HEARSAY AND OBJECTIONS

Marcus Angelo Manos, Shareholder
Maynard Nexsen PC
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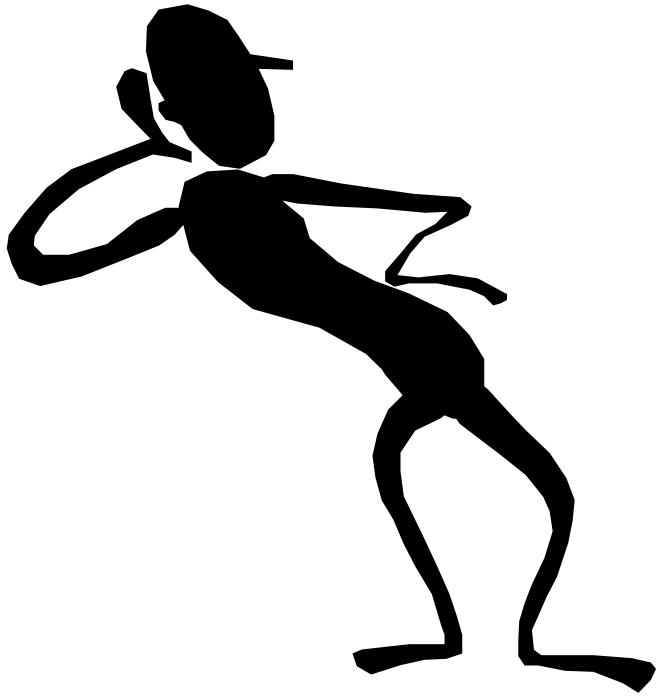
What is hearsay?

- An out-of-court statement
- Offered in evidence
- To prove the matter asserted
- State and Federal rules of Evidence are now very similar in South Carolina



Even Experienced Judges Can be Confused on What is Hearsay

- The “knee-jerk” reaction is that if someone else told it to the witness or wrote the document given to the witness, it must be hearsay
- Very often this IS NOT THE CASE
- If you are proffering the evidence, you must be prepared to quickly and effectively combat the “knee-jerk” reaction

What is often thought to be but isn't hearsay

- Statements of a party opponent, particularly documents—this will be discussed in the authentication section of the presentation as well
- Prior statement by a testifying witness
- Not offered for truth of matter asserted

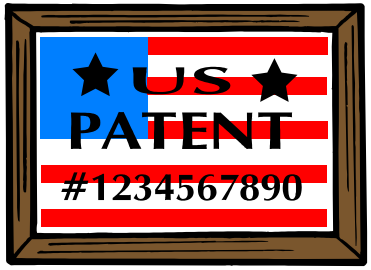
Statement of Party Opponent

- Documents—key point if opposing party produced it during litigation its identifying numbers on it, it is likely in evidence without more (A document produced in response to discovery is authenticated and admissible as a party's statement and can be used at trial or in summary judgment. *Shell Trademark Mgmt. BV & Motiva Enter.,LLC, v. Ray Thomas Petroleum Co., Inc.*, 642 F. Supp. 2d 493, 510-11 (W.D.N.C. 2009).
- Depositions—fits nicely with Rule 32(a)(3) can use adverse party's deposition for any purpose—but remember to look for them from other cases too!
- Answers to interrogatories
- Pleadings
- Decision maker for entity or person involved in incident at issue
- How about advertising?

Advertisements also constitute non-hearsay admissions under Fed. R. Evid. 801(d)(2). Courts hold advertising to be admissible evidence against the advertising entity in many types of cases. For example, statements in an alleged patent infringer's advertising may be probative admissions regarding the question of infringement. CMI Corp. v. Metropolitan Enter., Inc., 534 F.2d 874, 883 (10th Cir. 1976). Likewise, an advertisement seeking employees when an employer claims it is laying off employees because of lack of work as a justification, would be admissible in an employment case as an admission against interest. Walker v. Faith Tech., Inc., 344 F. Supp.2d 1261, 1276 n.12 (D. Kan. 2004).

