The Hearsay Rule

THIRD EDITION

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For Yangdon and Kalden Fenner, Lyle and Sasha Dessouky

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Foreword

Part of my job as a law professor teaching Evidence is to teach hearsay as a tool. My students need to learn to understand hearsay so that they can use this tool to advocate a position, to convince an opponent, first, and a judge, second, and to win. My students need to learn how to manipulate the hearsay rules to serve the ends of their clients. I hope I am a good teacher of manipulation. Part of my job as a lawyer who works with this subject is to take sides, to argue the rules, to persuade. My job as a lawyer with this specialty calls for me to understand these rules and to engage in the manipulation I hope I teach my students.

This book is about those things. It is about how law students, lawyers, and judges can understand and use the hearsay rules. It is about how students can learn these rules right, right from the beginning (for that is so much easier than trying to relearn them later). It is about how students can use these rules in class and on their final exams. It is about how students can manipulate these rules in their clinics, mock trials, internships, and clerkships. This book is about how lawyers can understand the hearsay rules, how lawyers can build a reputation — as in "Hey, here is a lawyer who actually understands this stuff!" — and how lawyers can manipulate the rules in the interests of their clients. It is about how judges can remain faithful to the rule of law while using the rules to see that justice is served. In the process, the book tells nothing but the truth.

* * *

Chapter 1 begins with a fresh look at the principles and values that underlie the hearsay rule. It presents time-tested and brand-new techniques for recognizing hearsay for, unlike obscenity, sometimes it is not so easy to know it when you see it. Chapter 2 covers the definitional exclusions. Chapters 3, 4, and 5 cover the exceptions in Rule 803, 804, and 805, respectively. Through the first five chapters the topics covered are rather traditional and straightforward for a treatment of the hearsay rule.

Though the organization and much of the content of the first five chapters is very traditional, much of what is in these chapters is not. The key to the exclusions and exceptions is that each has a certain number of foundational facts: The lawyer seeking the admission of hearsay evidence must produce evidence of each of the foundational elements; the lawyer wanting to block admission of hearsay evidence must defeat offering counsel on at least one foundational element. This book takes a foundational approach to hearsay. It breaks out and lists the foundational elements for each exclusion and exception covered in this book. This makes it a handy quick reference. You know exactly what you need to prove or what you need to defeat for each exclusion and exception covered — even when the need arises suddenly, in the heat of battle. Following the foun-

dational elements, is a statement of the values on which each exception is built, which will serve as an interpretative guide to the exception. Following the statement of values, for each exception covered there is a "Use Note" discussing each foundational element and commenting on ways in which each exception, each element, can be used to achieve the student's, lawyer's, or judge's goal. There is the handy, quick reference of the list of foundational elements and the ultimately more helpful detailed discussion, with cases and ideas on the use of each of the foundational elements.

Some other examples of what is new in the first five chapters: Chapter 1 presents new ways of conceptualizing hearsay. The part of Chapter 2 that deals with adoptive admissions presents a whole new way of looking at them, analyzing them, and understanding them — one that seems simpler than the traditional ways of approaching adoptive admissions.

In addition to a very complete treatment of the exclusions and specific exceptions — with foundational elements, the values behind each, and in depth analysis of each foundational element — Chapters 2, 3, and 4 look past the trees of a particular exception and onto how the exception fits into the forest of hearsay. The Use Notes discuss the ways various parts of the hearsay rules interrelate. Surprisingly, this is not commonly addressed in other works, which mostly just talk trees, and not forest. An example of seeing the forest is in the discussion of the former testimony exception. That Use Note begins with a discussion of other ways to get former testimony around the hearsay rule. Students, lawyers, and judges faced with former testimony will see a discussion of eleven ways it might be admissible in spite of the hearsay rule: the former testimony exception and ten other techniques.

Chapter 5 presents the most complete treatment of the residual exception currently available. It includes, for example, a discussion of how that exception can be used to get into evidence an out-of-court statement made by a witness who is testifying — get the out-of-court statement in as substantive evidence of the facts declared and not just as impeachment, even though the out-of-court declarant is a testifying witness. There is offhand reference to this point in some other writings, but there is no analysis and all of the offhand references come to what I think is the wrong conclusion. This is an important point. Take, for example, a criminal case where the prosecutor has a favorable pretrial statement from a witness and the witness takes the stand at trial and tells a different story. Perhaps the witness has had a change of heart out of love or intimidation. Whatever the reason, the witness tells a different story on the stand and the pretrial statement of this available witness does not fit under any of the exclusions in Rule 801(d) or the exceptions in Rule 803 or 804. Chapter 5 discusses how this pretrial statement may be admissible as substantive evidence of the facts declared . . . even though the declarant is testifying.

