

EVIDENCE

Week 5 and 6

- I. Unit 9 Continued
 - a. 104(a)/(b) sorting machine
 - i. If the preliminary question must be answered "yes" For the evidence to be relevant, then 104 (b) applies
 - ii. If the evidence is relevant regardless of whether the preliminary question is answered yes or no, then 104(a) applies.
 - iii. Example
 1. Evidence: captain inspected ship and embarked with family
 2. Preliminary question: was his conduct intended as an assertion?
 - a. Is it relevant in any case or must he intend it as an assertion for it to be relevant?
 - b. It is relevant either way, which makes it a 104 (a) question. Evidence is relevant if it tends to make a fact at issue more or less likely. Fact at issue: seaworthiness of the ship. Seaworthiness is more or less likely based on the fact he boarded (at least a little), whether he was trying to communicate or not.
 - c. Under rule 104 (a), the judge decides the preliminary question and the jury doesn't change it. Judge will decide whether or not the statement was intended as an assertion or no.
 3. Proposition: ship was seaworthy
 - iv. Conclusion: ruling of conduct as hearsay or no will basically always be a 104(a) question.
 1. Judge will decide
 2. Judge may hear full story (voir dire)
 3. Jury will not be asked to re-decide.
 4. Under the federal rules, this one act is either hearsay or not hearsay depending on the judge's decision of whether or not the actor was trying to communicate something, because that is the only situation under which we would need to worry about sincerity.
 - b. McCormick, the borderland of hearsay. He creates categories
 - i. Stark action with no elements of communication - not hearsay
 - ii. Acts and words explaining them are offered together - maybe hearsay
 - iii. Words of action - maybe hearsay.
 - c. Wright v. Doe d. Tatham
 - i. The servants who benefited from the will wanted to get in the letters written to him to show that he is competent
 1. Letters - written words. Are these hearsay?
 - a. Declarant - writer of the letter
 - b. Out of court - yes
 - c. Statement - yes. Written assertions.

- d. Truth - in this case, no. "I just travelled to America" - only hearsay if offered to prove that the writer had in fact just travelled to America.
2. The servant's attorney is not trying to admit these to show that Marsden's relatives travelled to America, but to prove that the letter writer acted as though Marsden is competent. Therefore, not hearsay under the FRE's.
3. Under the common law, it is still hearsay because we must take a trip through point B of the triangle.
4. Wright letters under the FRE
 - a. Mailing of the letters - not intended as an assertion, not hearsay.
 - b. "I just traveled to America" - is a statement, under the FRE's. Not being offered to prove the truth, so not hearsay.
 - c. It seems unlikely that these actions were intending to say anything about Marsden's competence. The sponsoring attorney wants the jury to find an implied belief that Marsden was competent.
 - d. This really isn't strong evidence!
 - i. The implied assertion is sort of ambiguous. "I just traveled to America and here is a letter" does not really indicate competence. We want to cross examine this person about why they were writing a letter. This shred of letter is extremely ambiguous.
 - ii. Insincerity: writing a letter doesn't indicate whether they are sincere in a belief that we aren't really even sure they have.
 - iii. Erroneous memory/faulty perception: we have no idea whether they were right about Marsden, in their hypothetical perception of him as competent.
 - iv. This is why common law kept it out! But honestly if it had come in, a competent attorney would've attacked all of these things. Trust in the adversarial process.
 - v. Some state jurisdictions still follow the common law so it is important to understand the problems with the trip through B
5. Regina v. Kearley (H.L. Eng. 1992): the courts in England reaffirmed Wright v. Doe d. Tatham and exclude implied assertion testimony. Case is similar to Barnhart below. Phone calls were intercepted asking to purchase drugs. They were ruled inadmissible hearsay under the common law rule/Texas rule, because we have to take a trip through point B of the triangle.
6. Texas rule: Starts like 801(c)(2): a party offers into evidence for the truth of the matter asserted; matter asserted includes any matter explicitly asserted and any matter implied by a statement, if the probative value

of the statement as offered flows from the declarant's belief as to the matter. "50 on seabiscuit" is now hearsay because the matter implicitly asserted is that you are calling a booking house. (as in People v. Barnhart).

7. People v. Barnhart:
 - a. Is 50 on seabiscuit hearsay?
 - i. There is a declarant
 - ii. There is maybe a statement. It could be a command, grammatically. There is no implied statement. An assertion is generally considered to be a declarative statement only, although questions, commands, and explanations could assert truths under the write circumstances. (Inwrinkleried).
 - iii. (Texas defines statement in a different way from the FRE's: a statement is an oral or written expression (instead of assertion)).
 - iv. It was out of court.
 - v. It is being offered to establish an implied belief that this was a gambling house, rather to indicate that the statement "50 on seabiscuit" is true
 - b. Advisory Committee:
 - i. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity
 - ii. Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision c.
 - iii. The advisory committee seems to be saying that they did this on purpose.
 - iv. There is no question that this stuff would be hearsay under the common law.
 - c. What about the statement, "I want to place a bet"
 - i. Out of court (over the phone & intercepted by the police)
 - ii. Declarant - the caller
 - iii. Statement - I want to place a bet is an assertion that you actually want to place a bet.
 - iv. Offered for the truth of the matter? NO. It is being offered to prove that the receiving phone is located at a
 - v. betting house. It's a step closer to hearsay because it is a statement (50 on seabiscuit is not) but it is still not offered for the truth.