CHAPTER 9

Hearsay

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9.1 Introduction to Hearsay

Hearsay
Statements made out of court, offered into evidence to prove the truth of the statement.

FRE 801, P. 279

Hearsay rules deal with statements made out of court. The Federal Rules of Evidence define hearsay as, "A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801. The "declarant" is defined as the person who makes the statement. A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." These definitions mirror those used in most states, although there are some differences between the Federal Rules and some state rules. These differences will be discussed where relevant throughout this chapter as the hearsay definition is more thoroughly explored.

FRE 802, P. 280

The general rule is that hearsay is inadmissible in a court of law unless a specific exception allows the hearsay to be admitted. FRE 802. However, the law regarding what constitutes hearsay is confusing and complex. Even armed with a firm understanding of what constitutes hearsay, the law carves out so many exceptions, they overshadow the general rule.

It is important to recognize that the Rules approach hearsay in three ways. First, the Rules say what hearsay is. Not every out-of-court statement constitutes hearsay. A statement is hearsay only if it is offered to prove the truth of the matter asserted.

Suppose a police officer testifies that a witness at the crime scene said, "The defendant hit the victim." This is hearsay if the statement is offered to prove that the defendant did, in fact, hit the victim.

After identifying what hearsay is, the Rules say what hearsay is not.

Suppose a declarant says, "I am the King of the world." If offered to prove that the declarant was not mentally competent at the time he made the statement, the statement would not be hearsay. The statement is clearly not being offered to prove that the declarant is, in fact, the King of the world, so it is not being offered to prove the truth of the matter asserted.

Finally, the Rules identify exceptions and allow certain types of hearsay to be admitted into evidence. The effect of identifying evidence as nonhearsay is often the same as the effect of finding an exception to the hearsay rules that applies to specific evidence and allows it to come in. Although the outcome may be the same, it is important to understand the difference between nonhearsay and hearsay admissible under an exception, in order to properly formulate legal arguments in support of admitting or excluding the evidence. This chapter will deal with evidence that is admissible because it is defined as nonhearsay. The next chapter will identify evidence that is hearsay, but admissible because of an exception in the rules.

In spite of its complexity (or maybe because of it), hearsay is probably the most interesting body of evidence law to study. If you like intellectual jigsaw puzzles, you'll love this.

9.2 Purpose of Hearsay Rules

The fundamental purpose behind the hearsay rules is to limit the admission of inaccurate testimony. Testimony based on what was said out of court is generally considered to be unreliable because out-of-court statements are usually not under oath, and are not subject to

scrutiny or cross-examination at the time they are made. The evidentiary rules encourage admitting evidence obtained directly "from the horse's mouth," in order to avoid inaccuracies. It is generally desirable to have the witness who makes the statement available in court to be cross-examined or impeached, so the trier-of-fact can assess the witness's perceptions and credibility. The following example is illustrative.

Assume there has been a fire, and the police suspect arson. Ms. Listner says that Mr. Looker told her that he saw George Jones out walking near the fire at the time the fire started. Ms. Listner can provide no other information about Mr. Jones or about what Mr. Looker saw. However Mr. Looker, who made the statement, could be examined further. He could be asked, "At what time did you see George Jones? How do you know when the fire started? Describe what Mr. Jones was wearing. Was he carrying anything at the time you saw him? How do you know Mr. Jones? Have you had any difficulty with him in the past?"

The answers to these questions provide more than information. They provide a gauge by which the reliability of Mr. Looker's perception can be measured. Ms. Listner's testimony is inadmissible hearsay. Mr. Looker's testimony is not.

It is important to differentiate between the reliability of the witness who is repeating the hearsay and the reliability of the hearsay statement itself. In developing hearsay policy, the legislatures and courts have looked at the probability that the statement itself is reliable. Whether the witness on the stand reporting the statement is reporting it accurately, or honestly, or just making it up is for the trier-of-fact to assess.

9.3 An Introduction to Nonhearsay

Understanding what is excluded from the definition of hearsay involves using both logic and a good memory. Some exclusions are intuitively obvious, and others are the products of legal evolution that may not be entirely logical. The logical exclusions can be reasoned out. The others need to be learned.

