1991

Procedural Options for Resolving Hearsay Issues

Roger C. Park
UC Hastings College of the Law, parkr@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Part of the Evidence Commons

Recommended Citation
Available at: http://repository.uchastings.edu/faculty_scholarship/579
Author: Roger C. Park
Source: Cardozo Law Review
Citation: 13 Cardozo L. Rev. 929 (1991).
Title: Procedural Options for Resolving Hearsay Issues

Originally published in CARDOZO LAW REVIEW. This article is reprinted with permission from CARDOZO LAW REVIEW and Benjamin N. Cardozo School of Law, Yeshiva University.
PROCEDURAL OPTIONS FOR RESOLVING HEARSAY ISSUES

Roger C. Park*

A COMMENT ON RICHARD D. FRIEDMAN'S "IMPROVING THE PROCEDURE FOR RESOLVING HEARSAY ISSUES"

In his admirable paper, Improving the Procedure for Resolving Hearsay Issues, and in another soon to follow, Professor Richard Friedman has explored hearsay procedure with creativity and depth. He has suggested new procedural options, discussed below, that could at times replace rulings that sustain or overrule hearsay objections. Though others have noted that procedural devices such as notice could be used to ameliorate the impact of admitting hearsay, Professor Friedman's new array of options is an original contribution to the hearsay literature.

Professor Friedman's first suggestion for improvement involves an important but incidental issue. He argues that when the opponent causes a declarant to be produced for live testimony, the declarant should ordinarily be examined as if she had been produced by the proponent. The proponent should put her on the stand, elicit her testimony on direct, and then offer her for cross-examination. I agree completely with this point. This proposal deserves support, whatever the fate of Professor Friedman's other procedural suggestions.

His second point involves dividing the burdens of producing the declarant. He argues that when a hearsay declarant is possibly available, procedural options other than simply admitting or excluding the declarant's out-of-court statements ought to be considered.

Under current law, the trial court unconditionally admits or excludes a hearsay statement. When it admits a hearsay statement, the court, in effect, places the whole burden of producing the declarant upon the opponent of the statement. If the opponent wants to cross-

---

* Fredrikson & Byron Professor of Law, University of Minnesota. I wish to thank my colleague, Dan Farber, for helpful comments on this paper.


4 Friedman, Improving Procedure, supra note 1, at 892.

5 Id. at 905.
examine the declarant, the opponent must identify and locate the declarant, secure her presence by persuasion or subpoena, arrange for her travel, and pay her expenses. When it excludes a hearsay statement, the court, in effect, places the whole burden of producing the declarant upon the proponent, who must arrange and pay for the declarant’s appearance in order to have her evidence.

Professor Friedman points out that the various burdens of producing the declarant can be unbundled. The burden of producing the declarant can be broken down into the “physical burden” (“the actual work required to procure the declarant’s testimony”) and the “financial burden” (“the cost of doing that work”). Alternatively, it could be divided into specific tasks. For example, one party might be required to locate the declarant, while the other might be required to arrange and pay for travel. The party that failed to do its assigned tasks would suffer an adverse evidentiary consequence—the undesired admission or exclusion of the hearsay—or, in rare cases, an additional sanction.

Although the paper’s distinction between “physical” and “financial” burdens is useful shorthand, the difference between the two is often of no importance. The “physical” burden of making airline and hotel reservations, for example, is actually a particular type of financial burden, consisting of the cost of internal staff work. Placing the burden of making reservations on one party and the burden of paying airfare on the other is merely a way of dividing a financial burden. The division of the burden does not affect the overall cost of production.

Yet there are situations in which one of the parties has superior access to a resource necessary to produce the declarant. Then, the court can reduce the overall cost of production by forcing that party to use its power. In these situations, Professor Friedman’s suggestion that burdens be unbundled has much appeal. A party’s superior access might take the following forms:

a. Superior access to information about the identity and location of the declarant;

b. Superior access to means of transportation;

c. Superior access to means of persuading or coercing the declarant to waive a right not to testify;

---

6 Id. at 917-20.
7 Id.
8 Id. at 905-17, 921-22.
9 See id. at 915-16 (indicating that a sanction would be appropriate when an opponent who has been assigned the physical burden of production fails to produce because the opponent prefers to have the proponent offer hearsay instead of live testimony).
d. Superior access to means of extinguishing a right not to testify possessed by the declarant.

In all of these situations, a good argument can be made that the court should be allowed to impose upon the party with superior access the obligation to use that access, even when the other party ought to bear the cost of producing the declarant.

In evaluating the question whether judges should compel a party to use superior access, each situation ought to be considered on its own merits. When one party has superior access to information about identity and location, or to transportation, the question is easy. Forcing that party to use its access serves truth-finding without impinging on any significant countervailing values.

