Hearsay Review Problems  (With Answers)

Instructions

For each of the fact patterns which follow, the first question asks whether the evidence is hearsay as hearsay is defined in Rules 801(a)-(c) of the Federal Rules of Evidence. To signify that the evidence does not fall within the definition of hearsay contained in Rule 801(a)-(c) of the Federal Rules of Evidence answer “F”. The second question with respect to each of the fifty sets of facts asks whether the evidence is admissible under the Federal Rules of Evidence. Assume that all necessary foundation has been offered, that the evidence is relevant, that no privilege is applicable, etc. In short, focus solely upon the hearsay issue. To signify that the evidence is admissible, for example, by virtue of being exempt as an admission of a party-opponent, Rule 801(d)(2), or meets the requirements of the exception for an excited utterance, Rule 803(2), answer “T.” To signify that the evidence is not admissible, answer “F.”

Set One

- In a civil action between P and D, one of the issues is whether X was present in Boston on October 21, 1988. X is available at the trial. P calls W who testifies that on October 20 he visited X at X’s home in New York and X showed him an airline ticket with X’s name typed on it for a trip from New York to Boston on October 21, 1988.

  X’s conduct in expressing his intent to go to Boston is hearsay but admissible under 803(3) as an expression of then existing intent.

- Same issue above except that P offers a reimbursement voucher signed by X which X submitted to his company-employer covering expenses of “my trip to Boston October 21, 1988.”

  Hearsay but admissible as a business record under 803(6) with proper foundation.

- Same issue as above except that P calls W to testify that W heard X tell Y on October 20, 1988 that “I plan to go to Boston tomorrow.”

  Hearsay - admissible under 803(3)

- Same issue as above except that P calls W to testify that on October 22, 1988, X told W “Yesterday I was in Boston.”

  Inadmissible hearsay. Backward looking. Statement of memory offered to prove the matter remembered.

- To prove that X had heard of the firm of Dun & Bradstreet, testimony by Y that X
once said, “I subscribe to Dun & Bradstreet.”

Not hearsay. Statement demonstrates that the speaker had heard of Dun & Bradstreet. “Category 2” nonhearsay.

- To prove that Z was bankrupt, testimony by X that “the latest Dun & Bradstreet report indicated that Z was bankrupt.”

Hearsay and inadmissible in this form. A witness cannot testify to what a document says without producing the document. If the document were produced, it would be admissible under 803(17).

- To prove that Z was bankrupt, testimony by X that, as a regular reader of Dun & Bradstreet, he (X) knows that Z was bankrupt.

Implicit hearsay and inadmissible.

- To prove that D acted in good faith in foreclosing a mortgage on Z’s property, a Dun & Bradstreet report received by D shortly before the foreclosure indicated that Z was having financial troubles.

Nonhearsay – effect on hearer. It doesn’t matter if the report is false – D. acted in good faith.

- To prove that T lacked testamentary capacity on January 2, testimony of Y that on several occasions during December and January T had told Y that she (T) was Reggie Jackson.

Not hearsay. Not offered for the truth of the statement but only to demonstrate the speaker’s delusional state of mind. Admissible in any case under 803(3) – statement of belief not offered to prove the truth of the matter believed.

- P sues for damages arising out of an automobile accident. P calls W, who testifies that X, D’s employee, was driving D’s truck at the time of the collision and that, the day after the collision, he (W) heard X say to D, “I’m sorry, boss, I just didn’t see the light.”

An agent admission under 801(d)(2)(D).

- State v. D. To prove that V’s assailant was D, testimony by Y that at the police line-up V, separated from suspect by one-way glass, pointed his index finger at D in response to a question, “Do you see the man who did it?” V is unavailable at trial.

Inadmissible hearsay. 801(d)(1)(C) requires that the declarant be available at trial. (If very close in time to the assault, could be admitted under 803(2)).

- P v. D. To prove P’s damages, P calls Y, who testifies that P, still pinned in the demolished car, said, “My leg hurts something awful!”
Hearsay admissible under 803(3).

- P v. D. To prove that P was conscious soon after the wreck, D calls Y, who testifies that P, still pinned in the demolished car, said, “My leg hurts something awful!”  
  Not hearsay. Offered only to demonstrate speaker's state of mind.

- P v. D. To prove that D accepted P's offer, P offers his (P's) testimony that D said in response to the offer, “All right, P, it's a deal.”  
  Not hearsay but a “verbal act.”