Hearsay does not include all out-of-court statements. First, it includes only those statements offered to prove the truth of the matter asserted. Impeachment evidence is nonhearsay because it is not offered to prove the truth of the matter asserted. It is offered to prove that the witness is not credible. The rules we have studied with regard to impeachment, then, are not directly relevant to this chapter because the evidence they address is, by definition, nonhearsay. Similarly, out-of-court statements offered to prove state of mind or motive

are nonhearsay because they are not offered to prove the truth. The following example illustrates this point.

Jack robbed a bank. In the course of the robbery, he pointed a gun at a patron and said, "Put your jewelry in this bag or I'll shoot you." Jack's statement is *nonhearsay* if it is offered to show that the patron was under duress when she placed the jewelry in Jack's bag. To show duress, it doesn't matter whether Jack's statement was true or not. It only matters that the patron believed he might shoot her and for that reason put the jewelry in the bag. Jack's statement is hearsay only if it is offered to prove he would have in fact shot the patron had she not done what she was told.

Students often ask, "What if the patron just made up the statement? What if Jack never threatened the patron at all? What do the hearsay rules say about that?" The hearsay rules don't address that issue. The rules address the reliability of out-of-court statements and the declarant who allegedly made them, rather than the witness who recounts them. The witness who is repeating the statements is there for the jury to evaluate.

9.4 Nonverbal Assertions

Nonverbal Assertion
Gestures, such as a nod of the head meaning "yes," constitute nonverbal assertions.

The Federal Rules provide that **nonverbal** conduct, if intended as an **assertion,** constitutes hearsay. When the assertion is direct as opposed to implied, the state and federal courts are consistent in their assessments. The following example illustrates direct nonverbal conduct that constitutes hearsay.

Assume you are having a conversation with someone who becomes agitated. She puts her hands over her ears clearly communicating that she does not wish to hear any more on the subject. This is nonverbal conduct intended to be an assertion. It is hearsay in both federal and state courts.

The problem arises when nonverbal conduct implicitly asserts something, but the assertion is not intentional. In this situation, under the Federal Rules the conduct is admissible because it does not constitute hearsay. Many state courts, however, take an opposing view. Consider the following example.

Assume that you are in the lobby of a building when you observe someone putting on an overcoat and heavy gloves prior to exiting. Implied in this conduct (putting on the overcoat and gloves) is the assertion that it is cold outside. However, under the Federal Rules,

this nonverbal conduct is nonhearsay because there is no intent on the part of the declarant to assert that it is cold outside. He just happens to be putting on a coat and gloves, which creates that inference. In many states, the opposite conclusion would be reached, and the conduct would be considered hearsay.

Had the person directly stated, "Gee, it's cold outside," prior to putting on the overcoat, that statement would be hearsay in any jurisdiction. Although the inference to be drawn from the nonverbal conduct of putting on the overcoat and gloves is the same as the direct assertion of its being cold, the nonverbal indirect assertion is nonhearsay under the Federal Rules.

This dividing line isn't always rational. The actor (who put on the gloves and overcoat) is not in court to be cross-examined as to the accuracy of his perception, or the possibility of mistake. This conduct has the "feel" of hearsay, and many states define it as such. In such jurisdictions, the conduct of putting on the gloves and overcoat would be hearsay if offered to prove it was cold outside because the trier-of-fact would need to assess the credibility of the man putting on the overcoat to determine the value of the evidence.

9.5 Evidence That Is Not Hearsay Because the Rules Say It Is Not

Hearsay does not include out-of-court statements offered to prove the truth if the statements are defined as nonhearsay by the Rules of Evidence. The authors of this textbook are unable to rationalize why certain items are considered nonhearsay under the Rules and others are considered hearsay but admissible under exceptions to the Rules. The student is welcome to speculate and hypothesize about the reasons for the different identifications.

FRE 801, P. 279

FRE 801 specifically identifies as nonhearsay prior inconsistent statements of a witness when the statements were given under oath at a previous hearing, trial, or deposition. Keep in mind that this is not the same thing as FRE 613, under which a witness may be cross-examined about prior inconsistent statements for impeachment purposes. Rule 801 allows the prior inconsistent statement to be considered as direct evidence for its truthfulness.

