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Making your Industrial Hygiene Evidence Count

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Making your Industrial Hygiene Evidence Count

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All credibility, all good conscience, all evidence of truth come only from the senses.

[Friedrich Nietzsche](#), German philosopher, poet, and cultural critic

It is wrong always, everywhere, and for everyone, to believe anything upon insufficient evidence.

[William James](#), American philosopher, psychologist, and physician

Industrial Hygiene Evidence

Evidence is the link between what we sense and the truth. More precisely, it is the legal link between what we sense and what we, or perhaps a jury, believe is the truth. Evidence can be just about anything you can think of that logically makes this link. A picture, a recording, a physical object (e.g., the murder weapon), or a person's utterance is evidence of the existence (or non-existence) of some fact.

Industrial Hygienists (IHs) are factories of evidence. Employers or clients ask us to determine whether workers are exposed to certain substances, at what levels, and whether the levels are dangerous. In responding to requests we use instruments with read-outs, take air samples and submit them to a laboratory, or simply write down the things we see, smell or hear. Valuable information is produced, usually recorded, and ultimately communicated to the client along with an interpretation of what the information means. It is not likely any client or employer would rely solely on oral communications of important IH results, so IHs frequently write about and record the data they generate. The facts IH's write down are evidence and quite possibly the evidence that determines the outcome of a dispute.

Admissibility

IHs work hard to get to the truth about workplace hazards and how they might impact worker health. However, if the jury never gets to see the evidence, it cannot factor into the outcome of a dispute. Thus, whether your IH evidence is admissible is very important and IHs should make sure the evidence they generate is managed in a way that makes it likely admissible.

Hearsay – An Issue of Reliability

A significant stumbling block for evidence admissibility is hearsay. Did you know courts are far more interested in whether a dog barked than whether even the most prominent person said something outside the court room? A dog has no motivation (or reasoning capability) to lie. Human beings on the other hand have a long history of lying (or at least embellishing the facts)

to put themselves in a more favorable light. Tribunal systems have recognized this for thousands of years and have created and continually refined the complex rules of hearsay to counteract this human tendency.

Hearsay is an *out of court statement offered to prove the truth of the matter asserted*. In all jurisdictions hearsay is generally banned from the courtroom, unless an exception applies. Hearsay rules only concern statements, which are things said or intentionally asserted by human beings. Hearsay also only applies if the statement is made “out of court,” meaning a time or place other than giving direct testimony. The third element of hearsay is the trickiest to understand -- *the statement must be offered to prove the truth of the matter it asserts*.

To see how the elements of hearsay might come into play, suppose an IH takes a noise level reading of defendant’s machine using a sound level meter. He then emails the readings (75 dBA) to defendant’s supervisor, indicating the noise levels are safe. Now suppose a plaintiff regularly exposed to the machine claims it damaged his hearing and files a lawsuit.¹ A key issue of the case is whether plaintiff was actually exposed to noise above acceptable levels. How might defendant prove plaintiff was not over-exposed? The email of course! Plaintiff’s counsel objects, “Hearsay your honor!”

Having made an objection over admitting the email into evidence the judge must now consider an evidentiary issue -- *is the email hearsay?* The elements of hearsay provide the answer.

Statement?

The email is a statement because the IH, a human being made it. Statements do not have to be declarations; they can be grunts, a cough, a picture of the machine drawn on a post it note, etc.

Out of court?

The IH wrote the email in his office, and the opposing party had no opportunity (obviously) to cross examine the IH when it was made.

Offered to Prove Its Truth?

This depends on what defendant wants to prove. The email asserts noise levels are 75 dBA not a health hazard. If defendant offers it to prove sound levels were lower than plaintiff contends then it is hearsay because the court has no way to tell whether or not the IH just made it up.² But suppose defendant offers the email to show it knew about machine and had notice the levels were safe. This evidence is useful as a defense because it tends to show that defendant had no reason to suspect there was a noise problem and acted prudently under the circumstances. Introducing

¹ Ignore workers’ compensation remedies; plaintiff could be an independent contractor or even a member of the public.

