A Student’s Guide to Hearsay
REVISED 4th Edition
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A Student’s Guide to Hearsay

REVISED 4th Edition

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PREFACE

“I’ve already spent a ridiculous amount of money on a casebook and separate rules pamphlet. There are hornbooks and manuals that cover all of evidence. Why should I buy a book that only deals with hearsay?”

Good question. Here are my answers:

1. Hearsay is an important subject. It is a major component of your evidence course; it is one of those subjects that every lawyer should understand.

2. Hearsay is one of the most difficult bodies of law you will ever encounter in law school. The basic concept is a tricky one; once you’ve mastered that, you have to deal with dozens of technical exceptions, written and unwritten.

3. This book will help you learn it.

Let me expand a little on each of these reasons.

1. **Hearsay is an important subject.**

Hearsay pervades everything a lawyer does in a courtroom; it is impossible to try even the simplest case without encountering it. The leading evidence casebooks devote anywhere from 20-40 percent of their length to the hearsay rule and its exceptions; professors spend an equivalent percentage of classroom time covering the subject.

2. **Hearsay is a difficult subject.**

The hearsay rule is simple enough; hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

The legal profession has struggled for more than a century just to come up with a basic definition of hearsay. Even though hearsay is now defined by statute — thank goodness for the Federal Rules of Evidence! — there are numerous “unwritten exceptions” to the definition, as well as eight statutory exceptions to the definition, each of which creates a category of evidence that fits the definition (or appears to), but is classified as non-hearsay.

In addition, there are 29 statutory exceptions to the hearsay rule, each of which creates a category of evidence that is hearsay but is nevertheless admissible over a hearsay objection. Each of these statutory exceptions has its own requirements, procedural wrinkles, legislative history, and judicial gloss.

To learn this body of law and apply it correctly is a major challenge. Suppose, for example, I want to call W, a witness who will testify, “On March 1, X said to me, ‘I’m going out with Frank tonight.’” Under some circumstances, what X said to W is not hearsay; under some circumstances it fits the basic definition of hearsay but is not hearsay because what X said fits within an exception to the hearsay definition; under other circumstances what X said is hearsay but fits within an exception to the hearsay rule; in still other circumstances, it is

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1 There are 23 exceptions codified in Fed. R. Evid. 803, five exceptions in Fed. R. Evid. 804, and a “residual” exception in Fed. R. Evid. 807.
hearsay and does not fit within any exception; and yet in other circumstances, it is hearsay but judges disagree as to whether it fits within an exception to the hearsay rule.

Additional complicating factors include constitutional considerations (in particular, the Fifth Amendment privilege against self-incrimination and the Sixth Amendment Confrontation Clause), as well as the concept of multiple hearsay.

To repeat the basic point: hearsay is a difficult subject.

3. This book will help you learn it.

This book will help you learn hearsay because it breaks down each element of the hearsay definition, and each exception to the definition or to the rule, into its component parts. For example, for each hearsay exception, this book:

- Outlines the policies underlying the provision
- Lists and explains the requirements that must be satisfied for the evidence to fit within the exception
- Explains additional issues that have arisen or are likely to arise
- Explains how a rule interacts with other rules of evidence
- Spells out the procedural and tactical considerations that must be understood to appreciate how the rule “plays” in the courtroom
- Gives review questions and answers so you can test and apply what you’ve learned

Has an associated website, http://law.cua.edu/Fac_Staff/FishmanC/studentguidetohearsay.cfm, which will post updates on major developments in hearsay law.

Don’t misunderstand: you are not getting a simplified, comic book version of hearsay. This book will help you learn hearsay as you want to learn it, to do well on your final, the bar exam, and in practice.

Along the way, I also explain the hearsay significance of: a ham sandwich, Humpty Dumpty, the Greek god of wine, Tim McGraw, dog saliva, IBM’s computer and Jeopardy champion “Watson,” my wife Betty, William Shakespeare, the Chicago Cubs, 1950’s TV shows, peat moss, a squeaky boot, Leonardo DiCaprio, the French Army, the speed of sound, and the way criminals treat their girlfriends. As a bonus, I even tell you a little big about what “love” means.

I’ve been teaching evidence for 35 years, to an average of 80 or so students each year. (Before that, I was a prosecutor in New York City for eight years.) The outlines, explanations, and questions in this book have been tested in the classroom. they work for my students; I’m confident they will work for you.

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DEDICATION

This book is dedicated, in ascending order of importance, to:


2. My colleagues and friends at the Catholic University of America Law School.

3. My evidence students, who for the past 35 years have helped me learn how to teach, and therefore how to write about, the law of evidence.

4. Betty; Rebecca, Brian, Sam and Yael; and Sarah and Luke.
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