FRE 613, P. 276

Also under Rule 801, evidence of a prior consistent statement is admissible to prove the truth when offered to rebut an inference that the witness is fabricating testimony. This is nonhearsay according to the Rule.

Finally under Rule 801, evidence of an admission by a party, agent of the party, or co-conspirator of the party, offered against that party, is admissible to prove the admitted conduct. The admission

FRE 801(d)(2), P. 279

need not have been made under oath (unlike prior inconsistent statements). It is not hearsay. FRE 801(d)(2) has been amended however, consistent with case law, to provide that an admission made by an agent or co-conspirator is not alone sufficient to prove the existence of the agency or conspiracy, nor is it sufficient to show the participation of party against whom the statement is offered. In other words, although admissions by co-conspirators are not hearsay under the Rules, the amended FRE 801(d)(2)(E) recognizes the potential for unreliability in such statements and requires that there be corroboration to prove the agency or conspiracy.

FRE 801(d)(2)(E), P. 280

You may well ask why these types of statements are nonhearsay. The answer is because the rule says so. One can logically understand why prior statements admissible for impeachment purposes are nonhearsay; they are not offered to prove the truth of the statement. Prior statements offered to prove the truth are nonhearsay only because the rule says they are not. Some states allow such statements under hearsay exceptions. The Federal Rules simply exclude such statements from the definition of hearsay.

9.6 Evidence That Is Not Hearsay Because the Court Says It Is Not

A long history of case law lingers in the states and even the federal system invoking the logic that certain evidence offered as circumstantial evidence is not hearsay because it is used to create inferences and not to prove the truth of the matter asserted. This argument has not been used frequently and is not easy to explain. In fact, according to Michael Graham, *Handbook of Federal Evidence,* 3rd ed. (1991) 727, the use of this logic is "theoretically unsound." Graham writes:

> The reason for such inaccuracy may be attributed primarily to the fact that in most instances, while the evidence under consideration was highly probative, highly necessary, and highly trustworthy, no applicable hearsay exception existed.

Under the Federal Rules of Evidence as currently drafted, there is arguably no need for the circumstantial evidence analysis. According to Rule 807, hearsay statements not specifically covered under any exception may still be admissible if they have "equivalent guarantees of trustworthiness" and are essential to the case. This "catch-all" provision might appear to eliminate the need for the questionable circumstantial evidence argument, at least in the federal system; however, the courts are not all in agreement on that point. In a 1990 case, *United States v. Ashby,* 864 F.2d 690 (10th Cir. 1990), the federal court of appeals upheld a lower court ruling that certain

FRE 807, P. 286

evidence was nonhearsay because it was circumstantial evidence. In this case, a car title found in the glove box showing that defendant was the owner of the seized vehicle was admitted over defendant's hearsay objection. The appellate court affirmed the trial court's ruling, stating,

> [T]he car title was used circumstantially to tie appellant to the car, not to prove that she was the owner. Since these documents were used to tie appellant to the car, they were not hearsay . . . and were relevant for the purpose for which they were introduced.

It is difficult to comprehend how a car title that is introduced to "tie" a party to a car is not being used to show ownership. This appears to be an instance where the title isn't hearsay because the court said it isn't.

9.7 Identifying Nonhearsay Uses of Evidence Offered for Purposes Other Than to Prove the Truth, and Understanding Their Limitations

Most of the time, it is not too difficult to identify statements that are nonhearsay because they are offered to prove matters other than the truth of the assertion. A general category of out-of-court statements that are nonhearsay are those offered to prove a declarant's state of mind or motive. The following hypothetical illustrates this situation.

Mary and Jim were walking down a street when they heard a woman scream, "Stop that—you're really hurting that child!" They walked quickly to the alley from which they heard the scream (which took only seconds) and saw a child, bleeding badly, lying on the ground. A man was standing near the child when Mary and Jim arrived but started to run away when Mary and Jim approached. Mary reached down to help the child, while Jim followed the man, who ran into an apartment building. Jim then called the police and an ambulance. The child was taken to the hospital, and the man who had been observed by Mary and Jim was found by the police with Jim's help in one of the apartments in the building Jim had seen him enter. The man, Rudy, was charged with assault and battery. The woman who had originally screamed, "Stop that—you're really hurting that child!" was not found for questioning.

