

- Statements admitted and defined as non-hearsay
- FRE 801(d)(1)
  - Prior inconsistent testimony by witness, under oath, in another proceeding is non-hearsay; *i.e.*, comes in unimpeded and is afforded substantive probative value (contrast from impeachment value of prior inconsistent statement not under oath).
  - Also non-hearsay if consistent prior statement, offered to rebut claim of recent fabrication or improper influence of motive.
- Also non-hearsay if a statement of identification made after perceiving the person.

# Machines and animals speak

- If a witness says: "I looked at the clock on the west wall; it was exactly 3:00 p.m." Is what was reflected on the clock hearsay?
- If a trained dog indicates he has found heroin in a bag and the officer presents that as his probable cause for the search, is the dog's conduct hearsay?

## Advisory Committee Note to Rule 801

- The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended....
- Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept.
- When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility.

Five general basis statements not considered hearsay that would otherwise meet the definition:

- Offered for impeachment purposes only;
- Verbal acts (massage-prostitution problem);
- Effect on listener or reader;
- Verbal objects (finding symbols in possession problem);
- Circumstantial evidence of state of mind (wife's will problem);
- Circumstantial evidence of memory or belief (child identification of assailant's room problem).
- Circumstantial evidence of other facts.

- Keep in mind that the requirement that an assertion was intended by the actor is expressly applicable only to non-verbal conduct. FRE 801(a)(2).
- With statements, written or verbal, the courts will still look at whether the statement amounts to an assertion, intentionally or by necessary implication.

- Prob. 3-F. Alford smells gas and is going to call gas co. Forrest shows up and says: "I'm from the gas co. Show me where the pipe is; we've had leak reports." When he does, Forrest lights a cigarette and burns Alford. Alford sues gas co. for negligence; gas co. denies Forrest was its agent and says Alford was contributorily negligent.
- Are Forrest's statements hearsay?

- Prob. 3-G. Seaver, Flawn, and Nichols charged with conspiracy to distribute cocaine. Prosecution needs to prove trio worked out of a house in Alton, and sold at Eagle's Nest Bar & Grill. Flawn owned the house in Alton. Prosecutor proves that:
- Seaver had in his possession matchbook from Eagle's Nest.
- Mug found at Alton house with Seaver's college logo and nickname on it.
- Waitress at Eagle's Nest will testify that she often saw Nichols with another man, who she pointed out to detective. Detective will testify that she pointed out Seaver.
- Which are hearsay?

- Prob. 3-H. Anna Sofer killed by bus. Husband sues Metro for wrongful death. Metro offers will, executed few weeks before her death, in which Anna said husband was scum.
- Hearsay?

- Prob. 3-1. Sexual assault of minor case. Officer 1 wants to testify as to detailed description of room where assault took place by minor. Officer 2 will describe his observations of the room, independently, when the warrant was served.
- Is Officer 1's testimony hearsay?

# United States v. Singer

- Landlord mails formal eviction letter to Almaden. Envelope offered as proof of Almaden's address.
- Hearsay?
- Is there a distinction between the address on the letter being offered as: (a) an out-of-court assertion of where Almaden lived; from (b) an indication by landlord's conduct of mailing the letter as to where Almaden lived?
- Does the operative document doctrine fit here?
- What about intercepted calls to bookies?
- What about questions with implied assertions?
  - "Et tu, Brute?"
  - "Kenny, is that you?"

- Prob. 3-J "My husband is in Denver."
- Is the statement hearsay?
  - Not offered for TOMA.
  - Performance aspect – lying to federal officials is a crime.
- Prob. 3-K - Hangar owner wants to offer testimony that he told 6 persons he was storing an aircraft as proof that he was not involved in a marijuana airlift operation involving the aircraft.
- Are the statements hearsay?
  - Not offered for TOMA.

- US v. Pacelli. Pacelli charged with conspiracy to deprive witness of civil rights by murder. Lipsky helped him murder the witness and turns state's evidence. Lipsky wants to testify that after witness murdered and crime reported, he met at Pacelli's house with Pacelli's wife and confederates. Pacelli's wife gave Lipsky money to skip town. Others, by their conduct, arguably implied they thought Pacelli guilty. Pre-rules case.
- Is Lipsky's testimony hearsay under common law?
- Does the result change under the rules?
- What about the post-rules Reynolds case in the note? Reynolds arrested for passing forged check. Sees Parran and says: "I didn't tell them anything about you."
- Hearsay as to Parran?