- State v. D for killing V. To prove that D had a motive for killing V, the state offers the testimony of Y that he (Y) had told D that he (Y) saw V rape D's sister.  
  Not hearsay but effect on hearer – proves motive.

- State v. D for killing V. To prove that D had heard of V before the homicide, the state offers the testimony of Y that a day before the homicide he (Y) told D that he (Y) saw V rape D's sister.  
  Not hearsay but effect on hearer – it literally proves that D. heard of V.

- State v. D. To prove that D's house is a house of prostitution, testimony of Y that he (Y) saw many women who (D stipulated) were prostitutes entering and leaving the place.  
  Not hearsay. Conduct of prostitutes was not intended to communicate anything; therefore, nonassertive conduct.

- P v. D Corporation. To prove that D Corporation mailed out certain literature, P offers the testimony of Y that D's president said that D Corporation mailed out the literature.  
  Admissible – 801(d)(2)(C).

- P v. D. To prove the way in which an industrial accident happened, P offers a motion picture taken by Y of P reenacting the accident.  
  This is assertive conduct and hearsay. If plaintiff does not testify, it is inadmissible. If plaintiff does testify, he can offer the film as demonstrative evidence to illustrate his sworn testimony.

- P v. D. To prove that P was able to get around after the accident, D offers a motion picture taken by Y of P reenacting the accident.
Not hearsay. The film demonstrates the fact in question.

- **P v. D.** To prove that D paid P for a piano, D calls Y, who testifies that he saw D hand P some cash and heard D at the time say, “OK, this is in full payment for the piano.”

**Not hearsay.** Sometimes called “verbal part of an act” – Category 1 nonhearsay.

- **P v. D.** To prove that the accident was caused by a defective tire, D offers the testimony of Y that he (Y) told P just before the trip that “D’s tire is about ready to blow.”

**Hearsay but admissible under 803(1) if the speaker made the statement while observing the tire.**

- **P v. D.** To prove that P in riding with D assumed the risk, D offers the testimony of Y that he (Y) told P just before the trip that “D’s tire is about ready to blow.”

**Not hearsay – effect on hearer – proves notice.**

- **P v. D.** To prove that an accident was caused by a blow-out, P offers his own testimony that he and D were riding in the car and that just before the crash, he (P) shouted at D, “My God, one of your back tires has blown out!”

**Hearsay.** Admissible under 803(2) – excited utterance.

- **P v. D.** To prove that on a certain day ATT stock closed at 60, D testifies that on the afternoon of that day he telephoned P and said to him, “P, I’ve just seen on the ticker that ATT closed at 60.”

**Hearsay.** Arguably too backward looking to qualify under 803(1). It could be an excited utterance if ATT had risen or fallen a substantial amount.

- **P v. D.** To prove that P was over 50 years old in 1957, D offers a 1957 hospital record of P containing an entry: “Patient gives age as 52.”

**Double hearsay.** Record said patient said. What patient said is an admission. The record is admissible as a business record – 803(6).

- **P’s administrator v. D.** To prove that D in fact received a deed to Blackacre from P, D offers the testimony of Y that D said during the relevant period, “Blackacre is mine. I’ve got papers from P to prove it.”

**Hearsay. Inadmissible under 803(14) and (15) which only apply to documents.**

- **P’s administrator v. D.** To prove that D in fact received a deed to Blackacre from P, D offers the testimony of Z that P once said, “Blackacre now belongs to D. I delivered the deed to him yesterday.”
Hearsay. Since P. is dead (and therefore unavailable), admissible as a statement against property interest. 804(b)(3).

- P v. D's executor. On the issue of D's testamentary capacity, P offers testimony that on the day before the will was executed, D walked around “barking like a dog.”

Not hearsay. Nonassertive nonverbal conduct.

- Prosecution of D for killing V. Plea of self-defense. On the issue of D's fear of V, W1 testifies that he heard W2 say to D, “V has knifed three people in the last year.”

Not hearsay. Effect on hearer.

- Same as above except the evidence is offered to prove V was the aggressor.

Hearsay. The statement must be true in order to prove that, in fact, V was aggressive. No exception – inadmissible.

- As tending to show that D had a revolver in his possession, the state offers the testimony of W that, as D passed W's house, W called her husband's attention to a revolver sticking out of D's pocket.