In this case, the unknown declarant's scream is admissible into evidence to show Mary's and Jim's states of mind when they went to the alley to investigate, and to explain Jim's motive in following Rudy to the apartment building. When offered to prove the state of mind of Jim or Mary, the statement is not hearsay.

Since the statement is not admissible to prove that the defendant was, in fact, hurting the child, the court may issue a limiting instruction ordering the jury to consider the statement only for its nonhearsay purpose. Notwithstanding such a limiting instruction, the jury will most likely be influenced by the statement in the above hypothetical, even if only unconsciously. Attorneys will consequently often object to the use of out-of-court statements introduced allegedly for nonhearsay purposes, if those statements are likely to mislead the jury or cause unfair prejudice against a party (FRE 403). Recent United States Supreme Court cases have added some wrinkles to statements such as the one here. We will discuss the nature and admissibility of similar out-of-court statements in Section 10.2.

FRE 403, P. 264

In the following criminal case, the government argued that out-of-court statements made by an informant were admissible to provide "background" information. Since the out-of-court statements were not used to prove the truth, these statements were technically nonhearsay. The court agreed that the statements were not hearsay, especially in light of the limiting instructions repeatedly given by the judge. However, the appellate court analyzed the testimony for its overall effect and found it should have been excluded for unfair prejudice. The argument was valid that the evidence technically had a nonhearsay purpose, but the court still must consider the evidence for its potential effect on the jury and the harm it might do.

United States v. Mazza and DeCologero

792 F.2d 1210 (1st Cir. 1986)

* * *

Antonio Mazza and Anthony DeCologero appeal their convictions for conspiracy to possess cocaine with an intent to distribute it. They primarily attack the way in which the government first presented its case to the jury, namely, by having two government agents describe what an informer had previously told them about what the appellants said and did in a series of meetings with the informer. We agree with the appellants that the admission of the descriptive testimony was erroneous. . . .

I

Our analysis of the appellants' main argument depends heavily on the specific facts of the case. We shall first summarize these facts, then discuss the basic error of law. . . .

A

The government's evidence, much of which was on tape, shows the following series of events, all of which took place in late summer of 1984.

August 3: Agents of the Federal Drug Enforcement Administration lawfully searched the home of Armand Barrasso. They found about a pound of cocaine. In return for a promise to recommend leniency to his eventual sentencing judge, Barrasso promised to help the DEA by becoming an informer. His actions during the ensuing investigation of the appellants were closely supervised by two DEA agents, Peter Vinton and Daniel Doherty.

[Several meetings between Barrasso were monitored, and Barrasso reported back to the DEA agents after each meeting, until the time of arrest.]

* * *

The appellants' major claim on this appeal is that the way in which government presented its case to the jury was unfair. Before calling Barrasso to describe what happened during the August and September meetings, the government called DEA agents Doherty and Vinton, who supervised the investigation of Mazza and DeCologero. On direct examination, the agents were permitted to describe what Barrasso had told them outside the courtroom about what he and the appellants had said and done in these conversations, at which the agents were not present. Indeed, in at least one instance, one of the agents testified about what Barrasso had told the other agent (outside the courtroom) about one of his conversations with the appellants. The agents' testimony contained many statements by Barrasso that if taken as true, would strongly incriminate the appellants. Indeed, the jury initially heard much of the story that we have presented . . . through the government agents' descriptions of what Barrasso had told them out of court. This way of presenting the evidence, the appellants claim, led the jury to hear the government's case three times—twice out of the mouths of the government agents, in the form of inadmissible hearsay testimony, and only later in the form of admissible testimony by Barrasso himself. Barrasso, they add, was a highly untrustworthy witness whose credibility was unfairly enhanced by the government's manner of proof.