- Betts v. Betts. Child custody case, Mother loses and appeals admission of statement by daughter when she learned Mother had married man accused but acquitted of beating younger son to death.
- Are child's statements hearsay?

## Hearsay Quiz

- 1. As proof that B lacked testamentary capacity in April, evidence that several times in March he told friends he was Woody Allen.
  - Nonhearsay. Not offered to prove TOMA.
- 2. As proof that C assumed the risk of accident on account of faulty brakes in riding in D's car, D's testimony that: "I told C before he got in that something was wrong with my brakes."
  - Nonhearsay because offered to prove effect on listener.
- 3. In E's personal injury suit, as proof that F was an agent of defendant All-Cure Drugstore, E's testimony that F said: "I'm awfully sorry, I was running an errand for my employer All-Cure Drugstore."
  - Hearsay.
- 4. As proof that G stole a car, evidence that police stopped him and that his girlfriend H falsely stated at that time, "This car belongs to my brother."
  - Nonhearsay because not offered to prove TOMA.

## Hearsay Quiz

- 5. As proof that H was frightened when J brandished a plastic pistol and demanded cash, evidence that H began sweating and shaking.
  - Nonhearsay. Non-verbal act not intended as assertion.
- 6. As proof that the time was about midnight when K entered the building, testimony by L that she saw K come in and mentioned it to M ten minutes later, coupled with M's testimony that it was "just past midnight when L told me that she saw K enter."
  - Nonhearsay. L's live testimony as to time she saw I enter is not out-of-court statement. M's testimony might be hearsay if offered alone as to what L said, but now that L's statement independently admitted, M's testimony not offered to prove TOMA, but only to prove time of comment.

## Hearsay Quiz

- 7. As proof that N committed the robbery with which he is charged, testimony from bystander O that: "I picked N out of the lineup as the one who did it."
  - Hearsay. (Again, though, reserve judgment on admissibility.)
- 8. As proof that P was unusually accomplished in French, evidence that in her first year of college she was accepted into a fourth year course.
  - Nonhearsay. Non-verbal conduct not intended as an assertion.
- 9. As proof that defendant Q participated in a criminal venture under duress, evidence that coparticipant R told him: "We will kill you if you don't help us."
  - Nonhearsay. Offered as circumstantial evidence of effect on state of mind on hearer.

## Hearsay Quiz

- 10. As proof that S favored increasing the penalties for drunk driving, evidence that she joined an organization entitled "Mothers Against Drunk Driving," coupled with proof that the principal aim of that organization is to increase such penalties.
  - Nonhearsay, because non-verbal conduct not intended as an assertion. However, a close case because joining organization might reasonably be interpreted as an intended assertion.
- 11. As proof that defendant T owned a .32 caliber pistol, testimony by a police officer that when he asked T's father, U, whether T owned such a pistol, U went to a drawer in the house where he and T lived, pulled out a .32 caliber pistol, and handed it to the officer.
  - Hearsay. Non-verbal conduct intended as assertion.

## Hearsay Quiz

- 12. As proof that officer V acted in good faith in arresting W, offered by V in defending against the claim brought by W for violation of his rights, evidence that the prosecuting attorney told V "you have probable cause to arrest W."
  - Nonhearsay, because offered as circumstantial evidence of state of mind of defendant V. Also, not offered to prove TOMA, but lack of bad faith on V's part.
- 13. As proof that St. John's beat Georgetown in basketball, evidence that Z, who had bet on Georgetown, paid off his debt.
  - Nonhearsay. Non-verbal conduct not intended as assertion.
- 14. As proof that X had committed a prior bank robbery, evidence that she was prosecuted for that crime and that a jury had found her guilty.
  - Hearsay by established common law. (However, probably non-hearsay because of operative statement doctrine, but irrelevant because clearly meets an exception, discussed later.)

