

NC Hearsay Overview

2010

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Mapping the Evidence Highway

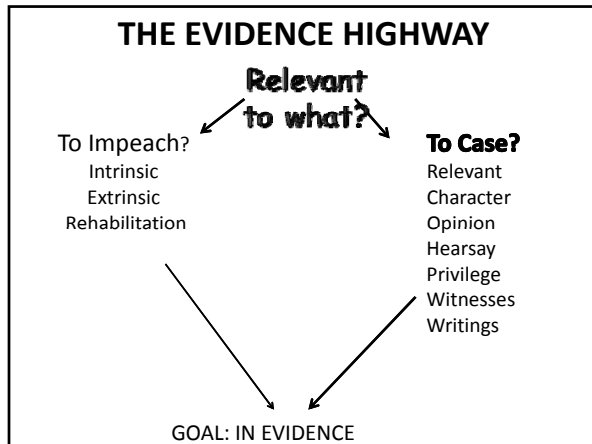
- Protocols and Experts
- GPS



THE EVIDENCE HIGHWAY


Relevance	1
Character	2
Impeach	3
Hearsay	4
Privilege	5
Opinions	6

Destination? "In Evidence"



Forks in the Road

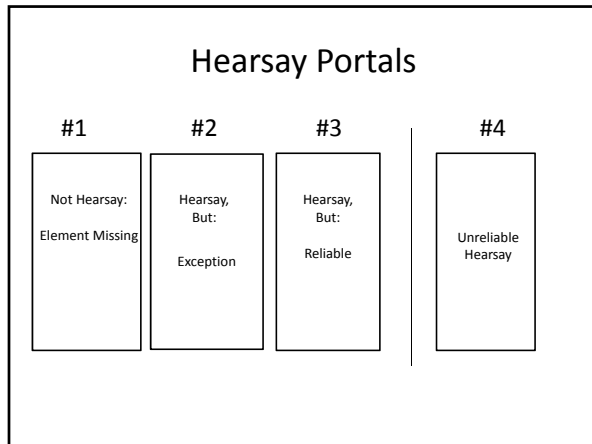
“If you see a fork in the road, take it.” – Yogi Berra



“If you don’t know where you are going, any road will take you there.” -- Lewis Carroll, Alice in Wonderland

Hearsay Protocol

- Portal #1: Not Hearsay.
- Portal #2: Hearsay, but an Exception
- Portal #3: Hearsay, But Reliable
- Portal #4: Unreliable Hearsay



Hearsay Definition

(a) Statement -

- an oral or written assertion; or
- nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant –

- a person who makes a statement

Definition (Cont'd.)

(c) Hearsay –

- A statement,
- other than one made by the declarant,
- while testifying at the trial or hearing,
- offered in evidence to prove the truth of the matter asserted."

(d) Exception:

- Admissions by a Party-Opponent



PORTAL #1

Not Hearsay Issues

Not Hearsay Issues

Hypo #1: The Yardage Print Out

Alex would win the golf contest if he was closest to the pin on his tee shot. His 3-month old 'Yanny Yardage Device' measured the distance at 14.5 feet. The sponsor disagreed and refused to give him the grand prize of \$1000. Alex sued. At trial, he offered the print-out from the yardage device. Admit?

Hypo 1 – Yardage Print-Out

- A. Yes, because it is hearsay, but reliable.
- B. Yes, if it is properly authenticated.
- C. No, because it is inadmissible hearsay.
- D. No, unless it is the original printout.

Declarant Issues

- Must be Human
- No animals
 - OR -
 - Non-directed machines



Not Offered for the Truth Issues

- Generally, there are a variety of purposes not “for the truth of the matter asserted” –
 - Not just boiler plate
 - Various reasons, but key is *Relevancy* --
- *Relevant* to the case for another purpose than truth of matter asserted

Prior Statements of Witnesses

- Unlike the Federal Rules, these statements are generally hearsay if offered for their truth.
- (NC has no 801(d)(1))

Prior Consistent Statements

Hypo #2 – State v. Later:

In *State v. Later*, the witness's prior consistent statement, which varied slightly from the witness's actual statement at trial, was admitted. On objection, the judge's ruling was proper if:

Hypo #2 – Prior Statements

- The prior consistent statement was made by a witness on the stand and can explain statement.
- The prior consistent statement was offered to corroborate other evidence.
- Only the part of the prior consistent statement identical to the trial statement was admitted.
- The statement was offered corroborating other evidence and a Rule 105 limiting instruction was given.

State v. Early, --N.C. App. --, 670 S.E. 2d 594 (2009)

Hypo #3 – Non-Hearsay

Defendant Danny is charged with a crime. Which of the following is most likely to be excluded as hearsay at Danny's trial?

Hypo #3 - continued

- A. A statement by a witness to police that "Danny committed the crime" to show Danny was the perpetrator.
- B. A statement by a witness to police, "Danny committed the crime," to show why the police went looking for Danny.
- C. A statement by an officer to another officer to show the other officer's conduct: "I'm looking for Danny and need back-up."
- D. A police dog barked when Danny walked by.

Explains Conduct – A Non-Hearsay Purpose

- A statement explaining conduct is not offered for the truth of the matter asserted.

