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The Meanings of Hearsay

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THE MEANINGS OF HEARSAY

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> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> Lewis Carroll,
> *Through the Looking-Glass*

For me, hearsay is one of the more elusive concepts in teaching the law of evidence. What does the concept of hearsay encompass? Should a particular item of evidence be classified as hearsay or not hearsay? A definition of hearsay is contained in the Federal Rules of Evidence, but this definition differs in significant ways from the traditional common-law concept. Moreover, any legal definition of hearsay—whether in the Federal Rules or the common law—bears only slight resemblance to the ordinary, generic meaning of that term, which law students presumably bring to their study of Evidence as part of their general fund of knowledge. Indeed, the law of evidence often uses the term "hearsay," as well as related terms like "asserted" and "implied," in ways that are quite dissonant with the ordinary meaning of these words. Even within the framework of the Federal Rules of Evidence, the simple expression, "not hearsay," is ambiguous without further explanation, for it can mean several different things. All in all, navigating my way through the meanings of hearsay is a continual challenge when I teach evidence.

I. THE ORDINARY MEANING OF HEARSAY

Students come to their study of the law of evidence with some notion of hearsay from everyday language. One typical dictionary definition of hearsay is "information heard from another."[1] Several observations come to mind in relation to this definition. First, the definition's focus is on the receipt through *hearing* of information conveyed *orally* by another person. The word hearsay itself suggests this focus by combining "hear" with "say." Other means of transmitting and receiving information—writing, reading, gestures, signals,

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1. THE AMERICAN HERITAGE DICTIONARY 600 (2d College ed. 1985). Another dictionary gives a similar definition: "[s]omething one has heard but does not know to be true." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 656 (4th ed. 2000).

observation, for example—are not within the ordinary meaning of hearsay. Second, the generic definition is limited to information one receives *from another person*. This definition does not include statements previously made by the same person, whereas an evidentiary definition of hearsay would encompass prior statements made by a witness. Third, the dictionary definition is silent on a point critical to the evidentiary definition—whether the significance or relevance of the information heard from another lies in its truth or only in the existence of the information. Finally, the dictionary definition of hearsay views hearsay from the perspective of the receiver ("hearer") of the information, not the provider or sponsor of the information—just the opposite of an evidentiary definition.

II. THE FEDERAL RULES' DEFINITION OF HEARSAY

A definition of hearsay is set forth in Rule 801(c) of the Federal Rules of Evidence: "'Hearsay' is 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."[2] Two words used in this definition—"statement" and "declarant"—are also defined in the Federal Rules. Under Rule 801(a), "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[3] Rule 801(b) defines a "declarant" as "a person who makes a statement."[4] The foregoing definitions use the words "assertion" (twice) and "asserted," yet there is no definition of these words in the Federal Rules. In ordinary usage, "assert" means "[t]o state or express positively."[5] Synonyms include words like "affirm," "declare," and "aver."[6]

The definition of hearsay in the Federal Rules of Evidence differs significantly from the everyday meaning of the word—"information heard from another." First, while the dictionary definition encompasses only the hearing of information that is being communicated orally by another person, the Federal Rules, in defining "statement" broadly, extend the hearsay concept to written and nonverbal communications as well. Moreover, the definition in the Federal Rules is not limited to information which one person (the witness) has received from another person (the out-of-court declarant). In other words, a witness's own prior, out-of-court statements may qualify as hearsay under the Federal Rules. And, of course, the Federal Rules' definition of hearsay

2. FED. R. EVID. 801(c).

3. FED. R. EVID. 801(a).

4. FED. R. EVID. 801(b).

5. THE AMERICAN HERITAGE DICTIONARY 134 (2d College ed. 1985); *see* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 85 (4th ed. 2000) (defining "assert" to mean "to state positively; declare; affirm").

6. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 85 (4th ed. 2000).

includes the critical element—missing from the ordinary meaning of hearsay—that the out-of-court statement (analogous to the information heard) is being offered in evidence to prove the truth of the matter asserted in the statement. Finally, while the dictionary definition of hearsay looks at the concept from the perspective of the receiver (hearer) of the information, the Federal Rules' definition focuses on the perspectives of the sponsor (proponent) and source (out-of-court declarant) of the information.

