



## Three Reasons Why Investigators Should Not Discount Hearsay Evidence

By Allison West

You are investigating a complaint of harassment. You meet with witness Wally and he tells you the following:

“Karen told me her boss Bill gave her a neck-rub and gives her daily compliments about her clothing while giving her ‘elevator eyes.’ I think Susan may know more about what happened.”

Many investigators would dutifully write down what Wally said and then likely disregard or discount his statement, labeling it “hearsay.” Is this the right approach? The answer is found in understanding the role of a workplace investigator.

Hearsay can be a verbal or written statement, or something nonverbal such as gestures or pictures. Legally, hearsay is an out of court statement offered to prove the truth of the matter asserted.<sup>1</sup> The premise behind the hearsay exclusion is that evidence presented in court must be reliable and subject to cross-examination. Hearsay evidence cannot be used in court unless it falls under one of the many exceptions (there are over 20 exceptions in the Federal Rules of Evidence.<sup>2</sup>) Trial attorneys spend a good deal of time arguing about the hearsay nature of evidence in advocating for and defending their clients.

How does hearsay impact workplace investigators? Should they discount hearsay evidence when deciding whether misconduct occurred? The prevailing myth is that any hearsay evidence is inherently unreliable because someone did not learn the information firsthand. However, each day we are firsthand witnesses to a variety of actions or words, and yet, our memories consistently fail us when we are asked to recount a situation, conversation, etc. Think of when you walked into your office this morning, acknowledged the receptionist, and then headed to the kitchen for your morning coffee. What color was the receptionist’s shirt? Eyes? Pants? You were certainly a firsthand witness. However, you may not remember those details because you were not focused on the receptionist or, even more significantly, those details were not important at the time. Firsthand witnesses are simply witnesses who were present at a particular place and time. There are no guarantees the information they provide is necessarily more reliable than someone who heard something secondhand.

Here are three reasons why workplace investigators should not rule out hearsay statements or evidence.

### First, hearsay evidence is not always unreliable.

Our job as investigators is to ask questions, probe, then probe some more. We are charged with putting the pieces of a puzzle together so we can, hopefully, see the picture of what happened regarding the complainant’s allegations and his or her version of the facts. Or, if no complaint was made, to figure out each witness’s version of the facts and reach a conclusion as to whether misconduct occurred, a policy was violated, or whatever the scope of the investigation directed the investigator to investigate.

In the example above, if the investigator determines Wally is a credible witness, he or she can surmise something may have happened to Karen by her boss Bill despite the fact that Wally did not witness anything firsthand. For example, even if someone was in the room when Karen’s boss Bill gave her the neck rub, this does not mean he or she saw Karen’s reaction or heard any comments made by Bill. On the other hand, if Wally is a good friend of Karen, he might notice the cadence of her speech when she relayed her story and might have picked up on more details and nuances because of their friendship. He could also provide insights into her credibility and relay his concern and possibly anger at what his friend had experienced. Of course, the investigator would also need to assess Wally’s credibility and determine whether his version of the facts is inherently plausible or if he had a motive to lie about or exaggerate the incident. For example, is there any “history” or grudge between Wally and Bill that would affect Wally’s credibility? Does Bill supervise Wally? Does Bill make decisions regarding Wally’s job performance evaluations or possible promotions? Has Wally been turned down for a promotion based on Bill’s recommendation?

Whether Wally is correct or accurate regarding the facts elicited during the interview is immaterial (during this investigation phase); he has provided information for the investigator to continue on the investigation journey to learn what happened. At this point in the investigation, excluding Wally’s testimony because of hearsay would be premature.

### Second, hearsay statements or evidence can lead investigators to relevant evidence.

Investigators must be open and accepting of information in whatever form and from whomever is willing to share. Whether information is hearsay is irrelevant when it comes to *gathering* the information. Too often, investigators (and management) make decisions based on whether the information obtained was accurate or witnessed firsthand. Simply because Wally did not witness what happened does not mean nothing happened to Karen. Wally mentioned someone named Susan who might have additional information, and he might also provide a timeline of Karen’s activities after the incident and other facts. His information is probative and could lead to additional facts that might substantiate Karen’s harassment allegations or provide clar-

<sup>1</sup> See, e.g., *Fed. R. Evid.* 801.

<sup>2</sup> *Fed. R. Evid.* 803.

ity in other areas. Remember, the investigator is not the “judge” or ultimate decision maker. The task of the investigator is to fact-find, reach conclusions, and report his or her findings.

The key determination is whether the information is *relevant*. Relevant evidence is what we are searching for in our quest to figure out what happened. Hearsay evidence may lead us to other relevant evidence or help the investigator determine whether something is in fact, irrelevant. Whether the information is accurate is determined during the course of the investigation and significantly, when making findings and determinations about the veracity and credibility of the witness and his or her testimony.

Additionally, hearsay evidence can also be corroborative. If several witnesses recount the same story it can mean each witness heard a similar account, which can assist in determining relevancy, accuracy, and credibility. Conversely, the possibility exists the witnesses may be fabricating the facts or may have their own agendas regarding the facts and outcome of the investigation. Again, probing into motive will assist the investigator to determine if these similar recollections are tainted.

**Third, ignoring hearsay evidence puts the investigator’s credibility at risk.**

At the end of the investigation, an investigator must be able to justify decisions made along the way regarding investigation strategy, witnesses interviewed, evidence gathered, and

ultimately the investigation findings. Ignoring evidence simply because it is hearsay before determining its accuracy and relevance, or the credibility of the witness, might show bias of the investigator or show the investigation was not thorough. Once bias is detected, the entire investigation may become suspect. If the investigator in our example discounted Wally’s testimony before making further inquiries (i.e., following up with an interview of Susan) because the testimony was hearsay, critical facts may not have been obtained. Moreover, corroborating evidence might have been overlooked and other evidence might have been missed.

Failure to conduct a thorough investigation—which includes evaluating hearsay evidence—puts an investigator at risk of having the investigation challenged by a third party. Investigators are cautioned to keep an open mind, follow relevant leads, make credibility determinations, and, most importantly, know that hearsay might well provide or lead to relevant information.



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