Title IX:
The Hearing

We're going to learn about these legal-sounding things today:

- Evidence:
  - Relevance
  - Admissibility
- Witnesses:
  - Credibility
  - Testimony
- Hearing Process:
  - Maintaining Order
  - Due Process

Why do we have hearings?

The purpose of the hearing is to ascertain truth through evidence and vet action through argument.

Evidence

- Witnesses
- Documents
- Audio/Visual Materials

Excluding Evidence

- Not Evidence
- Irrelevant
- Inadmissible

Relevance

What is relevant?

- Utah Rule of Evidence 401 states:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Hearing Officers are required to rule on the relevance of evidence in real time.

- Follow the rules set out by your institution in policy.
- Listen to the question asked or the description of the evidence being introduced.
- Ask yourself, does this evidence make a fact more or less probable?

An Example

- No, I am your father.
- I built C-3PO.
- You know that lightsaber that was in your hand when I cut it off? Somehow, 30 years in the future, it will magically reappear in an unguarded chest in the downstairs of a bar that Han Solo apparently loves, but never visited once during any of the other movies.

Another Example

- I threatened to kill Carol Baskin on my show like 30 times.
- I think Carol Baskin killed her husband.

An example from a hearing:

Issues:

- Engineer was brutally mean to his coworkers, calling them incompetent or corrupt. He scrutinized all of their work, even if it wasn't his job. When dealing with his own clients, he was overly critical, obstructionist, and antagonistic. The agency has a policy of cooperation and teaching with its clients.
- Did he engage in the conduct alleged?

Question:

- Am I a competent engineer?
- Was I ever wrong?
- Daniel is a liar and is known to be "untethered from the truth".
- Just because I'm pompous, here's what the hearing officer said, and the Court of Appeals repeated:

  The CSRO Decision noted that [employee] "did not provide, and has not yet provided, any evidence whatsoever in support of this remarkable accusation" but commented "that throughout th[e] proceeding, [Daniel] has acted as an honest, ethical, and capable member of the bar."

An Example You Might Face

Facts:

- Sports Team Star is accused of assaulting Athletic Trainer after practice. The Athletic Trainer asks him if he knows what consent is. He says he's never had a woman tell him "no".
- His representative objects that his knowledge of consent is irrelevant.

What do you do?

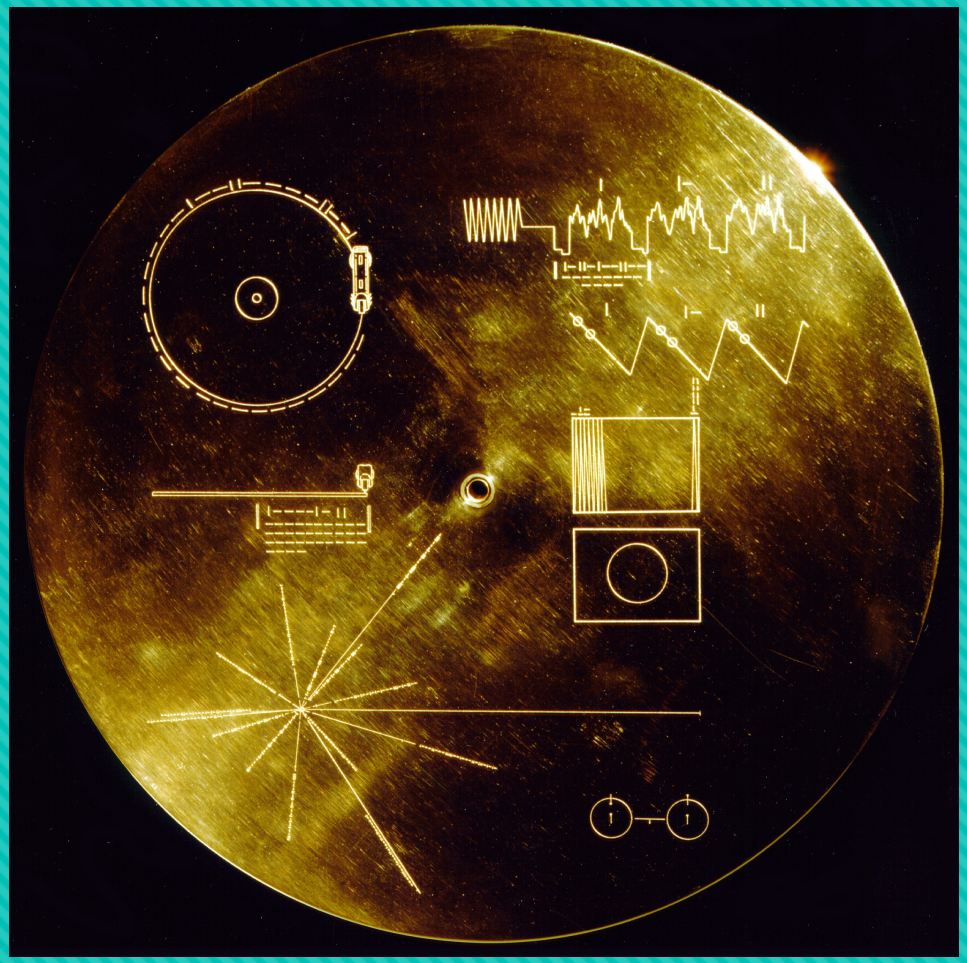
- Ask his representative to explain the argument.
- Ask the Athletic Trainer why the information is relevant.
- If you feel like you need information, ask his representative to respond to the argument presented by the Athletic Trainer
- You can reserve ruling on the issue, but do not forget to address it if you do.