In our opinion, both reason and authority indicate the appellants are right about the inadmissibility of the challenged testimony of the government agents. Technically speaking, the agents' testimony was nonhearsay, for the court repeatedly cautioned the jury not to consider the out-of-court statements for their truth, but, rather, to consider them as "background," or as showing "the basis for the actions taken

by the government." The court apparently meant for the jury to take the agents' accounts of what Barrasso told them as showing only the fact that Barrasso said certain words to the agents, not as evidence of the truth of Barrasso's out-of-court words. Nevertheless, as we shall explain, the risk that the jury would consider those words for their truth was great, and the government's need to present them to the jury—throughout the agents' testimony—was virtually nonexistent. Because the "probative value" of the agents' testimony was "substantially outweighed by the danger of unfair prejudice," it should have been excluded under Rule 403 of the Federal Rules of Evidence.

We fully recognize that out-of-court statements are often admissible for nonhearsay purposes and that a district court has considerable leeway in applying Rule 403. Nonetheless, in this instance, the testimony should have been excluded for three reasons.

First, the amount of out-of-court statement evidence was large. Barrasso's out-of-court statements pervaded the direct examination of both agents. The agents related so many of these statements that the government effectively managed to have the jury hear a second-hand account of Barrasso's entire story through witnesses whose credibility the jury was less apt to question.

Second, when the out-of-court statements were admitted, the risk that they could improperly sway the jury was high. The testimony might have shown facts not later corroborated; it would also likely bolster the credibility of the informer Barrasso before he took the stand. The jury was particularly likely to consider these out-of-court declarations for their truth, for they directly implicated the defendants in the specific criminal acts at issue.

Third, the agents' testimony about Barrasso's out-of-court statements had almost no probative value.

* * *

In context, the government could simply have asked the agents to testify that they debriefed Barrasso after his conversations with the appellants. The government could—and should—have left Barrasso to testify about the substance of those conversations.

In sum, the amount of potentially prejudicial testimony admitted, combined with the lack of need, convinces us that its admission was erroneous.

FRE 801, P. 279

Please note in this case that informant Barrasso's accounts of the defendants' out-of-court statements are not hearsay under 801(d)(2) because they constitute admissions of a co-conspirator. (Admissions of a party or co-conspirator are not hearsay because the rule says so.)

This case illustrates that using subterfuge to get in otherwise inadmissible evidence generally will not work. The stated purpose for

admitting the hearsay in this case was not persuasive. Prosecution created a technical argument whereby the evidence could come in, but on close scrutiny, when admitted for the argued purpose, the evidence was essentially nonprobative. If an argument is a pretense through which one hopes to get the evidence in front of the jury, there is a good chance the court will see through the sham.

It is incumbent on the person analyzing prospective testimony to evaluate both the legitimate purpose for which the evidence is to be used, and the probative value of the evidence in that context.

9.8 Verbal Acts

Verbal Acts
Words that create a legal relationship or give legal context to an accompanying physical act.

The legal concept of **verbal acts** is not a logical one to many of us. Speaking is a verbal act to most ordinary mortals. When the law refers to verbal acts in the hearsay sense, however, the reference is to words that generally accompany other conduct, or create legal relationships, and that help define the context of a transaction. Words used in this context are also frequently referred to as an "operative legal fact" and are excluded from the definition of hearsay as a matter of developed law. They are nonhearsay.

For example, suppose Grandpa Bucks says to his grandson, "Take this thousand dollars as a gift." His statement is nonhearsay because characterizing the money as a gift is a verbal act. The act of giving money without accompanying words can have a lot of different meanings. The money could be a loan, a gift, a partial payment on a debt or contract, or even an unlawful payoff of a bribe. Out-of-court statements that characterize a transaction are considered verbal acts because without them the transaction would have no specific meaning.

A common place for the concept of verbal acts to apply is in the area of contract law. Words that create contracts, such as offers, acceptances, and rejections, are considered verbal acts. The case law presents various "logical" arguments for this type of exclusion; however, none of them are terribly compelling. It is simply established law that words that create legal relationships are excluded from the hearsay rules as verbal acts, and are therefore nonhearsay.

The concept of verbal acts applies in both the civil and criminal domains. The following case illustrates admissible testimony of a verbal act in a criminal case.

United States v. Jackson

588 F.2d 1046 (5th Cir. 1979)

[Defendant in this case is charged with various crimes related to narcotics sales. The defendant attempted to transport heroin in the suitcases of Miss Johnson, an unsuspecting friend.]

