

HEARSAY
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I am departing from the usual format of this article by discussing an article rather than a recent case. I am also going to make a confession. Hearsay has always been a mystery to me. It is sort of like pornography. I know it when I see it but I can't explain it. My confession is tempered by the observation that, having tried a lot of cases, I have discovered that a lot of Judges don't understand hearsay either.

James McElhaney's article in the March, 2003, issue of the ABA Journal is an excellent common sense explanation of the hearsay rule that every lawyer and every judge should read. Mr. McElhaney starts with the traditional definitions of hearsay. He quotes Irving Younger for the definition "hearsay is evidence that depends for its probative value on the veracity of an out of court declarant" and the Federal Rules of Evidence for the definition "hearsay is evidence of an out of court statement that is offered to prove the truth of the matter asserted."

How many times have you argued with opposing counsel, and the Judge, over whether a statement is or is not offered to prove the truth of something? Neither definition is of much help. What Mr. McElhaney points out is that the reason behind the hearsay rule is the key to its application. The hearsay rule's only purpose is to protect the right of cross examination and to allow the jury to weigh the testimony of the person who claims that something happened.

Mr. McElhaney suggests that instead of trying to figure out what is hearsay that a lawyer simply ask the question "who is the real witness?" That is, who needs to be cross examined to determine whether what is being said is true or not? So, if the witness is testifying that she saw the car run the stop sign, that is obviously not hearsay. She is the one that needs to be cross examined and the jury has to judge whether she saw what she says she saw or not. On the other hand, if she says someone told me that when the driver got out of the car it looked like he was drunk, the real witness who needs to be cross examined is the person who made that statement.

The witness on the stand can only tell us what the missing witness said about what he saw, not what the driver looked like because she didn't see him. The missing witness is the real witness and the statement is clearly hearsay.

Now that you have identified what is and isn't hearsay by asking who the real witness is, the next question is the more difficult one of whether the statement is being offered for its truth or not? If the truth or falsity doesn't make any difference, it is not hearsay. If the statement's truth does make a difference, it is hearsay. You make the determination the same way; ask yourself who is the real witness? If a witness testifies, "I heard the stablehand tell the plaintiff that that horse bucks and will probably throw him," you have to ask yourself what the purpose of the statement is. Is it to prove that the horse bucks or is it to prove that the plaintiff knew before he got on the horse he was going to get thrown off? If you need to prove that this is a dangerous horse, then the stablehand is the real witness. The person telling us about what the stablehand said may not know anything about the temperament of the horse so the real witness is the stablehand and the matter is being offered to prove the truth of the statement and it is hearsay. On the other hand, if the purpose of the statement is to prove that the plaintiff knew full well how dangerous this horse was, then the real witness is the person on the stand telling us that the statement was made. It is not relevant at this point whether the horse bucks or not, just that the plaintiff had notice. The statement is not offered to prove its truth and is not hearsay.

The article goes on to point out that there really are only three circumstances under which an out of court statement may be relevant for some purpose other than to prove its truth. The first is the notice or knowledge purpose. That is, that the statements only purpose is to show that one of the parties knew it had been made.

The second is a verbal act. Something that is done with words that has an effect beyond the fact that the words are merely said. Say, for example, in a libel or slander suit someone testified "I heard the defendant say, plaintiff was a crook." The reason the out of court statement

made by the person alleged to have uttered the slander is not hearsay is because it doesn't matter whether the statement is true or not. The only thing important is that it was said. The proponent is trying to prove that the defendant said the plaintiff was a crook not that the plaintiff really is a crook. The same thing is true regarding things like making an offer or acceptance; offering a job; offering to sell something for a certain price. These are all acts, not just statements, and the purpose for offering the statement is not to prove their truth but that the statement was made.

Lastly, verbal parts of acts can be offered without intending to prove their truth. These are a combination of a physical act with words that turn the act into something which has substantial meaning. For example, the witness might say "I saw the defendant hand a pile of cash to the Senator and when he did, he said, "this is for voting against that bill." Without the words, the act has no meaning. The purpose of offering the words is to give the act meaning and it is not hearsay.

Of course, there are lots of exceptions to the hearsay rule. By and large, they are listed in the Rules of Evidence and while they have their own problems, that will have to wait for another day. In the meantime, this article does an excellent job of simplifying the hearsay rule and hopefully making it easier for all of us to understand its application.

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