Situations in which a party has superior access to persuasion or coercion are more problematic. In these situations, a rule based on extrinsic policy protects the declarant from being forced to testify. The policy may be one of convenience (as when distance puts the declarant beyond the subpoena power) or of protection of a private relationship (as when the declarant has a right not to testify against a spouse). Justice will sometimes be served by requiring one of the parties to persuade a spouse or to coerce an employee to give up a right not to testify, but the cost of undermining the policy behind the right ought to be taken into account. Moreover, enforcement may pose problems of administration. The court may have difficulty determining whether the party bearing the burden made a good faith effort to persuade. When the burden-bearer has a close relationship to a declarant whose live testimony would harm the burden-bearer's case, that party's superior power to persuade may not be fully transferable to the adversary. In any event, it will not be easy to determine whether the party made a bona fide effort.

The final situation, in which one party has superior means to extinguish a right not to testify, is illustrated by the example in hypothetical 7 of Professor Friedman's paper. There, the prosecutor, in order to use a hearsay statement, would be compelled to grant immunity or plea bargain for a conviction. The immunity or conviction would extinguish the declarant's fifth amendment privilege and pave the way for compelled testimony. Adopting this solution imposes social costs external to the trial in which the statement is offered. The prosecution's need to use reliable hearsay in the instant case has become a bargaining chip for a party in another case. A fact unrelated to that other party's culpability will influence the sanction that party

10 Id. at 909.
receives. This often happens, but we should still seek to avoid it when possible.\footnote{There may be other dangers associated with grants of immunity to defense witnesses, such as the danger that the prosecution will restrict its cross-examination of the declarant in order to avoid expanding the scope of use immunity. \textit{See W. LAFAYE \& J. ISRAEL, CRIMINAL PROCEDURE} 881-82 (1985).}

Given that unbundling the burdens sometimes makes sense, the next question is how to translate Professor Friedman's insights into law reform. After we examine "unbundling," what is around the corner?

The procedural benefits of "unbundling" might be sought in a system that eliminated class exceptions to the hearsay rule. One could replace class exceptions with a single rule that hearsay is admissible, subject to a suitable division of the burden of producing an available declarant. One would probably want to add some provision allowing the judge to exclude hearsay when its prejudicial impact clearly outweighed its probative value.\footnote{Professor Friedman has shared with me his soon-to-be published sequel, \textit{Toward a Partial Economic, Game-Theoretic Analysis of Hearsay}, \textit{supra} note 2. This manuscript seems to me to advance something like the proposal that I have just described. I should emphasize, however, that my guess about his views is by no means a full description of them, nor is his manuscript in its final form.} In other words, there would be no specific exceptions for business records, present sense impressions, or the like. Instead, the trial judge would weigh probative value against prejudicial effect on an ad hoc basis. Upon a finding of adequate value, the trial judge would consider, in cases in which the declarant was available, how to allocate the burden of production. If a party failed to satisfy a burden, the trial judge could impose an adverse evidentiary consequence.

I have two misgivings about this approach. First, it would give more discretion to the trial judge than the present system of class exceptions. Second, it would not operate effectively unless the parties gave prior notice of their intent to introduce hearsay, along with a description of the statements to be introduced and their source. It is true that some of the objectives of the burden-splitting system could be achieved even in the absence of pretrial notice. However, any system that substitutes declarant-production for flat admission or exclusion of hearsay will not work healthily without a high incidence of pretrial notice. Pretrial notice is needed to facilitate decisions about burden allocation and to give time to make arrangements for declarant production. Judges would have to encourage notice by treating those who gave notice more favorably than those who, without excuse, failed to do so. Cautious litigants would feel obliged to give
pretrial notice of intent to offer many statements that are now routinely received without notice under the class exceptions. This notice requirement would be onerous.

I believe that the procedural approach described in Professor Friedman's paper has great merit. However, it should be used as part of a system that retains at least a reduced list of class exceptions. If a hearsay statement fits one of the class exceptions, then it should be admissible without notice and without making any decision about burden allocation. If it does not, then upon notice the judge would have authority to receive it, subject to a fair allocation of the burden of producing an available declarant.13

It is difficult to predict the impact of Professor Friedman's papers on hearsay reform. It is easy, however, to predict that they will have a significant and lasting impact on hearsay scholarship.

13 In 1987, I suggested creation of a residual exception, applicable to civil cases, that would admit first-hand hearsay upon notice without screening for reliability. Park, A Subject Matter Approach to Hearsay Reform, 86 Mich. L. Rev. 51, 119-22 (1987). I believed that when the declarant was available, notice and the opportunity to call the declarant provided adequate protection to the opponent. I thought then that it was generally appropriate for the opponent to bear the cost of production, though I said that in some (unspecified) situations cost-shifting might be appropriate. Id. at 119-20. Were I to write that piece again, I would incorporate many of Professor Friedman's insights about cost-shifting. I believe that we would still differ about hearsay reform, however, because I suspect him of harboring a dislike of the class exceptions—a dislike that I do not fully share.