

WHAT IS HEARSAY AND WHY DO WE CARE?

I. WHAT IS HEARSAY?

The definition of hearsay is set forth in Rule 801(c) of the North Carolina Rules of Evidence as follows:

“HEARSAY” IS 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.

The definition raises three issues:

- A. WHAT IS A STATEMENT? Rule 801(a) of the North Carolina Rules of Evidence provides:

A “STATEMENT” IS (1) AN ORAL OR WRITTEN ASSERTION OR (2) NONVERBAL CONDUCT OF A PERSON, IF IT IS INTENDED BY HIM AS AN ASSERTION.

- B. WHO IS A DECLARANT? Rule 801(b) of the North Carolina Rules of Evidence provides:

A “DECLARANT” IS A PERSON WHO MAKES A STATEMENT.

- C. WHEN IS A STATEMENT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED? Or conversely, when is a statement offered in evidence to prove something other than the truth of the matter asserted?

With that basic definition in mind, we can turn to the more pressing question.

II. WHY DO WE CARE IF HEARSAY IS ADMITTED?

What is the matter with hearsay? Of course, Rule 802 of the North Carolina Rules of Evidence says that:

HEARSAY IS NOT ADMISSIBLE EXCEPT AS PROVIDED BY STATUTE OR BY THESE RULES.

So, absent an exception, hearsay testimony does not come into evidence.

Why do the Rules of Evidence proscribe hearsay? That raises the issue of what are the policy reasons behind the rules. This is what Jessie Smith really wants you to comprehend.

A. McCORMICK ANALYSIS

The Anglo-American tradition evolved three conditions under which witnesses ordinarily will be required to testify: OATH, PERSONAL PRESENCE AT THE TRIAL, AND CROSS-EXAMINATION. The rules against hearsay are designed to ensure compliance with these ideal conditions. Kenneth S. Broun, *McCormick on Evidence*, 6th ed. (2006) Section 245, hereinafter “McCormick”. When hearsay evidence is offered, two witnesses are involved. The testifying witness is sworn, is present for the trial and is subject to cross-examination. The other witness, the declarant, is not sworn, may not be present and cannot be cross-examined about the statement at that time. Therein, lays the difficulty. McCormick, Section 245.

The administration of an oath is designed to induce a witness to feel a “special obligation” to speak the truth. In addition, it also subjects the witness to the possible punishment for perjury. *Id.*

The requirement of personal presences permits the fact-finder to observe the demeanor of the witness and facilitates scrutiny of the credibility of the witness. When the declarant is not present, the fact-finder’s ability to scrutinize the credibility of the declarant’s statement is compromised. In addition, the fact that another’s statement is relayed to the fact-finder by another individual increases the risk of miscommunication. This risk is less in some instances such as the use of business records.

The primary concern about reliance on hearsay evidence results from the absence of cross-examination of the declarant. Wigmore, in his most frequently quoted statement, observed that cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” See *California v. Green*, 399 U. S. 149, 158 (1970). Chancellor Kent observed that “a person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author. McCormick, citing *Coleman v. Southwick*, 9 John 50 (N. Y. 1812).

B. WIGMORE ANALYSIS

The fundamental test, shown by experience to be invaluable, is the test of cross-examination. The rule, to be sure calls for two elements, cross-examination proper and confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable. The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertions of a witness may be best brought to light and exposed by the test of cross-examination. It is sufficient to note that the hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination. Wigmore, *Evidence In Trials At Common Law*, Chadbourn Revision, Volume V, Section 1362 (1974).

Wigmore rejected the notion that an oath was significant. He observed that “in most instances, however, we find the oath coupled with cross-examination in the definition of the rule. “That this coupling is merely accidental may easily be shown.” According to Wigmore, the oath is an incidental feature customarily accompanying cross-examination and cross-examination is the essential and real test required by the rule.

C. BRANDIS TREATISE ANALYSIS

Kenneth Broun, in the latest revision of the Brandis treatise on North Carolina Evidence, observes that “(h)earsay in its most flagrantly irresponsible forms is no doubt subject to these objections, but the only one which fairly explains the hearsay rule itself and offers any sort of common justification for the exceptions to the rule is the want of opportunity for cross-examination. If the declarant were testifying, the adverse party could by cross-examination inquire into the narrator’s capacity and opportunity to observe the facts which he related, the reliability of his memory, his ability to express his thoughts intelligibly and accurately, and his disposition to tell the truth generally or with respect to the particular case. When his hearsay statements are offered the opportunity to test these qualities of perception, memory, narration and veracity is greatly lessened and often completely destroyed.” Brandis and Broun, Section 193, pp. 96-97.

CONCLUSION. All of these concerns point to one larger principle. The ultimate issue is the reliability or trustworthiness of the evidence that is being presented to the fact-finder.

