Getting It In: He Said, She Said
(Dealing with Hearsay)

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“Hearsay” is a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted.
A **statement** is:

- (1) an oral or written assertion, or (2) nonverbal conduct of a person, if intended as an assertion (e.g., head nodding or pointing in response to a question)

The **declarant** is:

- The person who made the out-of-court statement

To prove “**the truth of the matter asserted**” means:

- Offered as evidence to prove the truth of the content of what was said
F.R.E. 802 generally prohibits the use of hearsay evidence.

Purpose:

- **Reliability & Fairness**
  - Parties must be able to test all statements against the dangers of testimonial evidence *at the time* the information is offered.
  - With an out of court statement, the adverse party cannot examine the declarant to assess/challenge the truthfulness of the statement.
To determine if evidence is hearsay, ask:

1. Is it a statement?
2. Was the statement made out of court?
3. Is it being offered for its truth?
The digital world presents new types of evidence with various hurdles – relevance, authentication, hearsay, original/duplicate, and more.

Digital communications are out-of-court statements subject to the same hearsay considerations.

Hearsay in the digital world
Consider the following hypothetical:

- Husband and Wife are in a contentious divorce.
- Husband alleges Wife has a drinking problem, and had an affair with H’s Friend.
- Wife alleges Husband is abusive, and had an affair with Secretary.
Wife calls Colleague, who testifies: “Secretary told me that she was sleeping with H.”

Out-of-court statement?
• Yes.
• Testimony contains an assertion made out-of-court. Secretary is the declarant.
H calls Neighbor, who testifies: “I overheard W having a conversation with H’s Friend right outside the Airport Motel.”

Out-of-court statement?
• No.
• The witness is only relaying her personal observation.
W calls Colleague, who testifies: “I asked Secretary if she was having an affair with H, and she nodded her head.”

Out-of-court statement?
• Yes.
• Plaintiff’s nonverbal conduct was intended as an assertion.
H calls Neighbor, who testifies:
“I asked W: ‘Were you at the Airport Motel on Tuesday?’”

Out-of-court statement?
• No.
• This is a question, not an assertion and no information was conveyed in the question.
W calls Colleague, who testifies: “I asked H: “When did you start sleeping with Secretary?”

Out-of-court statement?
• Yes.
• Although this is a question, the question contains an implied assertion – i.e., H is sleeping with Secretary.
H calls Neighbor, who testifies: “I told H that I saw W with Friend at the Airport Motel.”

Out-of-court statement?
• Yes.
• The witness can be the declarant, and prior statement by the witness was made out of court.
H calls Neighbor, who testifies: “I saw a YouTube video where W was standing on a bar singing the ‘Shots’ song by LMFAO.”

Out-of-court statement?
• No.
• Based only on this testimony, W is not making an assertion through the lyrics or nonverbal conduct.
On the issue of whether H has committed adultery, W offers an email to H from Secretary which states: “I love you.”

Is the statement hearsay?
• No.
• There is an out of court statement in the email, but it is not offered to prove the fact asserted, i.e., that Secretary loves H. Rather, the email is relevant for the fact that the statement was made.
• Whether the email will be admissible requires addressing other issues such as authentication...
Neighbor testified that Friend confessed to having an affair with W. To impeach Neighbor, W’s attorney asks Neighbor: “Didn’t you tell W that you have never talked to Friend?”

Is Neighbor’s prior statement hearsay?
• No.
• The prior inconsistent statement is relevant for the fact that it was previously said. The mere fact that a witness has previously maintained an inconsistent position is relevant in assessing the weight to be given to the witness’ testimony. The statement is not offered for the truth of the matter asserted but to impeach the credibility of the witness.
To prove adultery H testifies that he overheard Friend in the men’s locker room describe a tattoo that W has on an intimate part of her anatomy.

Does the testimony qualify as hearsay under the rules?

• Yes.
• The statement is being offered for the inference that the declarant acquired his knowledge of the tattoo by personal observation. The statement is relevant only if true.
To prove that H is having an affair with Secretary, W calls Colleague who testifies: “One afternoon, I walked into H’s office and happened to see H’s Google Chat with Secretary, in which H asked: ‘Wasn’t that the best sex we’ve ever had?’”

