

15. THINGS ARBITRARILY EXCLUDED FROM HEARSAY UNDER RULE 801(d)

The second line of defense to a hearsay objection is that the utterance falls into one of eight categories of statements excluded from hearsay under Rule 801(d). They are completely arbitrary, so don't waste time trying to reason out why these (and not others) are excluded. Just learn the rules, which are detailed and technical, but pretty clear.

1. A witness's own prior statements - sometimes.

A witness's own prior oral and written statements are usually hearsay. However, under Rule 801(d)(1), if the witness-declarant testifies and is available for cross-examination concerning the prior statement, the declarant's own statements are non-hearsay in three narrowly defined situations.

a. 801(d)(1)(a): Prior inconsistent statements under oath. If a witness testifies at trial, the witness's prior inconsistent statements made under oath at a trial, hearing or deposition are not hearsay.

b. 801(d)(1)(b): Prior consistent statements to rebut a charge of fabrication. If a witness testifies at trial, and the opposing attorney both impeaches the witness with a prior inconsistent statement and explicitly or implicitly suggests that the change is the result of recent fabrication, then you can use a statement consistent with the trial testimony that was made before the motive to fabricate arose to rebut the accusation.

c. 801(d)(1)(c): Statement of identification. If a witness testifies a trial and has trouble identifying the perpetrator, testimony that the witness previously made a statement identifying him is not hearsay. This is commonly used if a witness identifies a suspect at a lineup but his appearance has changed by the time the case goes to trial. The limitation to lineups is not written into the rule, so some courts extend this rule to allow other kinds of identification statements as non hearsay.

2. Statements of the opposing party, including corporate parties

Five types of statements made by or attributable to the opposing party are excluded under 801(d)(2). Unlike ordinary witness prior statements, the party need not actually testify and be subject to cross-examination. A statement falls into this category if it was made personally by the opposing party, adopted by the party, or can be attributed to the party on agency principles. A party cannot use this exclusion to offer his own statements into evidence.

a. 801(d)(2)(A). Statements made by the party personally. Who is a party is determined from looking at who is named in the complaint, whether the person is named as an individual, a state employee in their official capacity, the representative of an estate, or any other capacity.

b. 801(d)(2)(B): A statement made by another but adopted (explicitly or implicitly) by the party. The adoption can be explicit, as when the Board of Trustees approves the written recommendation of Michael McRobbie to name the law building Baier Hall. It can also be implicit, e.g., when a tenant tells the landlord the parking lot is dark and creepy, and the landlord installs more lights.

c. 801(d)(2)(C): A statement made by a person whom the party authorized to make a statement on the subject. This is usually applied to corporations who only speak through agents. The person can have explicit authority, e.g., a spokesperson who works in media relations; or be high enough up in the food chain to have implicit authority, e.g., the CEO. Individuals can also appoint agents to speak for them, but the courts are more likely to limit this to situations where the authorization is explicit.

d. 801(d)(2)(D): A statement made by a party's agent or employee on a matter within the scope of that relationship and while it existed. This type of statement is generally made by a lower-level employee authorized to act (e.g., empty the trash bins) but not speak, who makes a statement about their job while employed -- for example, the statement of a maintenance man who regularly empties trash bins who says he sees toxic waste being improperly thrown away.

e. 801(d)(2)(E). A statement made by a party's coconspirator during and in furtherance of the conspiracy. Merely having a relationship and being associated with someone is insufficient to establish a conspiracy. There must be evidence of a meeting of the minds of the conspirators and a mutual agreement to commit an offense. A formal conspiracy charge is not necessary to using this exception. Only statements that promote or facilitate the goals of the conspiracy are in furtherance of it; mere idle chatter is not admissible. A foundation is required demonstrating: 1) the existence of a conspiracy, 2) the scope and goals of the conspiracy, 3) the defendant's participation in it, and 4) the declarant's participation in it. Conspiracies usually end when the conspirators are arrested, so co-conspirator statements to police are rarely admissible.

3. Admission by silence.

An admission by silence is a much litigated type of adopted statement in which an accusation is made against a criminal defendant under circumstances where an innocent person would naturally deny it, but the defendant remains silent. It is the reaction of the party that constitutes adoption of the statement, so a foundation is required that the party probably heard and understood the accusation, had an opportunity to respond, but failed to deny it. It must be reasonably clear that the party is conceding the truth of the assertion. For example:

- The defendant's mother said "You shouldn't have hit the baby so hard," and the defendant responded, "Oh, shut up."
- The defendant's friend said "Hi, Odie, how you doing?" and the defendant and the friend then talked together; admission that defendant's name was Odie.

It must be reasonably clear which facts the defendant is conceding. A general accusation that the defendant is lying or hiding something is not an adoption of any particular fact. Silence by a defendant in police custody, especially if he has been told of his right to remain silent, is not admissible. *Doyle v. Ohio*, 426 U.S. 610 (1976).

4. There are two peculiarities to this rule.

- a) The personal knowledge rule does not apply. No one knows why.
- b) It is one-sided in criminal cases. The prosecution may call witnesses to testify to incriminating statements made by the defendant. The defendant may not call other witnesses

to testify to exculpatory statements made by the defendant nor to incriminating statements made by the victim.