**The Good Judge-ment Podcast**

**Evidence Series**

**“Gentlemen (and Ladies), This is** **Hearsay”**

[Wade] Hello folks. Welcome to another episode of the Good Judge-ment Podcast.

**[Tain] If you know anything about us here on the Good Judge-ment Podcast, you know we LOVE football.**

[Wade] And we don’t do math.

**[Tain] Ok, yeah. That’s right, two universal truths about us here on the podcast are that we love football and we don’t do math. Since this episode is being recorded during football season, we thought we would start this episode off with a famous football story.**

**[Wade] And also that we would not do any math.**

**[Tain] That’s right, Wade, a good football story and no math:**

**“Gentlemen, this is a football.”**

 **-Vince Lombardi**

[Wade] Why is this relevant to our series on evidence, you ask? Because today we’re going to discuss something so fundamental that you will all undoubtedly say, “come on guys, we already know that!” And that’s just great. If you do know it, and you really, really know it, then this little refresher will be nothing for you but a refresher.

**[Tain] The problem is that sometimes something is just SO fundamental that we take for granted that we know it- and we really don’t.**

**So our episode for today is entitled,**

**“Gentlemen (and ladies), this is hearsay”**

[End of scripted portion]

**Analysis:**

O.C.G.A. §§24-8-801-826

***First Question:* “Is there an objection?”**

O.C.G.A. §24-8-802

Hearsay shall not be admissible except as provided by this article; provided, however, that *if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.*

***Second Question:* “Is it hearsay?”**

“Hearsay”:

**“A statement, other than one being made by the declarant while testifying at the trial or hearing (i.e., an out of court statement), offered in evidence to prove the truth of the matter asserted”**

Elements:

1. Statement;
2. Out of court;
3. Offered in evidence;
4. To prove the truth of the matter asserted.

O.C.G.A. §24-8-801 Definitions

 “Statement”- (1) and oral or written assertion; or (2) nonverbal conduct of a person if it is intended by the person as an assertion

Examples: Shoulder shrug, nod or shake of the head, “giving the finger”

 “Declarant”- person who makes a statement.

**IT IS NO LONGER A SUFFICIENT EXCEPTION TO THE HEARSAY RULE TO SAY**

**“BUT YOUR HONOR, THE DECLARANT IS HERE TO TESTIFY”**

If the statement was made outside of court, it is hearsay, even if the person is present in court except as outlined in O.C.G.A. §24-8-801(d)

***Third question*: “Are we sure it is hearsay?”**

Exclusions (i.e., this is STILL not hearsay) O.C.G.A. §24-8-801(d):

 **Prior Statement by a Witness**

1. *If the declarant testifies at trial*:
	1. *Admissible as a prior consistent statement OR*
	2. *Admissible as a prior inconsistent statement.*
2. *If statement is admitted and the declarant does not testify at trial:*
	1. Other out of court statements “*shall* be admissible” NOT AS SUBSTANTIVE EVIDENCE:
		1. For the limited use of:
			1. **Impeaching** the credibility of the of the declarant; or
			2. **Rehabilitating** the credibility of the of the declarant.

IF THE OTHER STATEMENTS QUALIFY AS A PRIOR CONSISTENT OR INCONSISTENT STATEMENTS.

1. If the declarant testifies at trial and is subject to cross if the statement is one of identification of a person after perceiving the person.

**Admissions by a Party-Opponent**

1. The party’s own statement; or
2. Statement where party manifests an adoption of or belief in its truth; or
3. Statement by a person authorized by a person to make the statement; or
4. Statement by and agent in the scope of the agency; or
5. A statement by a co-conspirator including during the concealment phase of the conspiracy. Need not allege conspiracy.

There must be evidence other than the statement itself of the authorization in (C), the agency in (D) or the conspiracy in (E).

IF NONE OF THESE SITUATIONS APPLY, IT’S A FOOTBALL

**- I MEAN IT’S HEARSAY**

**Let’s do a couple of examples:**

Counsel: What happened then?

 Witness: He said, “Your husband is an idiot!”