Hearsay. (A testifying witness's own prior out-of-court statements are hearsay under the Federal Rules). Although the statement satisfies the hearsay exception 803(1), it is cumulative of her in court testimony and thus irrelevant.

- On the issue of D's guilt of the crime of killing V, W testifies that D fled the scene immediately after V's murder.

Not hearsay. Nonassertive conduct.

- On the issue whether plaintiff (P) had cancer, D calls N (a nurse), who testifies that E, a doctor, gave P X-ray treatments.

If N. observed the conduct, then not hearsay. Nonassertive conduct by the doctor.

- Same as above, N testifies instead that she heard E tell P that P had cancer.

Hearsay and inadmissible. (803(4)) does not apply to statements from doctor to patient).

- Same as above, instead of using N's testimony, D offers in evidence the hospital record containing a notation made by E to the effect that he had found a malignant tumor in P.

Hearsay but admissible as a business record. 803(6).
• Same as above, except that the hospital record contains a notation by the receiving physician to the effect that P, on entering the hospital, said that he had “a cancerous tumor.”

   Hearsay but admissible under 803(4).

• P v. D. On the issue of P’s knowledge that D was in the city, D offers X’s testimony that Z said to P, “D is in the city.”

   Not hearsay. Effect on hearer. (though we would need independent evidence that D in fact was in the city.)

• The testimony above is offered to prove that D was in the city.

   Inadmissible hearsay.

• P v.D. To prove that D was present in the city, D offers W’s testimony that P said, “I know that D is in the city.”

   Admission of a party opponent.

• On the issue of witness W1’s prejudice against defendant (D), W2 testifies for D that W1 said to D in an angry tone, while D remained silent, “Well, at least I’ve never stolen money from my employer like you have.”

   Not hearsay. The angry accusation demonstrates W1’s hostility toward D. Alternatively, even if considered hearsay it would be admissibly under 803(3) as a statement of belief not offered to prove the truth of the matter believed.

• On the issue whether D stole money from his employer, plaintiff offers the evidence above.

   D’s silence in the face of the accusation qualifies this as a tacit admission.

• To prove the license number of the car involved in a hit-and-run accident, P offers a crumpled slip of paper on which appears the number EE2468 and the testimony of a man that, though he cannot now recall the number of the car, he did, while the number was fresh in his mind, shortly after seeing the accident, write the number down on the piece of paper offered in evidence.

   Hearsay but admissible under 803(5) as a past recollection recorded.

• To prove the license number of the car involved in a hit-and-run accident, P offers a photograph of a retreating automobile bearing the license number EE2468 and the testimony of a woman that, though she cannot now remember the number of the car, she took the photograph offered in evidence of the accident car as it left the scene, and that the photograph is accurate.
Not hearsay. The authenticated photo is admissible for what it shows.

- P v. D. W1 testifies for P that D’s car was going “over 50 miles an hour.” Solely to impeach W1, D offers the testimony of W2 that W1 said a day after the accident that D was going “slow.”

Not hearsay. A prior inconsistent statement used only to impeach a witness.

- The evidence above is offered by D to prove that he (D) was going slowly.

Inadmissible to prove the truth of the matters asserted. Under the Federal Rules, a prior inconsistent statement is admissible as substantive evidence only if the statement was made under oath at a hearing or deposition.

- Same as above, W2 is a police officer with no present recollection of W1’s statement, so D offers W2’s accident report, written the day after the accident, containing W1’s statement to prove that D was going slowly.

  Double hearsay: officer wrote that witness said ... . Although the officer’s report could qualify as a past recollection recorded, this will not admit the witness’s statement. (805). Might try 803(8)(C) – factual findings in a public report offered in a civil case.

- P v. D. As tending to prove title to Blackacre in defendant (D) by adverse possession under claim of title, D offers the testimony of W that plaintiff (P) said to his sister, “I've been down to the town meeting, and D is telling everyone that he owns Blackacre.”

  Double hearsay: plaintiff said defendant said. What plaintiff said is an admission and what defendant said is a verbal act.

- P v. D. To prove that A was an agent of D, P offers the testimony of W that A said, “I am an agent of D.”

  Admissible as an agent admission only if there is other evidence that A indeed was an agent of D at the time he made the statement.

- Issue, whether testator’s will is a forgery. X is the sole legatee. The party claiming forgery calls W to testify that testator, two days before the date of the alleged will, complained to the police that X was threatening to kill him.

