The Hearsay Rule

Federal Rules of Evidence 801-804

The Hearsay Rule is important to understand when you are presenting evidence at trial. Like relevancy, hearsay can be a difficult concept to nail down. However, you must understand how it works if you are going to present a coherent defense.

Hearsay is a statement made out of court that is offered during trial to prove that something is true. A statement can be verbal, physical (like pointing), or written like a medical/business record. If it wasn't made under oath in a courtroom, it's hearsay and not admissible. The problem with hearsay is that when the person being quoted is not present, it becomes impossible to show it is credible. For example, to prove that Tom was in town, a witness testifies, "Susan told me that Tom was in town." Because the witness's evidence relies on an out-of-court statement that Susan made, if Susan is unavailable for cross-examination, the statement is hearsay.

As a result, hearsay evidence is generally not allowed in court. However, the Federal Rules of Evidence provide for exceptions to the Hearsay Rule. These include exceptions for business records.

Exceptions to the Hearsay Rule

The listed exceptions below to the Hearsay Rule apply regardless of whether the person who made the statement is available to testify. You do not have to call someone as a witness to have their statement(s) introduced if they are covered by the following:

- **Present Sense Impression.** This is a statement made out of court by someone who:
  - Was describing or explaining
  - An event or condition,
  - Made while or right after the person saying it perceived it.

        - **Example:** Someone who saw the alleged battery says, “I can’t believe that astronaut hit him.”
- **Excited Utterance.** This is a statement made out of court that:
    - Relates to a startling event or condition
      That was made while the person saying it was under the stress of excitement caused by the event.
        - **Example:** Someone yells, “Oh my God! She almost killed him!”
- **Then-Existing Mental, Emotional, or Physical Condition.** This is a statement made out of court about the current mental, emotional, or physical state (like pain or feelings) of the person saying it.
    - **Example:** Someone says, “My knee hurt too bad to run away.”
- **Statement Made for Medical Diagnosis or Treatment.** These are statements made to a doctor, nurse, or emergency medical personnel about:
    - Symptoms or medical history,
    - Reasonably pertinent to diagnosis or treatment.
        - **Example:** A person who witnessed a crime tells an emergency medical provider that they tripped while they were trying to run from the scene.
- **Recorded Recollection.** A recorded recollection is:
    - A writing, video, or audio recording
      That the witness once knew the contents of
      But cannot recall well enough at trial to testify fully and accurately.
        - **Example:** While testifying, a witness confirms that she remembers seeing a video of the alleged victim joking about something but doesn’t recall exactly what was said. The actual writing, video, or audio recording can be used to refresh the witness’s memory and can be introduced into evidence as an exception to the Hearsay Rule in some instances.
- **Business Records.** These are records of regularly conducted activity, like a business's accounting records:
    - If the record was made at or near the time of the event,
    - By or from information from someone with knowledge,
    - And if it was the regular practice of that business to make the record. This includes medical records.
        - **Example:** You want to introduce the reservation log of a restaurant near the scene of the crime that shows another person had made reservations at that restaurant. Business records, including medical

records, must be authenticated by certification or affidavit as described above.

While police incident reports are a business record, the statements in them are hearsay, and unless they fall into a hearsay exception, the statements in a police report are not admissible. Such statements could also violate your right to confront witnesses against them as provided in Menominee Tribal Code § 120-42(F).

Under Federal Rule of Evidence 804, there are exceptions to the Hearsay Rule that apply only if the declarant (the person who made the statement) is unavailable to testify.

Circumstances that make a declarant unavailable include:

- Being exempt from testifying due to privilege. This includes the privilege against self-incrimination, the spousal testimonial privilege, and the marital privilege. The spousal testimonial privilege allows a current spouse to refuse to testify against the other. The marital privilege allows you to object to testimony about conversations between spouses during the marriage.
- Refusing to testify despite a court order. This includes a witness who was subpoenaed but failed to appear. Unless a subpoena was issued, the witness will not be considered unavailable. This is why it is important to subpoena all witnesses, even friendly ones.
- Testifying to not remembering the subject matter.
- Being unable to attend due to death or illness.
- Being unable to be located despite diligent effort.

Exceptions under Federal Rule of Evidence 804 include:

- Former Testimony. Testimony given previously by the declarant in another hearing or deposition.
- Dying Declaration. A statement made by someone believing they are about to die, concerning the cause or circumstances of their impending death. The declarant does not have to actually die to get this sort of statement admitted into evidence. They only have to believe they are dying when they make the statement.
- Statement Against Interest. A statement that a reasonable person would have only made if it were true, because it is so contrary to their proprietary or pecuniary (legal) interest, or it created such a risk of criminal or civil liability.

Other Important Hearsay Rules

Federal Rule of Evidence 805 addresses situations where a statement includes another statement (like a report quoting someone else or a police report that quotes a witness). Both statements must independently qualify under a hearsay exception to be admissible.

Federal Rule of Evidence 807 is a catch-all exception that allows for the admission of hearsay statements that don't fit into any other exception but have equivalent guarantees of trustworthiness, are material facts, and are more probative than other available evidence.

What is NOT Hearsay?

Federal Rule of Evidence 801(d)

Under the Federal Rules of Evidence, certain statements are explicitly excluded from the definition of hearsay. This means they are not considered hearsay at all, even if they are out-of-court statements. These are exclusions from the Hearsay Rule, not exceptions. Exceptions are still hearsay but are allowed under certain conditions. Exclusions are not hearsay and admissible subject to other objections discussed below.

Statements that are not hearsay include:

- Prior Statements by a witness. If a witness has made out-of-court statements to others that are different from what they are presently testifying to, these statements are not hearsay and are admissible.
- Prior inconsistent statements made under oath at a trial, hearing, or deposition. Inconsistent statements made under oath are not hearsay.
- Prior consistent statements used to rebut a charge of fabrication or improper influence. This happens when the witness has made prior statements that show they have been telling the same story all along. These statements are used when one party claims the witness is lying or has been persuaded to tell a different story. The prior statements are not hearsay.
- Statements of identification made after perceiving someone (e.g., a witness identifying a suspect in a lineup). While these statements are not hearsay, they can be challenged as prejudicial if the lineup and identification were not

conducted properly. For example, the defendant is 6’ 3”, but everyone else in the lineup is under 5’ 5”.

- Admissions by a party-opponent are not hearsay. Anything you said out of court can be admitted against them.

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