² The IH could give testimony at trial about the noise levels because he has personal knowledge, avoiding the hearsay issue altogether. But trial testimony is costly, subject to impeachment, etc., and we want our IH data to stand on its own.

the email for this purpose might have a different outcome. The email is not relied on to prove the machine's actual sound level but rather to show defendant believed it to be safe when the email was received.³

Business Records Exception

IH data is usually introduced to prove a worker was not exposed, or was over-exposed, to a hazard (i.e., for the truth of the matter asserted).⁴ In the example above, the noise level transmitted by email is hearsay when offered to prove that the sound level was not hazardous. This is a problem for defendant because the email is critical to its defense, but as hearsay it's banned from the court room. *Or is it?*

The Federal Rules of Evidence have over 30 exceptions to the hearsay rule. California has more. In fact, there are so many exceptions to the hearsay ban that some scholars have pondered whether the exceptions to hearsay “swallow the rule.”⁵ Thus, in many instances, a statement that is truly hearsay can still be admissible because it meets the elements of one or more of the many exceptions.

Hearsay exceptions include what a person says during his last dying breath, or while under the stress of witnessing a startling event, but the most relevant hearsay exception for IH practice is the business records exception. Jurisdictions have long recognized that information in business records is particularly reliable and does not require the safe guards of the hearsay rule.

The elements of the business records exception vary by jurisdiction, but typically include a record of a business transaction:

- 1) made in the **regular course** of business;
- 2) by a person who has a **duty** of making the record;
- 3) **personal knowledge** of the matters recorded;
- 4) recorded **at or near** the time of the transaction.

These elements make it clear what an IH needs to do to make his data admissible. The first element suggests that the procedures, policies, best management practices, etc. that comprises the “IH program” should be formalized. The written IH program should include forms for collecting data, used by all IH's in the firm. Formalizing IH procedures and practices, particularly around data collection, helps meet the “regular course of business” element because it shows the judge that taking samples and recording the results *is* the regular business of the IH.

³ In Federal Rules of Evidence parlance, this is termed “offered to show its effect on the listener;” in other words, the email is offered to show defendant had notice that the machine was safe as a result of having read the email.

⁴ Remember also that either party may want to introduce the evidence depending on its value to proving or defending the claim.

⁵ Beaver, James E., *The Residual Hearsay Exception Reconsidered*, 20 Fla. St. U. L. Rev. 787 (1993).

The duty element is easily met by including clear-cut roles and responsibilities in the written IH program. Clearly differentiate the roles of discipline versus technician level tasks. In the hypothetical case above, a likely scenario is a technician took the sound level readings and then reported them to the IH who prepared the email. This is fine so long as the technician uses the established forms for recording the measurements, follows all the steps outlined in a written procedure (i.e., perhaps initials are required), and stays within the boundaries of his written duties. In our hypothetical, the bare-naked email may be inadmissible hearsay, but if a formal “Noise Sampling Record” is attached and properly filled out in accordance with procedure, the judge is likely to conclude that taken together the email and the noise sampling record comprise regularly recorded business information prepared by a person with a duty for doing so.

All evidence other than expert witness testimony requires *personal knowledge* about the facts purported, so it is not surprising to find this requirement embedded in the business records exception. This means the person taking the readings, or handling the sampling cassettes, should be the same person filling out the record. Again, insert a rule of this sort into the written program so that it is clear that only those with personal knowledge of the events are under a duty to prepare the record.

As an aside, it is important to clearly define the differences between records and documents. How many times have we said, “Make sure you *document* the sample results?” Get in the habit of using the word “record” rather than “document” when it comes to IH data. If you wonder why this is important, think back to the issue of hearsay – *how do we know the statement or information is reliable?* A record is a picture of what actually happened in the past. A document on the other hand is a collection of information that describes the way we want things done. Policies, procedures, written guidance are all “documents” because they describe the organization’s expectations about IH practice (or any other organizational task for that matter). Documents can and should be revised from time to time to reflect lessons learned, changes in the law, etc. Records can be corrected but not revised. The foundation of the business record exception is that records, not documents, are reliable because they reflect what actually happened absent human intermeddling.

The final element of the business records exception is the fuzziest. Whenever a rule of law includes “at or near,” it is up to the courts to decide what “at or near” means and different jurisdictions may, and often do, come to different interpretations. As a practical matter, prepare your IH records as soon as the information is generated, but within reason. It’s probably okay to record the information in a lab notebook and then go back to the office to fill out the record, but strive to avoid this practice whenever possible. At the very least, make sure records are completed by the end of the work shift. Again, the timing of record preparation should be clear in the written IH program.