  Admissible under 803(3) – statement of belief not offered to prove the truth of the matter believed but to prove that testator held such a belief and thus was unlikely to leave his estate to X. Also arguably nonhearsay (Category 2) – demonstrates testator's state of mind toward X.

Set Two
Action for breach of contract. The plaintiff, to show the existence of the contract, introduces a letter from plaintiff to defendant which states, “I accept your offer to sell 100 widgets.”

Not hearsay. Verbal act. (an “acceptance”)

Action for breach of contract. To prove the breach, plaintiff testifies that the defendant told him: “You can take your contract and cram it.”

Not hearsay. Verbal act. (a “repudiation”)

Action for breach of contract. To prove the making of the contract, the plaintiff introduces evidence that the defendant’s secretary told her mother: “The boss just made a great deal for a gross of widgets.”

Hearsay but probably an agent admission. The plaintiff would have to prove that knowledge of new widget contracts was within the subject area of secretary’s employment. If the secretary routinely typed the confirmations for such contracts, for example, then this would satisfy.

Prosecution for bestiality. The prosecution calls a witness to testify that he saw the defendant kissing his horse.

Weird question. (I didn't write these). Not hearsay – demonstrates matter in issue.

Malpractice action for a botched nose job. To prove damages, the plaintiff testifies that for weeks after the accident, his fellow workers referred to him to his face as “Hose-Nose.”

Not hearsay. Effect on hearer. Pain and suffering.

Prosecution for corporate piracy. To show that defendant stole the formula for plastic scissors, the prosecution offers a note in plaintiff’s handwriting, setting forth the formula which was found in defendant’s possession.

Not hearsay. The authentication of the writing makes this relevant – not the truth of the contents.

A police officer testifies that all of the tellers, who have already testified but are still under subpoena, picked the defendant out of a line-up as the person who held up the bank.

It is hearsay. If all the tellers testified to this effect, the officer’s testimony is cumulative and inadmissible. If any of the tellers did not testify to their identification, this testimony is inadmissible under 801(d)(1)(C) because although the tellers may still be under subpoena, they are not on the stand and available
for cross-examination.

- Grand theft prosecution. The owner of the store is called to testify to the items that the defendant took, but on the stand is unable to recall all of them. The prosecutor shows him a copy of the police report in which the items found on the defendant are listed. The witness says: “Oh, yes. Now I remember.” He then testifies as to the remainder of the stolen items.

  Not hearsay. The witness is testifying from recollection refreshed. The police report is not admissible unless the opponent offers it into evidence.

- Prosecution for assault with a deadly weapon. To prove defendant acted reasonably in self-defense, the defendant testifies that a bartender told him: “Jake (the victim) was in here looking for you an hour ago with blood in his eye and a rod in his pocket. He says you cheated him at cards.”

  Not hearsay. Effect on hearer.

- Prosecution for bigamy. A witness testifies that he was at a wedding and in response to the traditional nuptial inquiry, the defendant answered: “I do.”

  Not hearsay. Verbal act.

- Will contest. Plaintiff testifies that the testator was his father.

  Implicit hearsay. Since father is dead and therefore unavailable, then 804(b)(4). If someone else in the family told the plaintiff that the testator was his father, then 803(19).

- Action on life insurance contract. To prove the insured is dead, plaintiff offers a death certificate.

  Hearsay but admissible under 803(8)(A). (but only to prove the fact that he is dead, not the cause of death).

- Paternity suit. The mother takes the stand and when asked to identify the father, she points to the defendant.

  No hearsay – no out-of-court statement.

- Divorce action. To prove adultery the husband testifies that he overheard a friend in the men’s locker room describe a birthmark that the accused wife has on an intimate part of her anatomy. The wife has testified that only her husband knew of the mark.

  Not hearsay. Category 2. Statement demonstrates the declarant's knowledge.

- Action to recover the price of a car sold to defendant. To prove the car was paid for, defendant offers the testimony of a witness who claims to have heard
defendant say to plaintiff “Here is $5,000 in payment for the car.”

Hearsay but a tacit admission (assuming the plaintiff did not object, protest, or otherwise dispute the defendant's statement).

- To show that P was in pain, after an accident, a nurse will testify that he was screaming and moaning when admitted to the hospital.

  Not hearsay. Nonverbal conduct probably not intended to communicate. Even if hearsay, admissible under 803(3).