Documents Presented Elsewhere

- The typical business will submit many regulatory reports, administrative applications or other documents to government agencies under oath
- They may contain valuable admissions relevant to your case, go out and find them
- You may be able to get them by FOIA without a subpoena



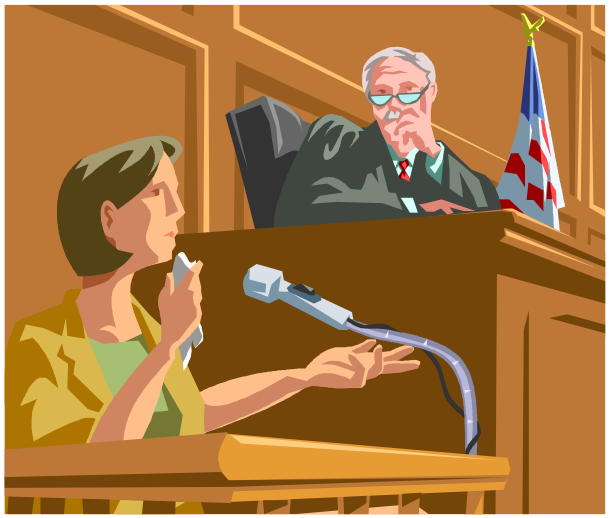
An admission made by a party in a representative capacity may be introduced as evidence against that party. Fed. R. Evid. 801(d)(2)(A). Thus, an admission against interest in a prior patent application will be admitted against the patentee in an action on a later granted patent. J.R. Clark Co. v. Murphy Metal Prod. Co., Inc., 114 F. Supp. 224, 229 (S.D. Tex. 1953), aff'd in relevant part, rev'd in part, 219 F.2d 313 (5th Cir. 1955); see also, Smith Indus. Int'l. v. Hughes Tool Co., 396 F.2d 735, 739 (5th Cir. 1968) (statement accompanying patent amendment constitutes admission); see also Buckley v. Airshield Corp., 116 F. Supp.2d 658, 663-64 (D. Md. 2000) (prior press release and testimony in a different patent infringement case admissible as admissions against interest on summary judgment).

Angles on Admissions

- They can be made by conduct “the party has manifested an adoption or belief in its truth…”
- They can be made by agents speaking within the scope of the agency
- They can be made by a spokesperson “a person authorized by the party to make a statement concerning the subject…”

Prior Statement—the Easy Non-hearsay

- Offered by opponent because inconsistent
- Offered by proponent because consistent (only after opponent attacks for fabrication or improper influence/motive though)
- Identification of a person after perceiving the person



The Gaping Hole in the Hearsay Wall—Not Being Offered for the Truth

- Notice
- Reason for acting
- State of mind
- How you ask the question is key

Cloaninger v. McDevitt, 555 F.3d 324, 328 (4th Cir. 2009)

- Civil rights action
- 911 Call became important evidence, doctor who called 911 stated plaintiff threatened suicide
- Plaintiff said he never threatened suicide so deputies had no cause to force entry to home and detain
- Tape of call admitted—not being used to prove truth of whether or not plaintiff threatened suicide but to explain deputies later actions
- Look at Floyd v. Floyd, 615 S.E.2d 465, 479-480 (SC 2005) for a good discussion too.

Fields v. J. Haynes Waters Builders, Inc., 658 S.E.2d 80, 87-88 (SC 2008)

Rule 801(c), SCRE, defines hearsay as "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." Hearsay is not admissible except as provided by the rules of evidence or other rules prescribed by this Court or by statute. Rule 802, SCRE.

Part of the Builder's strategy at trial was to attack the reasonableness of the costs the Fields incurred in removing the E.I.F.S. and in repairing the home. To combat this effort, the Fields sought to introduce, through the testimony of James Fields, evidence regarding the amount of an alternative estimate for the removal and repair work on the Fields' home. The trial court excluded the evidence, reasoning that the alternative estimate was hearsay when offered through James Fields. On appeal, the Fields argue that the alternative *559 estimate is not hearsay, but is a statement containing non-hearsay " words of contract."

The Fields' argument based on "words of contract" derives from the principle that not all words or utterances are offered for the truth of the matter asserted. 6 John Henry Wigmore, Evidence in Trials at Common Law § 1766 (1976) [hereinafter Wigmore on Evidence]. For example, in some scenarios, words or utterances themselves from an out of court declarant may, regardless of their truth, accompany an ambiguous act and give the act legal significance, be used circumstantially, such as to show a state of mind, or form part of an issue in a case. Id.