Examples

1. In an action where a mother sought a domestic violence protective order against a father, their child's statement to the mother that the father sexually abused the child was admissible.

- -- But not to show abuse, but for a limited purpose.

Burress v. Burress, __ N.C. App. __, 672 S.E. 2d 732, 734 (2009)

Example 2

2. A statement by a passenger of a car to a police officer, permitting a search of the car he had rented, is *not* hearsay because...

Example 2

(a) It is a verbal act; or

(a) It explains subsequent conduct of the officer in believing he could search the car.

State v. Hodges, __ N.C. App. __, 672 S.E. 2d 724, 731-732 (2009)

Example 3

3. *Cf.* Defendant offered a statement by a friend of defendant's (who used a credit card stolen in the robbery in question) to show the friend did not know the defendant.

State v. Hairston, 190 N.C. App. 620, 625, 661 S.E. 2d 39, 42 (2008).

Problems

1. Rule 403 - "Not for truth" can confuse the jury, even with a limiting instruction.
2. Rule 105 limiting instruction sometimes has the opposite effect

Portal #2

Exceptions

Portal #2: Admissions

Rule 801(d): – a statement is admissible as an exception to the hearsay rule if it is offered against a party and it is

- (A) his own statement... or
- (B) [adopted by Party]...or
- (C) ...by a person authorized by him to make a statement concerning the subject, or
- (D) a statement by his agent...[within the scope] or
- (E) a statement by a coconspirator during and in furtherance....

Hypo #4 - Admissions

Donny wrote his mother a letter, stating in pertinent part:

"I am in jail now. It wasn't my fault. That side door was loose. You know, the woman died in the rear bedroom, with an ashtray next to her, but not because of me."

Hypo 4 - Admissions

If Donny is charged with first degree murder, can the prosecutor offer the letter he wrote his mother in evidence?

Key Issues?

- (1) Relevance;
- (2) Hearsay

Hypo 4 - Admissions

See generally, State v. Garcell, 363 N.C. 10, 678 S.E.2d 618 (2009).

- What if the State offers a letter written by Donny's mother in reply, stating:

"In our family, if you did something, you need to be responsible for it. I think you did it."

Writings

Three main objections to writings:

1. Hearsay
2. Authentication
3. Best Evidence Rule

PORTAL #3

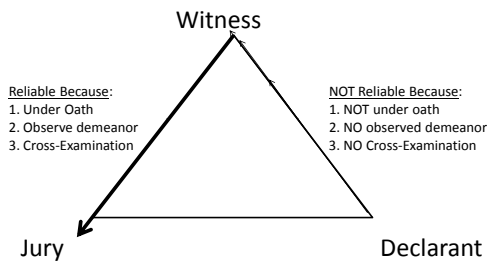
Reliable Hearsay

Reliability

Indicia of reliability --

- The hearsay will not confuse or mislead the trier of fact, even if no direct testimony exists.

Why Unreliable?



Hypo #5

A child victim of abuse was examined in a routine physical exam by a physician's assistant (P.A.) with her mother present.

The mother told the P.A., "I don't believe anything happened to my daughter; she never told me about anything like that; nor my son. It started when Social Services showed up."

The uncle is charged with child molesting. Is this statement by the mother admissible?

Hypo #5

- A. Yes, because it was made to a health care provider during an examination.
- B. Yes, because statements to health care providers are generally reliable.
- C. No, because the statements were not reasonably pertinent to treatment.
- D. No, because the statement violates the best evidence rule if the uncle will testify at trial.

State v. Norman, __ N.C. App. __, 675 S.E.2d 395, 398-399 (2009).

Exception

Statements for Medical Diagnosis or Treatment

803(4) Test:

1. Were the statements made for the *purpose of* medical diagnosis or treatment AND
2. were the statements *reasonably pertinent* to diagnosis or treatment.

Hypo #6

Arlene's boyfriend Ted had a bad temper. After a particularly significant fight, Arlene was shot in the stomach. She dialed 911, then said,

"I've been shot by my boyfriend, Ted. We had a fight. I told him I was going to break up with him. He's running away. , Get him."

Hypo #6

Arlene died two minutes later. Ted is charged with murder. At trial, the prosecutor offers the 911 call. The defense objects. What issues are relevant to admissibility?

1. Hearsay;
2. The Best Evidence Rule;
3. Privilege
4. The Confrontation Clause

Hypo #6 – continued

1. Not for truth -- Explains conduct?
2. Reliable Hearsay, Dying Declarations?
 - 804(b)(2) Statement Under Belief of Impending Death

Hypo #6 – continued

3. Reliable Hearsay, Excited Utterance?

803(2): A statement *relating to* a startling event or condition *made while* the declarant was under the *stress of* excitement caused by the event or condition.

Compare

803(2) Excited Utterance with,

803(1): A statement *describing* an event ...made *while* the declarant was perceiving the event or condition, or *immediately thereafter*.

E.g., *State v. Wilkerson*, 363 N.C. 382, 683 S.E.2d 174 (2009).

PORTAL #4

Unreliable Hearsay

Conclusion

Hearsay Words.....literally, or in context

Juror Questionnaires:

1. What is your marital status?
2. Have you ever been divorced or affected by it?

Left Turn at Albuquerque