III. ADDITIONAL COMMENTS ON THE DEFINITION OF HEARSAY

With these concerns or principles in mind, it is appropriate to complete the earlier consideration of the definition of hearsay.

A. CONDUCT. As indicated earlier, hearsay involves a statement, either an oral or written assertion or conduct that is intended as an assertion. See Rule 801(a). A determination of whether evidence is an oral or written assertion is less complicated than the determination of whether conduct is intended by the declarant as an assertion.

Conduct that is not intended as an assertion is not hearsay and the rules against hearsay do not exclude such evidence. See Brandis and Broun, Section 210. In criminal cases, such conduct is encountered frequently. Evidence of the defendant’s flight, the making of false or contradictory statements, attempts to bribe jurors, and suicide attempts has been admitted as indicative of a general consciousness of guilt. *Id.*, Section 210. In these instances, the particular conduct is not an assertion of a particular fact.

B. TRUTH OF THE MATTER ASSERTED. Issues concerning whether statements are being offered for the truth of the matter asserted arise frequently in criminal cases. If a statement is offered for any purpose other than the truth of the matter stated, it is not objectionable as hearsay. Brandis and Broun, Section 195. Some

commonly occurring situations involve statements offered to show misrepresentations or fraud, threats, knowledge of facts or notice, to explain subsequent conduct, or to impeach or corroborate. Brandis, Section 195.

IV. HEARSAY EXCEPTIONS BASED ON ADMISSIONS OF A PARTY

One group of hearsay exceptions involves admissions by a party opponent. Rule 801(d) authorizes the admission of hearsay statements as an exception to the hearsay rule if it is offered against a party. There are five separate exceptions under Rule 801(d) and three of them are particularly pertinent in criminal cases.

A. ADMISSION BY A PARTY OPPONENT—Rule 801(d)(A)

Rule 801(d)(A) establishes an exception for the party opponent's own statement in either his individual or a representative capacity. This rule makes admissions or confessions offered by the State against a criminal defendant admissible.

B. ADMISSION BY ADOPTION---Rule 801(d)(B)

Rule 801(d)(B) creates an exception for a statement of which the party opponent has manifested his adoption or belief in its truth. "If a statement is made in a party's presence under such circumstances that a denial would naturally and probably be expected if the statement were untrue, the party's silence or failure to deny is admissible as an implied admission. Brandis and Broun, Section 211, p. 150. "The mere fact that the statement was made in the party's presence is not enough. It must be shown that the party was silent when in a position to hear and understand what was said; and the source and the character of the statement and the circumstances under which it was made must have been such that a person in the party's position would be expected to deny it at the time if it were not true. Id. Section 211, p. 151.

C. ADMISSION BY CO-CONSPIRATORS---Rule 801(d)(E)

Rule 801(d)(E) creates an exception for a statement by a coconspirator of such party during the course and in furtherance of the conspiracy. This exception triggers three separate restrictions. First, a conspiracy must exist. The proponent of the evidence must introduce evidence of a prima facie case of conspiracy. See Brandis and Broun, Section 205. This prima facie proof may be based on the defendant's own admissions, testimony from a co-conspirator or circumstantial evidence. Id., p. 133, footnote 185. Second, once a conspiracy has been established, the declaration of the co-conspirator must have been made during the course of the conspiracy. Finally, the declaration must have been made in furtherance of the conspiracy.

V. PROCEDURAL CONCERNS

Prior to concluding this initial discussion of the concept of hearsay and the initial exceptions to the hearsay exclusion that are created by Rule 801(d), a few procedural comments should be made.

A. MULTIPLE HEARSAY—Rule 805

It is certainly possible to have more than one declarant. If a witness testifies to medical records that relate statements made by a patient to a medical care provider, the patient is a declarant and the medical care provider who created the business record is also a declarant. In such a situation, there is hearsay (the patient's statements) within hearsay (the business records). Rule 805 provides that "(h)earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." The result is that the trial court judge must parse the statement and determine whether each individual statement is either not hearsay or within an exception or exclusion to the hearsay rule. Multiple or "double hearsay is admissible if each part of the combined statements conforms to an exception." Brandis and Broun, Section 215, p. 168.

B. IMPEACHMENT OF A DECLARANT—Rule 806

The credibility of the declarant is subject to impeachment or corroboration. Rule 806 provides that "(w)hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would have been admissible for those purposes if the declarant had testified as a witness."

C. RULE OF COMPLETENESS

Finally, when a party's statement is admitted as an admission, the party is entitled to have everything brought out that was said at the time in connection with the point in controversy and explanatory of the admission. Brandis and Broun, Section 212. The proponent need not offer the entire statement. However, the opposing party is entitled to have the entire statement admitted and considered by the jury. *Id.*, Section 212, p. 156, footnote 296.