Traditionally “words of contract” were excluded from the prohibition of hearsay as utterances containing specific words forming part of the issue. Wigmore on Evidence § 1770. Examples of such words or utterances include words accompanying the making of a contract, utterances evidencing a promise to marry, words accompanying the **88 performance of a contract, words charged as a libel or slander, words evidencing the fact of sending notice, and words evidencing reputation. Id. Again, these words or utterances are not defined as hearsay because they are not offered to prove the truth of the matter asserted. Id. Instead, their utterance is itself a part of the issue litigated. Id.

In this case, it is clear that the second estimate for the Fields' home repairs, provided by a company called Prime South, does not qualify as non-hearsay “words of contract.” We believe it is instructive to focus on two aspects of this issue. First, the Fields did not enter into a contract with Prime South. Thus, because no contract exists between these parties, there can be no verbal assertions offered to interpret a contract. But more importantly, the issue regarding the Fields' repair costs is not whether the Fields believed the costs were reasonable, but whether the costs were in fact reasonable, and whether the Fields exercised due care in determining that the costs were reasonable. See May v. Hopkinson, 289 S.C. 549, 559, 347 S.E.2d 508, 514 (Ct.App.1986) (recognizing that the reasonable cost of repairs is competent and probative evidence on the issue of damages).

The relevant question in the hearsay analysis is what the Prime South document is offered to assert. The document is not offered as proof that Prime South simply offered to repair the Fields' home. Instead, the Fields offered the document to show that Prime South offered to repair the home for a specific price and that the price offered was reasonable. This assertion is classic hearsay when offered by an out of court declarant, and the trial court properly excluded the statement from evidence.

How You Ask or Present

- The key to minimizing objections and a smooth flow is how you ask/present
- Make clear you are eliciting the state of mind or notice facts, that you are using the opponents admissions etc.

March of the 23 Exceptions: Availability Immaterial

- Present Sense Impression
- Excited Utterance (just sounds obscene, and in some cases it is)
- Existing Mental, Emotional or Physical Condition
- Statements Made to Obtain Medical Diagnosis or Treatment
- Recorded recollection (only to refresh an ailing recollection)
- Records of Regularly Conducted Activity

Continued

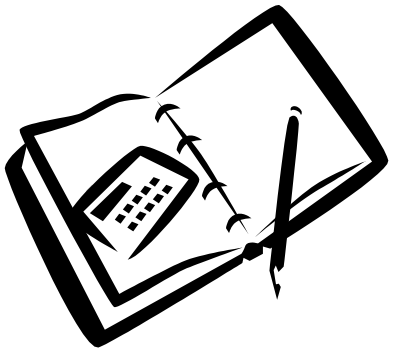
- Absence of entry in Records of Regularly Conducted Activity
- Public Records and Reports
- Records of Vital Statistics
- Absence of Public Record or Entry therein
- Records of Religious Organization
- Marriage, Baptismal or Similar Certificates
- Family Records
- Records of Documents Affecting an Interest in Property
- Statements in Documents Affecting an Interest in Property

Still More

- Statements in Ancient Records
- Market Reports, Commercial Publications {VITAL IN SECURITIES CASES FOR THE PLAINTIFF}
- Learned Treatises
- Reputation Concerning Personal or Family History
- Reputations Concerning Boundaries or General History
- Reputation as to Character
- Judgment of Previous Conviction
- Judgment as to Personal, Family or General History or Boundaries (Divorce, Quiet Title, Paternity etc.)

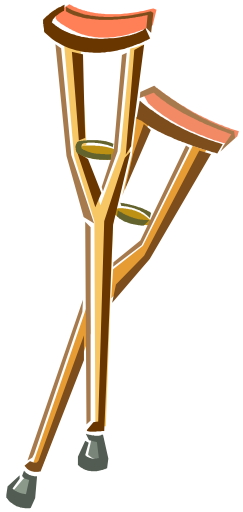
Always Look Over But Some Are Used all the Time

- 6 & 7 the Records/Absence of Entry in Records of Regularly Conducted Business
- This is the old business records as evidence statute
- Foundation is the key
- Learned Treatises
- Market Reports



Most Common Exceptions Cont.

- Medical treatment or diagnosis
- Excited Utterance (res gestae anyone?)
- Present Sense Impression
- Then Existing Mental, Emotional or Physical Condition



Most Common Exceptions Cont.

- Ancient Records
- Prior Judgments
- Family Records
- Records of Documents affecting an Interest in Property
- Can be invaluable to stream line a case

More Exceptions if Declarant Unavailable

- You can't just say "hey he's not here" effort to locate and subpoena must be documented
- State v. Sanders, 588 S.E.2d 142, 144 (SC 2005) "…the State made numerous unsuccessful attempts to procure Vigier's appearance..."

