

## § 7.5

**Hearsay***He Said She Said***“ELEMENTIZATION” AND THE HEARSAY RULE**

Court rules and other forms of enacted law, such as statutes, can be complex and confusing. There is a skill, however, that makes using and applying rules much more efficient and accurate. We will refer to this skill as elementization.

Elementization means breaking a rule into elements, then applying each element individually to a legal issue. (“Elementization” is discussed more thoroughly in Volume 2 of these Essential Skills Textbooks.) There is no better rule with which to practice this technique than the *Hearsay Rule*, one of the most confusing rules in law.

All state and federal courts recognize some form of the hearsay rule. Hearsay is generally defined as:

*In-court testimony of an out-of-court statement made by someone other than the in-court witness, offered to establish the truth of matters asserted. In establishing hearsay, the question of credibility lies with the out-of-court asserter.*

An example of hearsay might be: John hears Anna say, “I’m going to shoot Kate.” The next day, Kate is found dead and Anna is charged with the murder. The prosecution wants John to testify about Anna’s statement. The testimony would be hearsay.

The hearsay rule exists because testimony from one person about what another person said is inherently unreliable. Even if the witness is telling the truth about the out-of-court statement (which may be an issue), there is still the possibility that the statement was taken out of context, the tone of the statement was misinterpreted, the statement was misunderstood, etc.

The general rule is that hearsay should *not* be admissible, unless there is a special exception that would allow it to be admitted. For a paralegal, understanding the hearsay rule will help determine the value of statements made by witnesses or clients during interviews or the investigative process.

### EXERCISE | ELEMENTIZATION

Using a separate sheet of paper, break the above hearsay rule into individual elements.

### EXCEPTIONS TO THE HEARSAY RULE

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If an objection is made to a question in court because the answer would constitute hearsay, the party asking the question may argue that the answer may be hearsay, but it should be admissible because it falls under an exception to the *Hearsay Rule*. There are 24 federal exceptions to the *Hearsay Rule* and each state determines for itself which exceptions will be recognized by its courts. Of the 24 exceptions, eight constitute the majority of all acceptable hearsay exceptions. They are:

1. *admissions (by a party to the action)*  
Statements made by a party to the action that amount to an admission regarding the matter at court.
2. *declaration against interest*  
Think of this as the same as an admission, except it is by a nonparty to the action.
3. *business entries*  
Records kept in the normal course of business by the person whose job it is to keep such records are considered hearsay but are admissible under this exception. Even though the “testimony” is actually a document, think of the entry itself as a statement.

4. *dying declaration*  
A statement made by someone who believes that his own death is imminent. Some states do not consider dying declarations hearsay; therefore, no exception is needed to make the statement admissible.
5. *declaration of bodily symptoms and conditions*  
A statement made indicating a person's own bodily condition, such as "I feel great," or "My stomach hurts."
6. *declaration of state of mind*  
This is a statement regarding the knowledge and intent of the person making the statement. For instance, a person may say, "I'm so mad, I'm going to go over and beat up Joe." This exception has nothing to do with a person's sanity.
7. *declaration of present sense impression*  
A statement made immediately before or during an event. "Look at that speeding car!"
8. *excited utterance*  
A statement made immediately after an exciting event, about that event. Also referred to as *spontaneous declaration*. "I can't believe how mean he was to his wife just now!"

**EXERCISE | APPLYING THE HEARSAY RULE**

Using a separate sheet of paper, break the hearsay rule into individual elements and then apply each element to the following fact patterns.

**Hearsay is:**

*In-court testimony of an out-of-court statement made by someone other than the in-court witness, offered to establish the truth of matters asserted. In establishing hearsay, the question of credibility lies with the out-of-court asserter.*

1. *Joe was walking down the street when his girlfriend Jill ran up to him and said, "Bill just tried to attack me." Bill is being tried for attempted rape and the prosecution wants Jill to testify.*

Is it hearsay?

Is it admissible?

2. *Carl has been charged with armed robbery. His attorneys wish to enter into evidence attendance records from his high school, which they claim will establish that Carl was at school the day of the robbery.*

Is it hearsay?

Is it admissible?

3. *Sue and John are divorced. During their separation, Sue asked John whether he had fixed the brakes on her car, as he had agreed. He said, "I'll do it today." The brakes failed, causing Sue to crash. Sue wants to testify to John's statement.*

Is it hearsay?

Is it admissible?

4. *Gail was at a bar one night when she overheard a conversation between two people concerning fraudulent worker compensation claims. A state agency wants Gail to testify at an agency hearing about what she heard.*

Is it hearsay?

Is it admissible?

5. *Harold was at a football game with Ted. During the game, Ted told Harold he had committed a series of burglaries. Ted was killed three weeks later in an accident. The police have charged Kip with the burglaries. Harold wants to testify at Kip's trial.*

Is it hearsay?

Is it admissible?

6. *Paul and Carol were walking down the street. Suddenly, Carol exclaimed, "Boy, that guy is so ugly he'd make my dog vomit!" The man she was referring to, Gilbert, is suing for mental cruelty. Gilbert's attorney wants Carol to testify.*

Is it hearsay?

Is it admissible?

7. *Ned and Nora are standing on a corner. When a plane flies over, Ned exclaims, "That plane sure is flying low." The plane eventually crashes into a house and a suit is commenced against the estate of the pilot. Nora is called to testify about the statement made by Ned.*

Is it hearsay?

Is it admissible?

8. *Rita and Frank were driving near their house when a rabbit ran out in front of the car. Frank swerved to avoid the rabbit. He ran head-on into another car and is being sued. Rita is asked to testify to the fact that Frank "jerked the steering wheel to the left."*

Is it hearsay?

Is it admissible?

9. *Eudora was talking to Felix on the phone. Suddenly, Felix cried out, "Please don't shoot me, Gladys!" Gladys has been charged with murder and the prosecutor wants to call Eudora to testify about the telephone conversation.*

Is it hearsay?

Is it admissible?

10. *Victor has been charged with murder. He needs to establish an alibi. Victor's attorneys want to enter into evidence at trial the book of reservations from a French restaurant, Chez Maggot.*

Is it hearsay?

Is it admissible?

11. *Henry was walking with Kathy on the beach when Lou grabbed Henry's beach bag and started to run. When Kathy tackled Lou, he said, "All I wanted was some money to get something to eat." Lou now claims he is innocent. The prosecution wants Kathy to testify about Lou's statement.*

Is it hearsay?

Is it admissible?

12. *Teri heard Ichabod declare, "I'm going to treat myself to a chocolate sundae!" Weight Watchers now wants Teri to recount this conversation at a meeting.*

Is it hearsay?

Is it admissible?