Miss Johnson testified that she was unaware that the canvas bag she transported from Los Angeles to Birmingham contained heroin, and the prosecutor stated in court that the government considered her to be an innocent participant in the criminal scheme. She testified that she met Porter in Los Angeles in June 1977 and that he invited her to his family reunion in Birmingham. On July 6 a woman Miss Johnson did not know came by her apartment and gave her $130 as air fare to Birmingham. She also handed her a small canvas bag and requested that she pack it with the things she was carrying on her trip. The stranger told Miss Johnson that Porter would pick her up at the Birmingham airport. Appellants contend that the witness's testimony as to what the unidentified woman said when she brought the money and canvas bag to the witness at her Los Angeles apartment violated the hearsay rule and the Confrontation Clause of the Sixth Amendment. We disagree. The Federal Rules of Evidence exclude from the operation of the hearsay rule any oral statement not intended as an assertion. F. Rule Evid. 801(a). Furthermore, an out-of-court statement that is not offered as proof of the matter asserted therein is not hearsay. F. Rule Evid. 801(c). We think that the out-of-court statements fall within that class of "cases in which the utterance is contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it." Since the unidentified woman in Los Angeles was not a witness against the appellants, there was no Confrontation Clause violation in this case.

The woman who dropped off the money and canvas bag in the above case clearly made an out-of-court statement when she said that Porter would pick up Miss Johnson at the Birmingham airport. This statement was allowed into evidence as nonhearsay because it was not offered to prove whether Porter would actually pick up Miss Johnson. It was offered as a "verbal act," which is a statement that explains conduct as the conduct occurs. It defines the concurrent physical act.

Verbal acts are confusing. They are consistently excluded from the definition of hearsay in the states as well as the federal system. They are difficult to identify. The two main considerations when assessing this type of nonhearsay are:

1. If words create a legal relationship between the parties, they will be considered verbal acts.
2. If the words accompany physical conduct and serve to shed light on the physical conduct, they are likely to be considered verbal acts.

Some examples of verbal acts which have been recognized as nonhearsay include, but are not limited to, a marriage offer, a promise, or a vow; a solicitation of a bribe; solicitation for prostitution; and an ownership declaration.

9.9 Implied Assertions

For there to be hearsay, there must be an out-of-court statement that makes an assertion. Some statements, however, are made in a non-assertive form or indirectly. A question, for instance, is not an assertion and technically, therefore, should not constitute hearsay. However, there are times when questions must be viewed as statements subject to the hearsay rules, or inappropriate outcomes would result.

Suppose a man named Bypasser observed an incident of a victim's being shoved by an assailant who then ran away. Suppose Bypasser went up to the victim and queried, "Can you believe the nerve of that guy, coming up and pushing you like that?" Bypasser technically didn't make a "statement"—he asked a question. Using rigid application of the rules, Bypasser's question isn't hearsay because it is a question and not an assertion. Looking at the "substance" of Bypasser's comment, however, it is clear that Bypasser did make an assertion. He simply put it in the form of a rhetorical question. He wasn't really inquiring about the "nerve" of the assailant. He was asserting his disapproval of what he saw. In this case, Bypasser's comment would constitute hearsay.

Notwithstanding the above example, under the Federal Rules of Evidence, most of the time indirect assertions are not considered hearsay. The Advisory Committee speaks of "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted." The Advisory Notes state that such verbal conduct is excluded from the definition of hearsay. The following example illustrates this point.

On July 1, Nephew Jimmy states, "I always defer to Uncle Harry on financial matters—he is the best." On July 2, Harry tries to give a large financial gift to a University, and his family files an action to enjoin the gift by asserting Harry's mental incompetence. Jimmy's statement is offered into evidence by Harry's attorney to show that Jimmy perceived Harry to be mentally competent near the time of the attempted gift. Jimmy's statement is not a direct assertion regarding Harry's competence. If it were, it would definitely be hearsay. Since, however, the statement isn't being offered to prove the truth of the assertion that Harry handled all of Jimmy's financial matters, or that Harry is "the best," then under the Federal Rules, the comment is not hearsay and is admissible.

Enjoin
To cause an action to stop through a court ordered injunction.