One could conceptualize hearsay under the Federal Rules as being comprised of two essential elements. There is hearsay under Rule 801(a)–(c) whenever a party is offering (1) evidence of an out-of-court statement (2) for the purpose of proving the truth of some matter asserted in the statement. The definition requires us to consider the perspectives of both the out-of-court declarant and the proponent, the party offering the evidence. From the perspective of the out-of-court actor or declarant, he or she must have intended to make a statement asserting some matter. Without a statement or assertion, there is no hearsay. From the perspective of the proponent of the evidence, that party must be offering the statement for the purpose of proving the truth of some matter asserted in it.

It may happen that an out-of-court declarant's statement asserts more than one matter. For example, the statement, "I didn't tell X about Y's involvement in the robbery"[7] asserts both that Y was involved in the robbery and that the declarant did not tell X about Y's involvement. Thus, Rule 801(c) may be too narrow in viewing hearsay as "a statement . . . offered in evidence to prove the truth of *the* matter asserted."[8] This suggests that a statement can assert only one matter. Perhaps the Rule should refer to "a matter asserted or "*any* matter asserted" in the out-of-court statement.

An assertion of a matter may be intended even though the declarant makes this assertion indirectly rather than by explicit declaration. For example, D makes an angry statement to X, "Well, at least I've never forged a will," which is offered to prove that X forged a will.[9] The statement expressly states that D, the declarant, never forged a will, but implies that X *has* forged a will. Since an assertion may be intended even though the declarant only implies it or states it indirectly, the ordinary dictionary meaning of "assert"—to state or express positively—may convey an erroneous impression of the actual meaning of words like "asserted" and "assertion" in the context of Rules 801(a)–(c) of the Federal Rules of Evidence.

7. This example is loosely based on the statement at issue in *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983) ("I didn't tell them anything about you.").

8. FED. R. EVID. 801(c) (emphasis added).

9. This example comes from JON R. WALTZ AND ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 135 (Updated 10th ed. 2005); *see also Reynolds*, 715 F.2d at 103 (statement of defendant's accomplice to defendant, "I didn't tell them [postal authorities] about you," implied defendant's involvement in conspiracy to defraud and was hearsay).

This brings me to so-called "implied assertions." First of all, the phrase has a certain oxymoronic quality, as the word "imply" has been defined to mean in ordinary usage "[t]o say or express *indirectly*,"[10] while "assert," as noted before, means "to state or express *positively*." More importantly, the expression "implied assertions" invites uncertainty as to whether they should be treated as hearsay or not. If an implied assertion is simply a type of "assertion," (intended to be such, even though said indirectly), then Rule 801(a) of the Federal Rules would classify it as a "statement," thus partly qualifying it as "hearsay." Presumably, a declarant may say a matter indirectly, but a court could find that, more probably than not, he or she intended to "assert" it. Yet, the phrase "implied assertions" has been used by courts to refer to evidence which is not hearsay under the Federal Rules of Evidence because there is no assertion.[11] In addition to the uncertainty and ambiguity in the phrase "implied assertion," the phrase also misses the critical distinction under the Federal Rules of Evidence between conduct intended as an assertion ("assertive conduct" or an "assertion") and conduct not intended as an assertion ("nonassertive conduct").

If the conduct of an out-of-court actor is not intended as an assertion of anything, there is no "statement" under Rule 801(a), and thus there is no "hearsay" under Rule 801(c).[12] This situation is readily seen as nonassertive conduct since no assertion of anything was intended. If the conduct of an out-of-court actor is intended as an assertion of only one matter (matter A), but the evidence is not offered to prove the truth of that matter asserted, there is no hearsay under Rule 801(c).[13] This conduct is less easily seen as nonassertive since the actor did intend to assert something, although not the matter sought to be proved by the evidence.

