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The Right Objection

BY STEPHEN A. SALTZBURG

Lawyers are expected—indeed required—to make the right objection to evidence offered at trial if they expect to win an evidence fight and to preserve an issue for appeal in the event they lose the fight at trial. In most instances, the right objection is obvious, especially to experienced counsel, and the real challenge is to raise it timely and clearly. But, there are cases in which crafting the right objection can be tricky.

An Illustrative Case

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010), is an example of a case in which choosing the right objection was more difficult than in the mine-run case. Terry Davis had been the national treasurer of the Phi Beta Sigma fraternity. He was charged with 10 counts of bank fraud, one count of first-degree theft, and one count of first-degree fraud. A jury acquitted him on two bank fraud counts and convicted him on all the other counts.

The fraternity was founded at Howard University in 1914 and over the years developed university and alumni chapters with more than 120,000 members who pay annual dues that are deposited in a general fund bank account and are used to pay the fraternity's operating expenses. Davis was an elected, unpaid officer of the fraternity. In order to ensure that the fraternity's funds were properly used, the fraternity had a policy that the fraternity's executive director, its national president, and the national treasurer must each sign a voucher authorizing each payment, and the president and treasurer each must co-sign every fraternity check. Davis disregarded these policies and wrote checks without obtaining approved vouchers. Some checks contained only his signature, and he signed or stamped the president's name on other checks.

When the fraternity investigated financial irregularities and discovered what Davis had done, it suspended him and installed a new treasurer. The new treasurer found at least $29,000 in checks that had been made out to "cash" that was not deposited in the fraternity's bank account. These checks gave rise to the prosecution.

The Defense

Davis's defense was that the checks he had made payable to cash were deposited into his personal banking account and used to pay fraternity bills and to reimburse himself for fraternity debts he had incurred using his personal funds. Although it might seem strange that Davis would write checks to cash and then turn around to use the money to pay fraternity expenses rather than pay them directly from the fraternity bank account, Davis testified that some vendors and banks were wary of dealing directly with the fraternity. Davis claimed that the fraternity had such a poor financial history that some vendors would not accept a fraternity check and that the fraternity's bank denied access to newly deposited funds while a check cleared, which delayed payment of the fraternity's overdue bills. Davis explained that, in order to deal with the fraternity's financial problems, he would (1) write a fraternity check to cash; (2) deposit the check in his personal account; (3) either write a personal check or use the proceeds to purchase a money order; and (4) remit the check or money order to a vendor, a separate fraternity bank account, or to a fraternity officer entitled to reimbursement of expenses.

The Corroborative Witness and the Evidence Objection

The witness upon whom Davis depended to corroborate his testimony was his wife, Rhonda Davis. The court of appeals described her testimony as follows:

> Rhonda testified that she saw her husband working at home on fraternity business "on a very regular basis every day, most of [the] time, in some way, shape or form." Asked about the "types of things" she saw him doing, she replied that "I would see him working on his computer with spreadsheets. I would—I would even help him mail things.

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> I would see the money orders that had to be processed. I would wait for the Fed. Ex. man." Defense counsel later asked Rhonda to elaborate further: "You talked about seeing Mr. Davis make payments for fraternity expenses. Can you tell me a specific instance when you saw him make a payment for a fraternity expense?" After she responded "Yes, I can," the prosecutor objected.

(596 F.3d at 855.)

The government objected that Rhonda Davis lacked personal knowledge as to the reasons that Terry Davis wrote checks and made payments and that, in essence, she was merely repeating hearsay statements by Terry. The government conceded that Rhonda could testify from personal knowledge that she saw her husband receive bills, write checks, and purchase money orders, but argued that any testimony about the nature of the documents and their purpose should be excluded under Rule 403 as speculative and prejudicial.

The trial judge apparently thought the evidence issue was more difficult than most such issues and took up the government's objection in a hearing the day after the government raised its objection. Both sides filed written memoranda and the trial judge and counsel questioned Rhonda out of the jury's presence. Rhonda's testimony focused on checks, money orders, and fraternity bills that she saw. The court of appeals described the testimony that occurred out of the jury's hearing:

> Rhonda stated that she saw Davis write checks to pay fraternity bills and expenses. But she could only recall one check that Davis wrote from his personal checking account to pay a fraternity bill. Asked how she knew this check was for a fraternity expense, she said her husband told her the check was "for fraternity stuff." The court also asked Rhonda how she knew Davis was using money orders to pay fraternity bills. She recalled asking Davis about the money orders "the very first time" she saw them at their home. He told her he used money orders to pay fraternity bills because some vendors would not accept the fraternity's checks. Rhonda also testified on *voir dire* that she and her husband did not use money orders to pay household expenses, and that she saw bills from The Hartford and the utility company PEPCO, neither of which served her household. She did not claim to have seen Davis using money orders for any particular vendor other than The Hartford.