The Advisory Committee defends the depiction of Jimmy's comment as nonhearsay because it believes the likelihood of fabrication in such situations is small, and the jury can assess an appropriate

weight to give this evidence. Many state courts, however, would not reach the same conclusion. Their logic is as follows.

Had Nephew Jimmy said, "Uncle Harry is mentally competent," his statement would unequivocally be considered hearsay. Since there is no substantive difference between Jimmy's direct statement of Harry's competence and his indirect implication of Harry's competence in his assertion that he used Harry for financial advice, to treat those two statements differently would be placing "form over substance." (Lawyers often argue that applying the law in certain ways puts "form over substance." They mean by this that in applying a rule strictly by its terms without looking at its purpose, the outcome can be the opposite of the one intended.)

For the paralegal, it is important to know that statements implying an assertion (as opposed to statements directly making that assertion) may be treated differently from each other, especially in the federal system. The rules in the relevant jurisdiction must be researched to adequately assess an outcome in this situation.

9.10 In Summary

The theories surrounding hearsay are complicated and not necessarily logically cohesive. To simplify, the following checklist should be used when evaluating out-of-court statements to determine if they are hearsay or nonhearsay.

- Is there a written or oral statement, or nonverbal conduct, that makes an assertion? (If not, there is no hearsay.)
- Is the assertion direct or indirect? (If indirect, the statement may be nonhearsay.)
- Is the assertion offered to prove the truth of the matter asserted? (If not, it is nonhearsay.)
- Does the assertion serve to explain a concurrent physical act? (If yes, it may be considered a verbal act and nonhearsay.)
- Does the assertion create a legal relationship between the parties? (If yes, it is nonhearsay.)
- Is the assertion excluded from the legal definition of hearsay, either by the Rules of Evidence or according to case law? (If yes, it is nonhearsay.)

If, after examining the evidence in light of all the questions above, you determine that you have a hearsay statement, you then must analyze whether the assertion is admissible under one of the many hearsay exceptions to be discussed in the next chapter.

End of Chapter Review Questions

1. What is hearsay?
2. What is nonhearsay?
3. What is the purpose of the hearsay rules?
4. What is a nonverbal assertion?
5. Identify some nonhearsay uses of out-of-court statements.
6. What is a verbal act?
7. What is an implied assertion?

Applications

Consider the following hypothetical situation.

Marissa, who lived with her mother, was a next-door neighbor of Randall, who lived alone. One day Randall asked Marissa if she would take care of his plants over the summer because he was going to be out of town a lot. Marissa agreed, and Randall gave her a key to his house, with his thanks.

Before Randall left, Marissa asked him if it was OK if she used his house while he was gone. She explained that at times she needed to have privacy away from her mother. Randall said,

Statement #1: "Of course, you can use the house any time."

After approximately six weeks of absence, Randall came home unexpectedly. When he entered his house, he found a party going on. Many of his personal things were lying broken, and the house was in a shambles. He began to tell people to leave. One party participant said,

Statement #2: "Look, Marissa said we could party here all we want. She said it didn't matter if anything broke or not—it ain't even her house, man!"

Randall called the police, and the party participants, one of whom turned out to be Marissa, were arrested. They were each charged with criminal trespass and criminal damage to property.

1. With regard to Statement #1, is there a nonhearsay use of this evidence? Discuss.
2. With regard to Statement # 2, is there a nonhearsay use for this evidence? Discuss.

Assume that the proponent of the evidence is attempting to introduce the following at trial. Will the judge rule that it is one of the following (a) not a statement so not hearsay; (b) a statement which might be hearsay; (c) a statement but not hearsay because the rule says so; or (d) a statement but not hearsay because the courts say so?

3. A prescription for bifocal lenses.
4. Professor Smart's selection of Mary to be his teaching assistant.
5. Defendant Alberto's email approving Monica's decision to fire people.
6. Monica's prior statement under oath to Congress now offered because her present testimony differs from that statement.
7. Mr. Comey's exclamation "That's the guy who entered the hospital room!"
8. Defendant Curd's statement to Alberto: "Don't tell anyone that we tried to get his signature."
9. The statement: "You can have this for your twenty-first birthday."
10. Mr. President said: "Don't question my authority to do this for I am divined by god to do this."