In order to have hearsay under the Federal Rules, a determination that there is a "statement" or "assertion" is, of course, only the first step. The statement must also be "offered in evidence to prove the truth of the matter asserted."[14] This phrase is almost hypnotic and may be confusing. Who is "offering" the statement? Who is "asserting" the matter? The statement is *offered* in evidence at the trial or hearing by a party (the proponent of the evidence) for a particular purpose. That purpose is to prove the truth of some matter that has been *asserted* out-of-court by the actor or declarant.

By limiting the definition of hearsay to out-of-court conduct intended as an assertion, the Federal Rules of Evidence reject the more expansive concept of

10. THE AMERICAN HERITAGE DICTIONARY 646 (2d College ed. 1985) (emphasis added).

11. *See, e.g.*, United States v. Zenni, 492 F. Supp. 464, 469 (E.D. Ky. 1980), *reprinted in* JON R. WALTZ AND ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 114–19 (Updated 10th ed. 2005).

12. *See supra* text accompanying notes 2–3.

13. *See supra* text accompanying note 2.

14. FED. R. EVID. 801(c).

hearsay recognized at common law: "[C]onduct, even when not intended as assertive, is hearsay when offered to show the actor's belief and hence the truth of the belief."[15] The common law concept, particularly when applied to nonassertive, nonverbal conduct, bears almost no resemblance to any ordinary meaning of hearsay. Not surprisingly, the hearsay issue in such conduct was apparently often missed by courts and lawyers under the common law concept of hearsay.

One final point deserves mention in connection with the Federal Rules' definition of hearsay: What is meant by saying that an item of evidence is not hearsay? Of course, an item of evidence is not hearsay if it falls outside the definition set forth in Rule 801(c). The evidence may not constitute an out-of-court "statement" or "assertion," for example. Or, even if the evidence is of an out-of-court statement, the proponent may not be offering it to prove the truth of the matter asserted in the statement; the mere making of the statement may be relevant for some purpose.

The Federal Rules, in Rule 801(d), define other situations in which an out-of-court statement is not hearsay, even though it *is* being offered to prove the truth of the matter asserted in the statement. Certain prior statements made by a witness are defined as "not hearsay."[16] Admissions by a party-opponent are also defined under the Federal Rules as "not hearsay."[17] These Rule 801(d) statements are functionally the same as exceptions to the hearsay rule: they allow evidence of an out-of-court statement to be admitted to prove the truth of a matter asserted in the statement. Defining Rule 801(d) statements as "not hearsay" invites confusion with statements that are "not hearsay" under Rule 801(c) because they are not offered to prove the truth of the matter asserted. The Rule 801(d) statements are exceptions to the definition of hearsay in Rule 801(c), rather than exceptions to the hearsay rule. While Rule 801(d) statements are often referred to as exemptions or exclusions, the fact remains that the Federal Rule designates them as "not hearsay." Perhaps, the phrase "not hearsay" should not be used without some further explanation—not hearsay because it is not an out-of-court "statement" (Rule 801(a), (c)); not hearsay because the out-of-court statement is not offered to prove the truth of the matter asserted (Rule 801(c)); not hearsay because the statement is a defined prior statement of a witness (Rule 801(d)(1)); or not hearsay because the statement is an admission by a party-opponent (Rule 801(d)(2)). Just saying "not hearsay" can mean too many different things.

15. Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 502 (1930), *reprinted in* JON R. WALTZ AND ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 121–23 (Updated 10th ed. 2005).

16. FED. R. EVID. 801(d)(1).

17. FED. R. EVID. 801(d)(2).

III. CONCLUSION

The meanings of hearsay present a special challenge in teaching Evidence. A word like "asserted," which is not defined in the Federal Rules of Evidence, does not mean what it means in everyday usage. A word combination like "implied assertion," aside from its oxymoronic quality in ordinary usage, is used by courts to mean, not a type of assertion, but a nonassertion. A basic phrase such as "not hearsay" refers to so many different types of evidence under the Federal Rules that it is without clear meaning unless explained. Even a specific type of evidence can defy clear definition. Consider a witness's prior statement identifying a person. Is this hearsay under the Federal Rules when offered to prove the truth of the matter asserted? Well, let's see. Under Rule 801(c), the answer is "yes"; under Rule 801(d)(1)(c), the answer is "no." I wonder what Humpty Dumpty would say about all this.