HEARSAY, PART 2

Reviewing Hearsay Exceptions

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What will we discuss?

- What is HEARSAY?
- What is not HEARSAY?
- Why is there a rule against HEARSAY?
- Should the rule be applied?

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How Is Hearsay Viewed?

Gossip or Evidence

- Not reliable
- Reliable

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Cross-Examination

"The greatest legal engine ever invented for the discovery of truth."

John Henry Wigmore

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Common Law Approach

- General rule: Exclude Hearsay
- Numerous exceptions

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The Paradox

- One-Third of the Law of Evidence is Concerned with HEARSAY
- Greatest part of which is focused on the EXCEPTIONS, rather than the RULE.

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"The hearsay rule is more famous for what it permits than for what it forbids."

John S. Strahorn, Jr.,

A Reconsideration of the Hearsay Rule and Admissions,

85 U.Pa.L.Rev. 484, 487 (1937).

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What to do?

(1) Abolish the rule against HEARSAY

(2) Admit HEARSAY if sufficiently probative

(3) Revise the **system** of exceptions

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Hearsay Article in Federal Rules

- Addresses the definition of HEARSAY
- Exclusions from of the definition
- Exclusions from the RULE against hearsay
- Classifying the exceptions
- Open-ended exceptions

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Where?

- Administrative Procedure Act
  - Does it require use of rules of evidence or another standard for admitting evidence?
  - Examples:
  - Oregon APA: 2015 ORS §183.450
  - Arizona APA: "without adherence to the rules of evidence"
  - North Dakota APA: determined by "Rules of Evidence"

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Revised Model State Administrative Procedure Act

- All relevant evidence is admissible,

including hearsay, if of the type

"commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual"

- Rules of evidence exclude hearsay, unless an exception applies

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Oregon APA

- 2015 O.R.S. § 183.450(1)

➢ Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party.

➢ All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.

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Hearsay

- Is it hearsay?
- Does the hearsay rule apply?
- Does an exception apply?

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What is HEARSAY?

An out of court statement offered for the truth of the matter asserted.

N.D.R.Ev., Rule 801(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

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How about this case?

- Officer was dispatched on a report of a boat falling off a trailer being pulled by a vehicle and the driver did not stop. When the officer arrived, the driver was not there and he did not locate him. Another call, the driver had returned.
- The officer interviewed several witnesses at 4:00 p.m. who said the accident occurred within a 15 minute window prior to the dispatch call at 3:10 p.m.

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INADMISSIBLE HEARSAY

- Offered to establish the driving was within 2 hours of the test
- Hearing Officer erroneously concluded the "present sense impression" and "excited utterance" exceptions applied
- The record was insufficient to show the test was within 2 hours of driving or actual physical control
- Dawson v. N.D. Dep't of Transp., 2013 ND 62, 830 N.W.2d 221

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HEARSAY RULE

- Hearsay is excluded
- UNLESS IT'S NOT EXCLUDED
- RULE 802. THE RULE AGAINST HEARSAY
- Hearsay is not admissible unless any of the following provides otherwise:
- (a) a statute;
- (b) these rules; or
- (c) other rules prescribed by the North Dakota Supreme Court.

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Does a statute or rule admit the hearsay?

- Does a statute, i.e. APA, or a specific statute applicable to your administrative hearing allow admission?
- Examples: regularly kept records of the department
- Is there a hearsay exception to the hearsay rule or another rule allowing admission found in the Rules of Evidence?
- Some other court rule?

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ALLOWED TESTIMONY DESCRIBING INADMISSIBLE HEARSAY

- Letter was of the type the engineer expert could rely on in forming her opinion
- An expert witness should be permitted to describe otherwise inadmissible hearsay relied upon in order to give the basis for an opinion
- Peterson v. Sando, 2011 ND 206, 806 N.W.2d 172

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Hearsay Exceptions: Rule 803

- Present Sense Impression
- Excited Utterance
- State of Mind
- Medical Diagnoses or Treatment
- Past Recollection Recorded
- Business Records, absence of same
- Public Record, absence of same

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Hearsay Exceptions: Rule 804

- Former Testimony
- Dying Declaration
- Declarations Against Interest
- Statement of Personal or Family History

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Residual Exception

Hearsay NOT excluded by the rule against hearsay, if:

(1) Equivalent circumstantial guarantees of trustworthiness;

(2) Offered as evidence of a material fact;

(3) More probative than other evidence obtainable through reasonable efforts; and

(4) Admission best serves purposes of rules and justice

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Thank you

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