The rest of the book — Chapters 6 through 14 — is not so traditional in either the topics covered or the content of the coverage. Chapter 6 goes beyond traditional evidence texts and treatises, goes beyond the rules of evidence, and discusses important hearsay exceptions that are found in Rule 32 of the Federal Rules of Civil Procedure and Rule 15 of the Federal Rules of Criminal Procedure.

Chapter 7 is devoted to state of mind evidence. Every out-of-court statement is in some way or another nonhearsay state of mind evidence. That's right: There are ways in which every out-of-court statement is nonhearsay. Sometimes, however, the nonhearsay use of the statement is not relevant. As a result, the statement will be inadmissible as hearsay in its relevant uses and inadmissible as irrelevant in its nonhearsay uses. This chapter makes an important point about the relationship between the hearsay rule and the rules of relevance. It also provides counsel with a way of turning every hearsay problem into a relevance problem. In addition, Chapter 7 gathers together the uses of state of mind evidence and discusses eight ways that such evidence might be used at trial.

Chapter 8 is devoted to the use of opinion evidence—expert and lay opinion—as a way to get around the hearsay rule. Chapter 9 is devoted to miscellaneous other ways around the hearsay rule—judicial notice and the rule of completeness for two examples. Chapters 10, 11, and 12 are devoted to important concepts such as the benefit of applying many exceptions to a single level of hearsay, the problem of multiple levels of hearsay behind a single statement, and the subject of evidence that is inadmissible hearsay to one issue in a case and either nonhearsay or admissible hearsay to another issue in the same case. Each of these chapters is useful to the student, the lawyer, and the judge alike. Chapter 11, for example, discusses how to make underlying levels of hearsay go away. It discusses cases that have found that one or another of the exceptions or exclusions does away with multiple hearsay problems. Under certain exceptions and exclusions, the declarant need not have personal knowledge of the facts declared in the statement and offering counsel need not deal with the hearsay that underlies the statement. Chapter 11 discusses where that has been held to be so, and how to argue that it is so elsewhere.

Chapter 13 deals with the interrelation between the hearsay rule and the competence of witnesses. Among other things, Chapter 13 suggests and discusses ways to stand the hearsay rule on its head and use it affirmatively—ways to use hearsay to get into evidence an out-of-court statement by a witness who was incompetent when the statement was made, is incompetent at the time of trial, or both.

Chapter 14 deals with the Confrontation Clause of the United States Constitution, its interrelation with the hearsay rule, and its effect on the admissibility of hearsay evidence offered against an accused in a criminal prosecution.

* * *

Hearsay is a tool. Its purpose is to assist the trier of fact in the search for truth by limiting the trier of fact's exposure to unreliable evidence. How effective a tool it is, is open to question. Two things are certain: Hearsay is everywhere, and it either helps you achieve your goal or it stands in your way; either way, it is a tool that must be used to advocate, to win, and to decide. This tool must be mastered by law students, practicing lawyers, and judges alike, and it is for all of them that this book is written.

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■ The journey is easy. Starting and stopping are difficult. At the beginning, there was Kathy Ford and, as the manuscript submission date approached, there were Pat Cooper and Vic Padios. (You may have noticed in life the tendency to appreciate most those who've helped you most recently. Pat and Vic, I have told you in person and now I tell you in print that I am immensely appreciative of your help.)

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One of the great joys in life is having a job where you look forward to coming to work each day. Most law professors have great jobs and, in my experience, most of them realize it. Not as many have as great a place to do the job as I do. For almost all of us on the faculty of the Creighton University School of Law it is true that we fight our battles and then we move on, taking nothing personally, letting nothing go sour and spoil the place where we spend so much of our time. Credit goes to the deans who have set the tone — Rod Shkolnick, Larry Raful, Pat Borchers, and Marianne Culhane — and, even more so, to the faculty who make it happen.

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