- X always leaves the house key under the back door mat when she leaves the house. To prove that she was in the house at a particular time, Z will testify that he was unable to find the key under that mat.

  Not hearsay. Nonverbal conduct probably not intended to communicate.

- To prove the value of a recently purchased car, the receipt for the purchase price, given at the sale by seller is offered.

  The receipt would qualify as verbal act nonhearsay if it were offered only to evidence the sale. But the receipt is hearsay when offered to prove the price. It would be admissible as a business record only if the seller were a business.

- To prove that the car brakes were defective, D had them fixed the day after the accident.

  Offered as an admission by conduct but inadmissible as a subsequent remedial measure under 407.

- On the issue of whether the plaintiff had a temperature, plaintiff's doctor offers to testify that the thermometer he used on plaintiff read 105°.

  Not hearsay. No out-of-court statement by a “person.”

- On the same issue, the plaintiff's mother offers to testify that the plaintiff said “I feel hot and feverish.”

  Hearsay but admissible under 803(3).

- On the same issue, the nurse offers to testify that the doctor wrapped the plaintiff in wet blankets (a standard treatment for fever).

  Not hearsay. Nonverbal conduct not intended to communicate.

- On the same issue, plaintiff offers to testify, “I told the doctor I felt hot and feverish.”
Hearsay but admissible under 803(4).

- On the same issue, plaintiff offers to testify, “I felt hot and feverish.”


- On the same issue, plaintiff’s doctor offers to testify, “The nurse told me the thermometer is registering 105°.”

Hearsay but admissible under 803(1).

- On the issue of what time it was, evidence that “Hal,” the witness’s talking watch said, “The time is ten-twenty p.m.”

Arguably not hearsay since there does not appear to be a statement by a “person.” But the watch did not set itself. A person must have set it and he or she may have been lying or mistaken when setting the watch to the “correct” time. Thus all the hearsay risks are present. Indeed, this argument makes all clocks hearsay! A clock is simply the clock setter’s assertion that the time set is correct. Of course, the clock setter relies on other clocks (also hearsay) to make this assertion. Nevertheless, courts have basically ignored the hearsay character of how we “tell time,” and freely admit what the clock or watch read or said.

- On the issue of who has the right of way, evidence that a sign facing D as he approached the intersection read, “Yield Right of Way.”

Not hearsay. Verbal act.

- To show that X was ill on a certain day, W offers to testify that on that date X complained to her that he had a pain in his chest.

Not clear if X was describing a then-existing physical sensation or recalling one he had earlier. If then-existing, then 803(3) would admit it. Otherwise, inadmissible unless W. is a doctor or other health care professional (see 803(4)).

- To prove D’s provocation for assaulting Y, D calls his friend X to testify that he heard W, D’s wife, tell D that “Y raped me.”

Not hearsay. Effect on hearer. (Whether true or not, it proves motive).

- To prove paternity, P calls Z, a family friend, to testify that D, the defendant, referred to the child as “my son.”

Hearsay but an admission of a party opponent.

- To prove that two people, X and Y, are engaged, Z, their friend, is called to testify that he heard X ask Y “Will you marry me?” and Y answered “Yes.”
It is hearsay – both are expressing their the-existing desires to marry one another. Admissible under 803(3).

- To prove that D was V's assailant and murderer, P calls V's doctor to testify that the police brought D to the hospital where V had been taken after the stabbing. When V opened her eyes and saw D, she shrunk back with a terrified look on her face and immediately lapsed into unconsciousness, never to awaken again.

  Nonverbal conduct probably not intended to communicate; therefore, not hearsay. Even if considered hearsay, admissible under 803(3) – then-existing emotional condition.

- To prove that D had a motive to kill V, P offers the testimony of D's ex-wife that she saw D lose over $10,000 to V in a poker game one night before the murder.


- Same as above, only instead the ex-wife's testimony will be that the day before the murder V came to D's ex-wife's apartment looking for D and told D's ex-wife that D owed him $10,000 from a poker game and that he had better pay up soon. (The ex-wife will also testify that she did not tell D about the incident with V.)

  Hearsay but admissible under 803(3) – statement of belief not offered to prove the truth of the matter believed (as long as V believed he was owed $10k, this would provoke him).

- Same as above, only instead the ex-wife's testimony will be that the night before the murder, D told her that "that S.O.B. V" had just cheated him out of $10,000.

  Admission.

