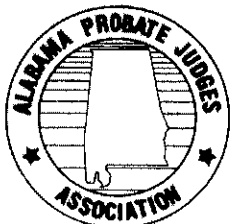


Evidence

Honorable Scott Donaldson
Alabama Civil Court of Appeals



Probate Training Conference
April 19-20, 2018
University of Alabama School of Law
Tuscaloosa, Alabama



HEARSAY EVIDENCE

or

“Non-Academic Hearsay”

Alabama Probate Judges
Conference

April 2018

Judge Scott Donaldson

“Wise judges may come to
differing conclusions in similar
situations.”

McCormick on Evidence

Two Rules to Remember

ARE 402: All relevant evidence is
admissible, except as otherwise provided by
the Constitution..., by statute, by these
rules, or by other rules applicable....

ARE 802: Hearsay is not admissible except
as provided by these rules, or by rules
adopted by the Supreme Court of Alabama
or by statute.

Hearsay

"Too much should not be expected of a definition. ... The most it can accomplish is to furnish a helpful starting point for discussion of the problems, and a memory aid in recalling some of the solutions." C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 242.01(1)(a); 242.01(1)(d) (6th ed. 2009), quoting from McCormick on Evidence.

Definition – ARE 801

(c) "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.

(b) A "declarant" is a person who makes a statement.

(a) A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

Still Applies to the Witness on the Stand

"Hearsay even includes a statement, made outside the present trial, by a declarant who is now subject to cross-examination."

"[C]onfusion results from a belief that there is no hearsay problem when the witness on the stand is subject to cross-examination....

McElroy's, §242.01(1); 242.01(1)(d).

Q. What did you tell the officer?
A. "I told the officer the light was red."
Is the statement subject to a hearsay objection? Yes, if for the truth.
vs.
Q. "What color was the light?"
A. "It was red."

THE MOST
IMPORTANT QUESTION TO ASK
BEFORE MAKING AN
EVIDENTIARY RULING

What is the purpose of this
evidence?

Operative Facts

If an issue is whether certain words were spoken or written, evidence that the words were spoken or written is admissible as nonhearsay evidence. Where a fact in controversy is whether certain things were said or done, the words or acts are admissible not as hearsay but as original evidence.

- The statement or act is "an integral part of the issue to be resolved in the case."
McElroy's, § 242.01(c)(1).
- The truth or accuracy of the statement is not the question – the question is whether the words were spoken or the statement was made.
- E.g., contract terms; fact that statement was made in defamation case.
- Sometimes called a "verbal act."

Not offered for the Truth

- Requests, directions, or authorizations do not ordinarily constitute hearsay as the statements are not assertions offered for the truth.
- Common "not for the truth" reasons include state of mind, knowledge, reactions, and explanations of subsequent conduct.

"He said he was the Emperor Napoleon."
Not offered to show he was the Emperor Napoleon, but offered for state of mind of declarant.

"He told me he was going to kill me."
Not offered for truth, but for effect on the listener.

"[P]otentially recognizable purposes are limited only by the creativity of counsel and the doctrine[s]...of relevancy." McElroy's, §242.01(1)(c) (7).

ARE 803(3) Then Existing Mental, Emotional, or Physical Condition

- "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) but....

- "...not including a statement of memory or belief to prove the fact remembered or believed...
- ...unless it relates to the execution, revocation, identification, or terms of [the] declarant's will."
- Should have some indicia of spontaneity, not time for reflection.

- "In will cases ... previous declarations of intention are received as evidence of the decedent's later conduct when those acts are at issue. Such statements are admissible on issues of forgery, alteration, contents of a will, and whether acts of revocation were done by the testator." McCormick On Evidence § 275 (7th ed.)

- Examples for discussion:
- "At the time he signed the deed, he said he was confused."
- "He said he was confused when he signed the deed. He told me that several months after signing it."
- "He said he was confused when he signed his will. He told me that several months after signing it."
- "John told me that Sam said he was confused as he signed the deed."

Prior Inconsistent Statements

"Prior inconsistent statements of a witness made out of court are admissible in evidence for the purpose of showing that the witness is not worthy of belief - that is, for impeachment purposes. *Such evidence is not classed as hearsay....* This type statement is not offered to prove the truth of the things said, and so does not fit the definition of hearsay." Jones v. State, 531 So.2d 1251, 1254 (Ala. Crim. App. 1988).

Prior Inconsistent Statement – Under Oath 801(d)(1)(A)

A statement is not hearsay if – [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, ...

**Admission by party opponent
ARE 801(d)(2)**

A statement is not hearsay if –[t]he statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

- Traditionally, must be "against interest."
- More liberal standard of admissibility under ARE: "[A]ny statement of a party, offered against that party, constitutes an admission, without regard to whether it was made against that party's interest at the time the statement was made."
Committee Notes ARE 801.
- "[A]ll statements of a party opponent are admissible if offered against that party and if they are relevant." McElroy's, §242.01(1)(e).

**Present Sense Impression and
Excited Utterances 803**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) PRESENT SENSE IMPRESSION. A statement *describing or explaining* an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) EXCITED UTTERANCE. 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.

"As compared with Rule 803(1), which limits a qualifying statement to a description or explanation of an event or condition, Rule 802(2) embodies a broader scope of subject matter coverage. An excited utterance need only 'relate' to the startling event or condition." Committee Notes 803.

- For excited utterances, must be three conditions: (1) startling event or condition, (2) statement must relate to the event or condition, and (3) statement must be made before time to fabricate has elapsed. McElroy's, §265.01(1).
- Instinctive and not deliberative.
- "The critical factor is whether the person... is still under the influence of the emotions arising from the startling event." McElroy's, § 265.01(2).

- For present sense impression, (1) does not require a startling event or condition, (2) but must describe or explain the event or condition (as opposed to being related to it), and (3) must be contemporaneous – “made while ... perceiving the event or condition, or immediately thereafter.” McElroy’s, § 265.02(2).
- An excited utterance does not have to be contemporaneous, so long as the emotional impact remains.

THE MOST
IMPORTANT QUESTION TO ASK
BEFORE MAKING AN
EVIDENTIARY RULING

What is the purpose of this
evidence?

Practice Pointers

- Require the proponent and opponent to articulate their positions on/in the record.
- The objecting party must raise a valid hearsay objection. If raised, the proponent must identify a reason why it is not or an exclusion/exception.
- Helps ensure proper rulings.
- Prevents raising new grounds/issues on appeal.

Consider these questions:

- Is it hearsay? Is it a statement that was made by a person other than the witness while presently testifying?
- What is the purpose of the evidence?
- If for the truth, it is hearsay. Is there an exception?
- If not for the truth, it's not hearsay. But is the other purpose relevant?
- If relevant, is there a 403 issue?

Analysis for discussion

- Q. Officer, what did Ms. Smith say to you? (Defense raises hearsay objection and bench conference is held for officer to answer)
- A. She told me she saw John shoot Mary.
- Court: Prosecutor, what is the purpose of the evidence?
- Prosecutor: To show what the office did next.

Is it hearsay? No - not for the truth..

Is there another possible objection?

Is it relevant – fact of consequence?

Is it an operative fact?

Is there another possible objection?

If relevant, is there a 403 issue?
