# HEARSAY, PART 1
# The Basics of Determiming Hearsay Admissibility

**Peter K. Halbach**
**Chief Hearing Officer**
**North Dakota Department of Transportation**
**Vice President, National Association of Hearing Officials**

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## What will we discuss?

- What is HEARSAY?
- What is not HEARSAY?
- Why is there a rule against HEARSAY?
- Should the rule be applied?

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## How Is Hearsay Viewed?

Gossip or Evidence

- Not reliable
- Reliable

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## Three Conditions Evolved for Witness Testimony

1. Oath
2. Personal Presence at Trial
3. Cross-Examination

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# Cross-Examination

"The greatest legal engine ever invented for the discovery of truth."

John Henry Wigmore

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# Right of Confrontation

- 6th Amendment to the U.S. Constitution, applicable in "criminal proceedings"
- Administrative hearings are civil proceedings
- Confrontation in an administrative hearing

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## Common Law Approach

- General rule: Exclude Hearsay
- Numerous exceptions

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## The Paradox

- One-Third of the Law of Evidence is Concerned with HEARSAY
- Greatest part of which is focused on the EXCEPTIONS, rather than the RULE.

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"The hearsay rule is more famous for what it permits than for what it forbids."

John S. Strahorn, Jr.,

A Reconsideration of the Hearsay Rule and Admissions,

85 U.Pa.L.Rev. 484, 487 (1937).

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## What to do?

(1) Abolish the rule against HEARSAY

(2) Admit HEARSAY if sufficiently probative

(3) Revise the **system** of exceptions

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# Hearsay Article in Federal Rules

- Addresses the definition of HEARSAY
- Exclusions from of the definition
- Exclusions from the RULE against hearsay
- Classifying the exceptions
- Open-ended exceptions

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# What is your rule?

- Are the "Rules of Evidence" applicable to your hearings?

  considered more formal

- Is the admissibility of evidence at your hearings governed by an Administrative Procedure Act?

  considered more liberal

- Combination or hybrid?

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# Where?

- Administrative Procedure Act
  - Does it require use of rules of evidence or another standard for admitting evidence?
  - Examples:
  - Oregon APA: 2015 ORS §183.450
  - Arizona APA: "without adherence to the rules of evidence"
  - North Dakota APA: determined by

"Rules of Evidence"

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# Revised Model State Administrative Procedure Act

- All relevant evidence is admissible,

<u>including hearsay</u>, if of the type

"commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual"

- Rules of evidence exclude hearsay, unless an exception applies

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# Oregon APA

- 2015 O.R.S. § 183.450(1)

➢ Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party.

➢ All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.

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# Hearsay

- Is it hearsay?
- Does the hearsay rule apply?
- Does an exception apply?

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# What is HEARSAY?

An out of court statement offered for the truth of the matter asserted.

N.D.R.Ev., Rule 801(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

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# Is this HEARSAY?

- The arresting officer, Deputy Janisch, testifies that Deputy Meadows contacted him for assistance with a traffic stop and Meadows said he stopped Mr. Ell for speeding.
- Ell objects, arguing the testimony is hearsay and should be excluded.
- Does Ell's argument hold water?

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# IT DEPENDS

- Why is it being offered?
- To prove the truth of the matter asserted?
- OR
- To show probable cause or reasonable suspicion to stop?
- CRIMINAL or ADMINISTRATIVE case

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# Admission Upheld

- Officer's knowledge imputed to another officer
- Including statements to establish probable cause or reasonable suspicion, because the statements are offered to establish the officer's knowledge and observations at the time of the stop or arrest
- "OFFICER TO OFFICER COMMUNICATIONS ARE PRESUMPTIVELY RELIABLE."
- Ell v. Director, Dep't of Transportation, 2016 ND 164, *citing* Osaba v. N.D. Dep't of Transp., 2012 ND 36, ¶ 11-12, 812 N.W.2d 440 and *quoting* City of Minot v. Keller, 2008 ND 38, ¶ 13, 745 N.W.2d 638.

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# Imputed if Communicated

## Osaba statements

- "Officers Brocker and Heinert then arrived at the hospital. While Sass remained with Osaba, Brocker reviewed security video from hospital cameras and reported to Sass that a video showed Osaba driving to the hospital in the truck that was parked in the hospital entranceway."

## Keller statements

- Officer Halseth had contact with Keller upon a call from a fast food restaurant. He observed Keller was drunk and told him not to drive.
- "Halseth told fellow officer Larry Haug that Keller was intoxicated, and he showed Haug where Keller's pick-up truck was parked." Haug later saw the vehicle being driven and made a stop.

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# How about this case?

- Officer was dispatched on a report of a boat falling off a trailer being pulled by a vehicle and the driver did not stop. When the officer arrived, the driver was not there and he did not locate him. Another call, the driver had returned.
- The officer interviewed several witnesses at 4:00 p.m. who said the accident occurred within a 15 minute window prior to the dispatch call at 3:10 p.m.

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# INADMISSIBLE HEARSAY

- Offered to establish the driving was within 2 hours of the test
- Hearing Officer erroneously concluded the "present sense impression" and "excited utterance" exceptions applied
- The record was insufficient to show the test was within 2 hours of driving or actual physical control
- Dawson v. N.D. Dep't of Transp., 2013 ND 62, 830 N.W.2d 221

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# HEARSAY RULE

- Hearsay is excluded
- UNLESS IT'S NOT EXCLUDED
- RULE 802. THE RULE AGAINST HEARSAY
- Hearsay is not admissible unless any of the following provides otherwise:
- (a) a statute;
- (b) these rules; or
- (c) other rules prescribed by the North Dakota Supreme Court.

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## Does a statute or rule admit the hearsay?

- Does a statute, i.e. APA, or a specific statute applicable to your administrative hearing allow admission?
- Examples: regularly kept records of the department
- Is there a hearsay exception to the hearsay rule or another rule allowing admission found in the Rules of Evidence?
- Some other court rule?

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## Rules other than Exceptions?

- Landowner claims the ALJ abused its discretion in admitting into evidence a letter from the Natural Resources Conservation Service to the Walsh County Water Resource District to establish that the natural elevation of his land near the slough was 1543.0 feet mean sea level for purposes of calculating whether he constructed or maintained a dam that impounded more water than authorized by law.
- Landowner claimed the letter constitutes "double hearsay" because it contains facts from a NRCS "trip report" to his land.
- Landowner argued the statements in the letter were "classic" hearsay and was improperly admitted into evidence.

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## RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY

- An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. ***
- (Previously: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.)

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## ALLOWED TESTIMONY DESCRIBING INADMISSIBLE HEARSAY

- Letter was of the type the engineer expert could rely on in forming her opinion
- An expert witness should be permitted to describe otherwise inadmissible hearsay relied upon in order to give the basis for an opinion
- Peterson v. Sando, 2011 ND 206, 806 N.W.2d 172

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## Opinion of an Expert

- Qualified by knowledge, skill, experience, or education
- Will assist the trier-of-fact
- Facts or data reasonably relied upon
- Facts or data need not be admissible

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Thank you

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