(*Id.*)

The trial judge ultimately sustained the government's objection. The court of appeals noted the relationship between the personal knowledge and hearsay rules:

> The Federal Rules of Evidence define hearsay as an out-of-court statement offered for its truth and generally bar its admission into evidence. Fed. R. Evid. 801(c), 802. The Rules also prohibit a witness from testifying unless he has personal knowledge of the subject of his testimony. Fed. R. Evid. 602. These provisions intersect if a witness satisfies Rule 602's personal knowledge requirement by relying on the truth of an out-of-court statement. "If the testimony of the witness purports to repeat an out-of-court statement, hearsay is the proper objection. If the testimony on its face purports to be based on direct perception of the facts described but is actually based on an out-of-court statement about those facts, the objection should be lack of personal knowledge." * * * (Citations omitted.)

(596 F.3d at 856.)

The court added in a footnote that "[b]ecause the distinction between the two objections is based only on the form of the testimony, an objection invoking either rule is sufficient." (*Id.* at n.2.) The footnote is almost certainly problematic, since a hearsay objection would generally not suffice to cover a witness's testimony that involves speculation rather than reliance on a declarant's statements. It does highlight, however, the way in which hearsay and personal knowledge objections may relate to one another.

Appellate Resolution

The court ruled that Rhonda's testimony about the one check she claimed to see her husband write to pay a fraternity bill was hearsay because she relied upon her husband's out-of-court statement regarding the purpose of the check. This analysis seems correct.

The court also recognized that generally

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checks, bills, and money orders are not hearsay. They are not true or false. "They are legally operative documents with a meaning independent of the truth of the words they display. . . . A $100 money order made out to The Hartford instructs a financial institution to disburse $100 to The Hartford. It would make no sense to ask whether the money order was true." (*Id.* at 856-57.)

But, the court held that the trial judge did not err in excluding some of Rhonda's testimony about the money orders because on voir dire she said that she relied upon three things to determine that the money orders were used to pay fraternity bills: (1) she saw money orders that her husband wrote to a vendor; (2) she and her husband did not use money orders for household expenses; and (3) her husband responded to a question she asked about the money orders and said they were for fraternity bills. The court reasoned that "[t]o the extent Rhonda's knowledge derived from what Davis told her, rather than from the practice of her household or the words written on the money orders, the district court properly excluded her proposed testimony regarding the money orders." (*Id.* at 857.)

The court's reasoning is again correct. Rhonda should have been permitted to testify as to (1) and (2) without any hearsay problem but not (3) because (3) simply relayed a hearsay statement from her husband.

As for the bills, the court rejected Davis's argument that Rhonda should have been able to testify to what she saw and stated that the documents contained assertions—i.e., the sender and recipient labels—and the labels asserted facts that could be characterized as true or false. This analysis appears strained. Surely it was relevant that Davis had bills purporting to have been sent to the fraternity from a vendor. He testified to such bills and Rhonda's testimony that she saw bills such as he described should have been admissible to corroborate his version of events rather than for the truth of the matters stated on the bills. The court distinguished cases in which documents were shown to be in a certain location and were not hearsay when used to prove a connection with an individual and insisted that Rhonda's testimony relied on the truth of the sender and recipient labels. Although a hindsight analysis demonstrates that there was a clear nonhearsay purpose for Rhonda's testimony, the court's failure to recognize this purpose is explained by "defense counsel's failure to articulate a justification for Rhonda's proposed testimony independent of the labels' truth." (*Id.* at 858.)

What About Best Evidence?

Although Rhonda's testimony about the labels clearly could have been nonhearsay, it would have raised a best evidence problem had the government made a best evidence objection. After all, Rhonda was trying to prove the contents of each bill. That triggers Fed. R. Evid. 1002. The court of appeals noted this in a footnote:

> The policy underlying the best evidence rule, embodied in Federal Rule of Evidence 1002, appeared to animate the district court's judgment regarding Rhonda's proposed testimony. In requiring litigants to prove the contents of a writing by introducing the writing itself, the rule guards against inaccuracy, fraud, and incompleteness. . . . Rhonda's testimony regarding documents not introduced at trial would have raised these concerns. But the best evidence rule also affords litigants an opportunity to demonstrate that admission of secondary evidence is necessary because the writing itself is unavailable. Fed. R. Evid. 1004. Because the government never made a best evidence objection, Davis was not called upon to produce the bills, checks, and money orders, although the court suggested that he should have done so.

Lessons

1. Counsel must make the right objection at trial. At times, it is unclear whether the right objection is lack of personal knowledge or hearsay. *Davis* suggests that either objection will do, but reliance on the footnote that says so is dangerous. When in doubt, prudent counsel would do better to raise both objections.
2. When a hearsay objection is made, the proponent of evidence bears a burden of demonstrating that the evidence is offered for a purpose other than its truth. Failure to do so may result in exclusion of evidence that might have been admitted. *Davis* illustrates this point with respect to the bills.
3. When testimony is offered to prove the contents of documents, there may be a best evidence problem even if there is no hearsay problem. *Davis* also illustrates this, although it is impossible to know whether Davis could have circumvented a best evidence objection given that none was made. ■

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