How do you announce your decision?

When you rule on relevance, you need to state your ruling on the record, especially if there is an objection.

- Make sure the parties have been heard. Sometimes, parties object to the same evidence or category of evidence multiple times. If the reason for the objection is already clear, you do not need to let the parties restate their positions. If you don't know, invite them to clarify.
- Announce your decision vocally, on the record, so it can be heard. "I rule that the evidence is relevant because…"

Make a Record



Remember, you're being recorded.

A Clear Record

- Ask the participants not to talk over each other
- Speak loudly, clearly, and slowly
- If you didn't hear something, do not be afraid of asking the person to repeat it
- Do not be afraid to exercise your authority; you are the grownup in the room

Rape Shield

Federal Rule of Evidence 412:

- **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

  (1) evidence offered to prove that a victim engaged in other sexual behavior; or

  (2) evidence offered to prove a victim's sexual predisposition.

  (b) Exceptions.

  (1) Omitted.

  (2) *Civil Cases*. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

  (c) Procedure to Determine Admissibility.

  (1) *Motion*. If a party intends to offer evidence under Rule 412(b), the party must:

  (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

  (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

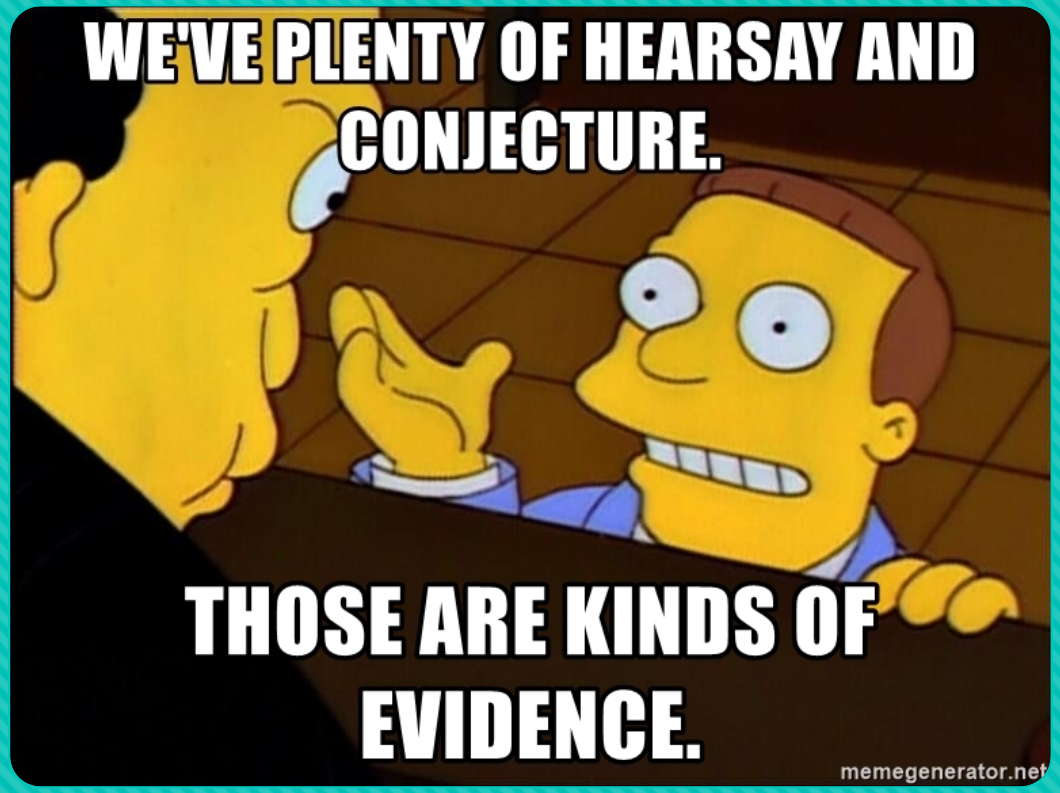
  (C) serve the motion on all parties; and

  (D) notify the victim or, when appropriate, the victim's guardian or representative.