- To prove that M is an unfit mother in a child custody suit, the father offers the testimony of the children's social worker that when she was visiting with the children in her office, the mother walked in, and the children immediately began crying and ran to hide behind the curtains.

  Nonverbal conduct probably not intended to communicate; therefore, not hearsay. Even if considered hearsay, admissible under 803(3) – then-existing emotional condition.

- Same as above, only the father offers the testimony of the family's neighbor that on several occasions she heard the mother yell at the children, "You are just a bunch of spoiled brats who can't behave properly; I'll teach you."

  Arguably not offered to prove the truth of the matters asserted but simply to demonstrate the mother's state of mind and attitude toward her children. In any event, it is a party admission.
To prove that he could not possibly have taken the jewelry that he is now on trial for stealing, D offers the testimony of the housekeeper of V (the owner of the allegedly stolen jewelry who lives in Los Angeles) that two days before the alleged robbery in New Orleans, where V was attending a convention, V told her that he was planning to leave his jewelry at home because he didn't want it to get stolen in New Orleans.

Hearsay but admissible as a statement of then-existing intent under 803(3).

Prosecution of D for battery upon V. To prove that she acted in self-defense, D testifies that the day before the fight, X told her that V was out to kill D for stealing V's boyfriend.

Not hearsay. Effect on hearer.

Personal injury action which requires retrial. Plaintiff died between the trials. To prove the plaintiff had the green light, W testifies that at the first trial, plaintiff testified that he had the green light.

804(b)(1) - former testimony exception.

To prove that X knew that a resolution had been passed by a corporate board, W testifies that he told X that the resolution had passed.

Not hearsay - effect on hearer – proves that X had reason to know ...

Prosecution of D for running a house of prostitution. D denies that her establishment was a house of prostitution. The prosecution calls W, a police officer, who testifies that while he was at the scene arresting D, he answered the phone and the caller on the other end said, “Make me an 8:30 with Candy tonight.”

An implied assertion problem. Hearsay – offered to prove the matter implied -- that the caller had reached a cat house -- and the truth of the caller's belief.

Product liability action against the manufacturer of a tire which blew out, causing injuries. To prove that the tire was defectively designed, plaintiff offers a report written by a government agency which investigated the type of tire involved in the accident and which concluded that the tire was defectively designed.

Hearsay but arguably admissible under 803(8)(C) under the decision Beech Aircraft v. Rainey.

Employee’s action for breach of an employment contract. Plaintiff had worked as an engineer for defendant's firm. Defendant claims that plaintiff was fired because of incompetence. To prove that he was competent, plaintiff offers a letter written to him by one of defendant's clients, in which the client asked him to
conduct a complex engineering survey.

A Wright v. Tatum problem. In writing the letter, did the client intend to communicate the implication that he believed the plaintiff was a competent engineer? Applying my test for implied assertions, the answer is “Yes” and thus this is hearsay. (If we assume that the client did not believe the plaintiff was competent then the client was necessarily lying or mistaken when he asked the plaintiff to conduct the complex engineering survey).

- Defamation action fo P against D. P alleges that D stood up in front of a large group and called P a “heavy drinker.” D claims that she did not call P a “heavy drinker.” At trial, D takes the stand and testifies that she called P a “heavy thinker” in front of the that group.

  Not hearsay. Not offered for the truth of the matter asserted but for effect on hearer; that is, the audience should have heard “thinker” not “drinker.”

- Prosecution of D for assault. The prosecution calls W, the alleged victim, and asks him if his attacker is in the courtroom. W responds by pointing to the defendant.


- Personal injury action. To prove the extent of injuries she suffered, plaintiff introduces a copy of her hospital bill.

  Admissible with proper foundation under the business record exception - 803(6).

- To prove that X was a good gardener, a party offers evidence that just before he went on a month-long European vacation, he gave X all of his house plants to take care of.

  Nonverbal conduct probably not intended to communicate; therefore, not hearsay.

- To prove that it was warm outside on a certain day, X calls a witness who testifies that when she was at the ball park on that day, many fans were in shirtsleeves and shorts.

  Nonverbal conduct probably not intended to communicate; therefore, not hearsay.

- Shareholder action against a corporate board for taking irresponsible action in passing a particular resolution. To prove that the resolution was not passed by the board, defendants call W, who testifies that she was present at the meeting and that fewer than half of the board members raised their hands after the chairman asked all in favor of the resolution to do so.
Not hearsay but verbal act evidence.