Four Specific Exceptions

- Former Testimony
- Statement Under Belief of Impending Death
- Statement Against Interest
- Statement of Personal or Family History

The BIG Exception

- Evidence being offered against the party that procured the absence of the witness
- This is a sanction
- Expect other bad things to go with it

The Catchall

- Federal Rule 807
- There is no comparable State rule
- A statement not covered by Rules 803 or 804 that has “equivalent circumstantial guarantees of trustworthiness”
- You must give the other side advance notice sufficient to prepare

Tips and Points From Key Cases

- Depositions—be careful about objections
- If a question calls for hearsay, but could be worded not to, is it a “form of question” objection
- If a question calls for what appears to be hearsay but it could fit an exception or non-hearsay basis if asked correctly can it be cured at the deposition?
- I don’t see definitive cases out there on this—but rule is if it can be cured you must object at the deposition and probably state the ground so it is clear why you are objecting so the examiner can fix if understood

State v. Stahlnecker, 690 SE2d 565 (SC 2010)

- Father's sexual assault on his own two year old—gross facts make tough law
- Statutory exemption to hearsay: look out for them S.C. Code Ann. 17-23-175 (making the out-of-court statements of children admissible in some circumstances)
- You must contemporaneously object—the fact you filed a motion in limine will not save you in State court if you don't object at trial
- Admission
- Excited utterance—ALL IN ONE CASE!
- This case is an evidence case study, good for law school exam questions

Thomas v. Dootson, 659 SE2d 253 (SC 2008)

- Did the dentist know the drill he was using was likely to over heat or was hot enough to injure patient?
- Surgical technicians statement to doctor that he warned him drill was hot admissible and not hearsay
- Not offered for truth of matter, just to show doctor on notice—other evidence supported it was too hot
- Come on, how is the jury supposed to "limit" this testimony in their minds?
- This is why "its not offered for truth" can be very effective in some cases

State v. McHoney, 544 SE2d 30 (SC 2001)

- Murder case, victim could not speak with nurse
- Indicated her attacker's name started with SP
- Died
- Dying declaration
- Those two letters enough to convict
- Sufficient indication of trustworthiness?

Wright v. Hieste Contr. Co., Inc., 698 SE2d 822 (SC 2010)

- Construction company President admitted what he believed caused fire in answer to interrogatory
- Court found it not binding! Interesting admission case, knowledge was based on one expert's report though
- Translated statements of employees not admissible

State v. Griffin, 528 SE2d 668 (SC 2000)

- The defense filed a motion in limine to exclude testimony of a murder victim's phone conversation over heard by a witness
- Loss of motion did not preserve for review, had to object at trial
- Even if preserved, victim's statements he was going to visit accused for a drug deal overheard by girlfriend's sister admissible under 803(3) "then existing state of mind"—once again this is powerful evidence, key link in case
- We will discuss motions in limine further this afternoon

State v. Tennant, 678 SE2d 812 (SC 2009)

- Man accused of kidnapping and sexually assaulting ex-wife tried to get his suicide note admitted under 803(3) present state of mind
- Court rejected, it was a statement of memory or belief to prove the fact remembered, not really state of mind
- PRACTICE TIP—If you use a document, beware of RULE 106, the rule of completeness. This can be especially dangerous with e-mail strings that might not otherwise be admissible.

Todd v. Joyner, 685 SE2d 595 (SC 2009)

- Defense expert presented by deposition
- In deposition expert read from earlier medical records in attempt to show “symptoms” from auto wreck were pre-existing
- Court found not hearsay under statements seeking medical treatment/diagnosis exception
- What about Rules 703 and 705? Isn’t expert entitled to rely on these, even if inadmissible? Then they become admissible when discussing conclusions under 705.

In re Crews, 698 SE2d 785 (SC 2010)

- Attorney disciplinary matter
- Attorney produced documents in response to subpoena
- Then objected as hearsay
- Court found them admissions
- This is important to foundation and authentication issues above, much more federal case law on this but here is a state case opening door to production in discovery=authentication and an admission of a party oponent

Questions?

Comments?

If you need more information

Marcus Angelo Manos, Maynard Nexsen PC
(803) 253-8275
MManos@maynardnexsen.com