  (2) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

  (d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Hearsay



I heard her say…

What is hearsay?

An out of court statement offered to prove the truth of the matter asserted.

Example of Hearsay

What is the statement?

"On the night of the incident, I heard the accused tell his friend he was going to hook up with a freshman no matter what."

Is it hearsay?

- Is it an out of court statement?

  Yes. It was heard somewhere else.

- Is it offered to prove the truth of the matter asserted?

  Yes. It is being offered to show the accuser had an intent to "hook up" with a freshman "no matter what" which sounds like it could include non-consensual conduct

But, is it admissible?

Hearsay is almost always admissible in administrative hearings like this.

But…

- It cannot be the ***only*** basis for your decision, but it can be used to reinforce your decision.
- If a person is unwilling to testify in person, any evidence they offer cannot be considered.
- Hearsay is generally inadmissible in court because it is not reliable but is very persuasive.
- This means that when you admit or are presented with hearsay evidence, you can assign it evidentiary value based on its credibility.

Some things are not hearsay

- A party's own statement:

  I heard the accused say, "No one can say 'no' to me!"

  I heard the victim say, "Oh, I totally hooked up with him last night and it was amazing!"

- A statement being offered to show the effect on the listener:

  "I heard the victim say that he was worried the accuser would hurt him."

  "What did you do next?"

  "I reported it to campus security and they opened an investigation."

Remember:

- A statement by a person who has refused to testify cannot be admitted into evidence
- Do not base your decision on hearsay alone
- Not all statements are hearsay

Prejudicial v. Probative Value

All evidence is subject to this rule.

Rule Against Prejudicial Evidence

If evidence is more prejudicial than probative, then it may be excluded.

This is a subset of relevance, if you're into nerdy law stuff.

Probative Value

- Evidence is probative if it tends to prove a fact.
- The more reliable the evidence, the more it tends to prove a fact.
- Unreliable evidence does not tend to prove a fact.
- Example:

  I saw the victim right after the incident and he was acting strange, worried, upset, and out of it.

Prejudicial Effect

Evidence that is compelling, but not reliable or of only limited relevance can cause prejudice, such as:

- Past behavior
- Scandalous allegations
- Rumors
- A person's history

Other Evidence Stuff

There are like…100 rules. Even a whole class on it in law school.

Other Categories of Basic Evidentiary Rules

- Personal Knowledge
- Foundation
- Expert Opinion
- Lay Opinion
- Exceptions to the Hearsay Rule
- Authentication

More Kinds of Objections:

- Argumentative
  - Isn't it true that you have always been a jerk?
- Duplicative
  - Did you know the victim?
  - But you knew the victim?
  - You knew the victim, right?
- Compound
  - You saw the victim at the party and at the dorm?
- Badgering the Witness
  - Did you order the Code Red?!
- Narrative
  - You want me on that wall, you need me on that wall.

Demeanor and Control

You are judging people; you need to act like it.

Controlling the Hearing

- Announce your expectations at the start of the hearing.
- Have a pretrial order (if the policy allows it).
- Try to resolve as many issues as you can before the first witness or presentation.
- Do not be afraid to assert your authority.
- Take a recess if you need to.
- If you need to chastise the representatives/attorneys, but don't want to do it in front of their clients, you can do it by having them approach the bench. It will still be recorded, but that's okay.

“Control, control, you must learn control!”

- The parties are there to present their cases to you, not each other. Don’t let them argue with each other.
- Remind the parties to direct their questions, objections, and argument to you, not the other party, their representative, the witness, or others.
- Demand that the parties treat each other, witnesses, and you with respect.
- Basic due process allows the hearing officer to control the hearing so it does not devolve into a shouting match. Ask the party/representative what they are doing.
  - “Your honor, Daniel is lying.” “Are you making an objection?”
- Counsel the parties against personal attacks.

Let's Practice!

Accused: Did you know that you are under oath and subject to losing your professional qualifications if you are dishonest or misleading in these proceedings?

Victim: Objection.

Victim: But isn't it true that you have had numerous other victims come forward and complain to the school about you?

Accused: Objection.

Representative during the other side's argument: Objection, that's false!

Horror Stories

- Ham Sandwich
- Preserving issues for appeal
- Harassing the witness
- Extreme Facts

The End…

Or is it?

Daniel Widdison
Utah Attorney General's Office
Litigation Division
Employment Section
dwiddison@agutah.gov
(801)366-0571