

8.21. Hearsay or Nonhearsay Within Hearsay

An out-of-court statement that is included within an otherwise admissible statement is itself admissible: (a) where it is offered to prove the truth of its contents and the included statement meets the requirements of an exception to the hearsay rule; or (b) it includes a statement made by a declarant that is not offered for its truth.

Note

The Court of Appeals has addressed proffers of evidence which involve a declarant's out-of-court statement which contains another out-of-court statement. In that instance, the Court admits evidence consisting of multiple layers of out-of-court statements provided each such layer overcomes a hearsay exception or is not offered for its truth. (*See People v Ortega*, 15 NY3d 610, 620-621 [2010] [Smith, J., concurring] [discussing the "hearsay within hearsay" rule in relation to the admissibility of a hospital record that was admissible as an exception to the hearsay rule as well as the statements of crime victims contained in the hospital record].) In essence, the Court has recognized that the hearsay rule should not exclude an out-of-court statement which includes another out-of-court statement when each part of the combined statements is separately admissible.

For example, in *People v Patterson* (28 NY3d 544 [2016]), the police obtained the phone number of Patterson's accomplice and then acquired from the provider of the phone service a record of the phone numbers of calls made to that phone during the period of the crime and the subscriber information associated with those calls. The last name of the subscriber and other information pointed to defendant Patterson as the subscriber. It was accepted that the log of the phone call numbers received by the accomplice was a business record and thus admissible for its truth. The subscriber information was not admissible for its truth "because the subscriber was not under a duty to report his or her 'pedigree' information correctly when activating the prepaid cell phone accounts" (*id.* at 550). The Court of Appeals, however, held that the subscriber information was admissible for a nonhearsay purpose, namely, it was admissible not for the truth of who the subscriber and caller was, but that someone (not necessarily the defendant) had supplied certain pedigree information in subscribing to the phone service. The People were then able to couple that pedigree information with other evidence which tended to confirm that the defendant was the subscriber and caller.

By contrast, in *Flynn v Manhattan & Bronx Surface Tr. Operating Auth.* (61 NY2d 769, 770-771 [1984]) a police officer testified as to what a bus driver told him about what he, the bus driver, had heard from a passenger. That testimony “was double hearsay,” i.e., passenger to bus driver and bus driver to police officer, and was inadmissible because the statement of the passenger did not fit within any of the exceptions to the hearsay rule (*id.* at 771).

The presence of multiple out-of-court statements frequently occurs in records of regularly conducted activities. In *Patterson*, the Court set forth with approval examples of such cases:

“*Splawn v Lextaj Corp.*, 197 AD2d 479, 480 [1st Dept 1993], *lv denied* 83 NY2d 753 [1994] [hotel logbook entries reporting burglaries not admissible to prove the crimes occurred but permitted to show hotel had notice of activity]; *People v Blanchard*, 177 AD2d 854, 855 [3d Dept 1991], *lv denied* 79 NY2d 918 [1992] [police blotter entry showing phone call made by someone purporting to be defendant’s father properly received not for its truth, but to impeach father, who testified that he did not make the call]; *Donohue v Losito*, 141 AD2d 691, 691-692 [2d Dept 1988], *lv denied* 72 NY2d 810 [1988] [portion of police report indicating trial witness stated that defendant had punched plaintiff in the face not admissible for its truth under CPLR 4518, but admissible to impeach witness]” (*Patterson*, 28 NY3d at 551).

(See also *e.g. Ortega*, 15 NY3d 610 [hospital record which may contain a patient’s statement]; *Cover v Cohen*, 61 NY2d 261, 274 [1984] [police accident report which may contain statements of those involved in an accident]; *Matter of Leon RR*, 48 NY2d 117, 123 [1979] [social service department reports which may contain statements of those involved in the services being provided].)

In sum, a hearsay statement, admissible under an exception, may contain several out-of-court statements. Theoretically, under the rule such a statement is admissible, provided each statement conforms to an exception or is offered for a non-truth purpose, as the rule contains no limit. However, the trial court has the discretion to exclude an otherwise admissible statement with multiple out-of-court statements upon a determination that the statement with so many layers of other statements is unreliable, or gives rise to confusion, or is otherwise more prejudicial than probative.