by a witness that he and the defendant are both gang members is offered to show bias, the likelihood is high the jurors will consider the defendant a gang member. It might be non-hearsay but objectionable under Rule 403.

2. Second and Third Lines of Defense: Exclusions and Exceptions

If you cannot find a reason why an utterance is not hearsay, you have two more lines of defense against a hearsay objection -- that it is excluded from the rule by 801(d), or fall into an exception from Rules 803 or 804. We will go through these in the next few classes.

*Now the hard part -- applying all this to actual situations. This is way harder than it looks. The only way you can hope to grasp any of this is to carefully and thoughtfully work through the problems.