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## Hearsay Quiz

- 15. As proof that Y went to New Orleans on Tuesday, evidence that on Monday he said: "Tomorrow I'm going to New Orleans."
  - Hearsay. Verbal statement with clear inferred assertion.
- 16. As proof that his brakes were bad, evidence that Z said: "I think I ought to reline my brakes before anybody drives the car."
  - Hearsay. Verbal statement with clear inferred assertion.
- 17. As proof that B was selling pornographic literature, evidence that he received a letter from C, enclosing a check and saying in substance, "please send me the dirty book."
  - Nonhearsay under operative document doctrine (constitutes a sale).
- 18. As proof of the manner in which X was injured in the workplace, evidence of a videotape in which X reenacts the events that led to her injury, offered in proof by X.
  - Hearsay. Non-verbal conduct intended as an assertion.

## Hearsay Quiz

- 19. As proof that E did not have permission to drive the car to Sacramento, evidence that owner F had told E "not to drive it out of San Francisco."
  - Nonhearsay. Operative conduct doctrine (set limits on permission). Also, circumstantial evidence as to effect it had on E.
- 20. As proof that tenant G terminated his month-to-month tenancy effective Nov. 1, evidence that G sent owner H a letter in Sept. that stated: "October will be my last month as tenant. I am vacating by Nov. 1."
  - Nonhearsay. Operative statement doctrine. (Notice of intent to terminate has independent legal effect.)
- 21. As proof that the stairs in Boomideal's Dept. store were adequately lighted, testimony by the floor manager that in six years several customers had complained that they were a long hard climb but no one had mentioned any lighting problem.
  - Nonhearsay. Non-verbal conduct not intended as an assertion. Also, not offered for TOMA.

## Hearsay Quiz

- 22. As proof that J had been in the law library before, evidence that on entering the library she said to the attendant, "May I please have the key to the locked cage in the basement, so I can look at Starkle on Evidence," coupled with proof that book is shelved in a locked cage at that location.
  - Nonhearsay. Offered as circumstantial evidence of her knowledge of library, not for TOMA as to location of book.
- 23. As proof that the bit-and-run driver drove a Porsche, testimony that the logo on the rear of the vehicle in question read: "Porsche."
  - Either way. Hearsay because the logo says the car is a Porsche and offered in court to prove TOMA. Nonhearsay because someone with personal knowledge could prove that only Porsches have that logo, and then the logo is not offered for TOMA. However, every court would let this in without the accompanying testimony anyway.

## Hearsay Quiz

- 24. On the question of whether tenant L had paid his rent for the month of April, testimony that in handing landlord M a check in the appropriate amount, L said to M, "This is for the April rent."
  - Nonhearsay. Operative statement doctrine. Identifying rent payment for April was legal completion of contract to pay rent for that month.
- 25. On the issue set out in 24, testimony that on day after giving the check to M, L was heard to say: "I paid my rent for April."
  - Hearsay. Out of court statement in court offered to prove TOMA.
- 26. As proof that the train had come from the west, testimony by eyewitness N that she pointed in the direction of the train when she heard it coming, coupled with testimony by a police officer present at the scene that the direction in which N pointed was west.
  - Nonhearsay. Non-verbal conduct intended as an assertion, but not as an assertion that the train was headed in a westerly direction.

## Hearsay Quiz

- 27. As proof that HiTech Corp. was a bad credit risk, evidence that Din & Bradstreet gives HiTech Corp a poor credit rating.
  - Pure hearsay.
- 28. As proof that BankWest acted reasonably in refusing to refinance HiTech Corp's debt, evidence that Din & Bradstreet gives HiTech Corp. a poor credit rating.
  - Nonhearsay. Offered as circumstantial evidence of reasonableness of BankWest's conduct, not for TOMA.
- 29. As proof that R was seriously ill, evidence that he was being kept in the ICU at the hospital.
  - Nonhearsay. Non-verbal conduct not intended as an assertion.

## Hearsay Quiz

- 30. As proof that S is an honest man, evidence that he handed the store clerk a \$10 bill for a \$7 purchase and, on receiving a \$10 bill and 3 ones from the clerk in change, S returned the \$10 bill and said, "I think you've made a mistake."
  - Nonhearsay. Not offered for TOMA.
- 31. As proof that V is a violent man, testimony that he is reputed in his community to be such.
  - Hearsay. (But reserve judgment on admissibility, to be covered later.)