Is Colleague’s testimony hearsay?
• No.
• First, the statements are not being offered to show that they had the best sex ever, but to show that H had an affair with Secretary. This is a party admission and is not hearsay. (FRE 801(d)(2)).
In addition to exclusions (e.g. party statement, prior inconsistent statement), there are also exceptions to the hearsay rule.

With exceptions, we admit out of court statements offered for the truth of the content asserted. For example:

• Present Sense Impression
• Excited Utterance
• Business Record or Public Record
• Former Testimony
• Statement Against Interest
Why do we have hearsay exceptions?

In certain situations, the dangers associated with hearsay testimony are less worrisome.

Consider:
- Perception
- Memory
- Narration/communication
- Sincerity/veracity
H testifies that Neighbor called him and said to him, “Guess what? I’m looking at W’s FaceBook page, and I just saw her check in at the Wildhorse Saloon and Bar down the street.”

Is the statement **admissible** hearsay?
- Maybe.
- Neighbor’s statement is hearsay. Reporting the observation may fall within present sense impression exception.
- W’s post is a statement, but is a party admission and is thus not hearsay (no exception needed).
- Although there is no hearsay problem, there may be other problems such as authentication.
H testifies that Neighbor texted him one hour later. The text said: “OMG! Went to Wildhorse. W makin’ out with Friend! WTF?!”

Is the statement **admissible** hearsay?
- Yes.
- Neighbor’s text is hearsay. Reporting the observation may fall within both the present sense impression and excited utterance exceptions.
- As before, there may be other problems such as authentication.
Put it in practice:

Present sense: A statement describing an event or condition made while declarant perceived it or immediately thereafter

Excited utterance: A statement relating to a startling event or condition made while declarant was under stress of excitement

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<tr>
<th></th>
<th>Present sense? Yes</th>
<th>Present sense? No</th>
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<tbody>
<tr>
<td>Excited utterance? Yes</td>
<td>OMG!! I see W kissing Friend!</td>
<td>OMG!! I saw W kissing Friend yesterday!</td>
</tr>
<tr>
<td>Excited utterance? No</td>
<td>I see W walking down the street</td>
<td>I saw W walking down the street yesterday</td>
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W offers a blog in which Secretary discusses sleeping with her boss in the broom closet at lunchtime.

Is the blog hearsay?
• Yes, but it might be admissible.
• Secretary’s statement may fit under the exception for a statement against interest, unless she was off the clock and not violating a workplace policy against such conduct.
• Remember that you will need to authenticate the blog.
H offers a post he found on W’s Facebook wall from Friend which said “I miss you and can’t wait to ‘see’ you tomorrow.”

Is the Facebook post hearsay?
• No.
• The statement in the Facebook post is relevant for the fact that it was said. H is not trying to prove the truth of the fact asserted, i.e., that Friend misses W. Rather, the fact that the statement was said is what makes it relevant.
• So this would be admissible if there are no other impediments (e.g. authentication).
H offers an email message he found on W’s computer from W to Friend which said “I love you and miss you and am going to take my H to the cleaners.” W denies ever writing the message.

Is the email message hearsay?
• No.
• The statement is a party admission.

But is the statement **admissible**?
• You would need to challenge or establish authenticity of the email. Let’s consider metadata...
W offers metadata showing that the email message was created by H on his computer.

Is the metadata hearsay?
• No.
• The metadata, by definition, is not a statement (oral or written verbal expression).

Is the metadata admissible?
• Maybe, but you will need to authenticate it (e.g. offer an expert to explain how the metadata was obtained)
**Hearsay Lessons**

- Don’t let the nature of the evidence overcomplicate the issues
  - Ask each question in the flowchart
    - Remember that not every out-of-court statement is hearsay because of exclusions
      - Learn the exceptions to the rule
        - Remember that the hearsay rule is not the only hurdle to admission
“In the book of life, the answers aren't in the back.”
- Carl Schulz

Questions? Review? Final Thoughts?

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