

Just What Is “Hearsay” Anyway?

By Dale Alberstone, Esq.

The word “hearsay” is used frequently in court as well as in common parlance among the general public. To non-legal professionals, the expression typically connotes a statement made by one person to a second person who then retells it. Repeating rumors and gossip are examples of hearsay. So too are statements to a television newscaster who then reports on what he/she was told by a “reliable” source.

In law, “hearsay” denotes a statement that was made by someone other than the witness who, while testifying at a hearing, repeats the statement, provided that statement is related by the witness as proof of the truth of what was said. In other words, it is something said or written by a third person which is then repeated in court by the person who heard or read it in order to establish that what was said was in fact true. More specifically, hearsay is an out-of-court statement later repeated in court to prove the truth of what was said.

By way of example, assume the following: On the second day of the month, the manager of an apartment complex serves a 3-Day Notice to Pay Rent or Quit on the tenant. The manager then tells the owner of the date of service. On the day trial is scheduled for the unlawful detainer, the manager is ill, so only the owner comes to court. The owner is prepared to testify that the manager told the owner that he (the manager) served the tenant on the second day of the month. The court will exclude that statement because it is hearsay.

Hearsay statements are excluded from evidence at trial for three reasons:

1. The statement usually was not made under oath: Although there are exceptions, most statements not made under oath are inadmissible at trial. In other words, if your best friend tells you that your neighbor’s dog bit him, you could not repeat that statement at trial to prove that the canine bit your friend. When your friend made the statement, he was not under oath. Of course, your friend could take the witness stand and testify under oath about the dog bite.
2. The adverse party has no opportunity to cross-examine the party who made out-of-court statement: Fundamental fairness under our system of jurisprudence generally allows the opposing party to cross-examine statements offered against him/her at trial. Our judicial system is founded on the belief and principle that truth is better ascertained when a third party can be cross-examined about what he said.
3. The judge and jury cannot observe the demeanor of the person who made the statement: In court, a person’s demeanor is observed and used as a factor to evaluate whether he/she is telling the truth. Judges and juries prefer to personally observe a declarant’s non-verbal conduct when assessing the credibility of his/her statements. In other words, a person who fidgets and has “shifty eyes” when speaking may be less credible than one who calmly relates a story while looking the jury square in the eye. Thus, judges and juries like to be able to physically see the person making the statement in order to assess credibility. When a witness in court merely repeats what he was told by someone else, that “someone else” needs to be personally present to testify in court in order that the judge or jury may assess his demeanor and credibility. The presence of a witness who

merely repeats what he heard is not sufficient.

For those three reasons, hearsay is inadmissible at trial unless an exception applies.

Exceptions to the Hearsay Rule

There are numerous exceptions to the rule excluding hearsay evidence at trial. Chief among them are the following:

1. Admissions or confessions of a person who is a party to the litigation: If a plaintiff or defendant makes a statement to a witness, that witness can testify at trial as to what the individual said. The reason for this exception is that a party to the case can then testify in his own defense or behalf as to whether or not he made the statement and what he meant if, in fact, he said it.
2. Statements made to prove the declarant's state of mind: Where the relevancy of a statement is to establish the person's state of mind rather than to prove the truth of what he said, then the statement is admissible as an exception to the hearsay rule. (Technically, it would not even be hearsay.) For example, in a trial to have a conservator appointed for an elderly person who repeatedly professes that he is the King of England, the claims to royalty may be used in court to prove the individual is incompetent (and therefore needs a conservator), because what is said is not offered to prove that the person actually is the King of England. Rather, it introduced at trial to prove the person's state of mind, not the truth of the belief.
3. Dying declarations: A statement made by a dying person respecting the cause and circumstances of his death is admissible to prove the truth of what he said if the statement was made upon his personal knowledge and under a sense of impending death. For example, if someone had heard Lana Clarkson say immediately before she died that Phil Spector had shot her, that statement would be admissible at trial even though (a) it was not under oath, (b) she could not be cross-examined, and (c) the jury could not observe her demeanor. (Of course, since courtroom evidence shows that a gun was placed in her mouth, we know that Ms. Clarkson could not have said anything, and certainly, even if she did speak, the only witness was Mr. Spector, who isn't about to repeat anything.)
4. Spontaneous Declarations: A statement which a person spontaneously utters to narrate, describe or explain an event is admissible if it was concurrently made under the stress caused by that perception.
5. Written business records: Information contained in business documents, while not audible speech, are generally the written word of a person. For example, if a manager writes down in his journal that when he inspected the tenant's unit there were no visible defects, then that business record could be used to prove at trial that the unit was in a good state of repair. Four conditions are necessary in order for a business record to be admitted as an exception to the hearsay rule:

- a. The record was made in the regular course of business,
 - b. The record was made about the same time as the person witnessed the event,
 - c. The person who created the document or other qualified witness testifies as to how it was prepared, and
 - d. The record would have to be prepared under conditions to render it trustworthy. For example, if the business establishment needs to rely upon the document to conduct its business, then the writing is likely to be trustworthy.
6. Declarations against interest: A statement made by a person who is unavailable to testify at trial is admissible to prove the truth of what he said to a witness if the statement was so strong against his pecuniary or proprietary interest as to subject him to the risk of civil or criminal liability or social disgrace. If a reasonable person would not have made the statement that the speaker made had such a statement not been true, then the witness who heard the statement may testify at trial as to what was said. For example, if a person professes to have robbed a bank and then flees the country, his statement can later be used in court to prove he was the bank robber.

Summary

In a legal context, the best way to think of hearsay is a statement which, when first said or written, did not occur in the courtroom, but is then later repeated in court by someone who heard or read the statement. In other words, just about everything said or written before the lawsuit started is hearsay. Unless an exception applies, hearsay can not be offered in trial to prove what was said was, in fact, true at the time it was said.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 31 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone has been awarded an AV rating from Martindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.