 Opp. Counsel: Objection, hearsay!

 Counsel: Your Honor, we’re not seeking to enter it for the truth of the matter asserted, i.e., that he really is an idiot, rather, we’re seeking to establish prior animosity between the parties…

 Court: Overruled. Proceed.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Counsel: What happened then?

 Witness: [The Defendant] told me that he shot [the victim].

 Opp. Counsel: Objection, hearsay!

 Counsel: Admission of a party opponent, Your Honor.

 Court: Overruled. Continue.

**SOMETIMES EVEN WHERE A STATEMENT IS HEARSAY AND THERE IS AN OBJECTION AND THERE IS NO EXCLUSION, THE STATEMENT MAY STILL COME IN.**

***Fourth question*: “Is it there an exception?”**

*We won’t address all of them*

O.C.G.A. §§24-8-803-826

 Counsel: Objection, hearsay!

 Court: Counsel, is there an exception?

 Opp. Counsel: Um, er, I mean, um… withdrawn…?

WHY ARE THESE EXCEPTIONS?

GENERAL “INDICIA OF RELIABILITY”

***Fifth question:* “Is the declarant available?”**

O.C.G.A. §24-8-803 (*Availability of the declarant is immaterial*)

 **(1) Present sense impression.**

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

**(2) Excited utterance.**

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

**(3) Then existing mental, emotional, or physical condition.**

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant’s will and not including a statement of belief as to the intent of another person;

**(4) Statements for purposes of medical diagnosis or treatment.**

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

**(5) Recorded recollection.**

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

**(6) Records of regularly conducted activity.**

Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of [Code Section 24-9-902](https://plus.lexis.com/document/?pdmfid=1530671&crid=36c5d412-1afc-424a-8220-1339e32459d5&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A6348-FWK1-DYB7-W3MB-00000-00&pdtocnodeidentifier=AAYAAJAACAAE&ecomp=y4qkk&prid=96c2d534-83d4-44e5-9ddb-72dab34de936) or by any other statute permitting certification. The term “business” as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

**(7) Absence of entry in records kept in accordance with paragraph (6) of this Code section.**

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

**(8) Public records and reports.**

Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

1. The activities of the public office;

**(B)** Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

**(C)** In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

**(9) Records of vital statistics.**

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

**(10) Absence of public record or entry.**

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with [Code Section 24-9-902](https://plus.lexis.com/document/?pdmfid=1530671&crid=36c5d412-1afc-424a-8220-1339e32459d5&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A6348-FWK1-DYB7-W3MB-00000-00&pdtocnodeidentifier=AAYAAJAACAAE&ecomp=y4qkk&prid=96c2d534-83d4-44e5-9ddb-72dab34de936), or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

**(11) Records of religious organizations.**

Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

**(12) Marriage, baptismal, and similar certificates.**

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

**(13) Family records.**

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

**(14) Records of documents affecting an interest in property.**

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable law authorizes the recording of documents of that kind in such office;

**(15) Statements in documents affecting an interest in property.**

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

**(16) Statements in ancient documents.**

Statements in a document in existence 20 years or more the authenticity of which is established;

**(17) Market reports and commercial publications.**

Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness’s particular occupation;

**(18) Learned treatises.**

To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

**(19) Reputation concerning personal or family history.**

Reputation among members of a person’s family by blood, adoption, or marriage or among a person’s associates or in the community concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person’s personal or family history;

**(20) Reputation concerning boundaries or general history.**

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

**(21) Reputation as to character.**

Reputation of a person’s character among associates or in the community;

**(22) Judgment of previous conviction.**

Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

**(23) Judgment as to personal, family, or general history or boundaries.**

Judgments as proof of matters of personal, family, or general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

Other Exceptions:

***Sixth question:* “Is the declarant *really* unavailable?”**

O.C.G.A. §24-8-804 (*Declarant MUST be unavailable*)

**(a)** As used in this Code section, the term “unavailable as a witness” includes situations in which the declarant:

**(1)** Is exempted by ruling of the court on the ground of **privilege** from testifying concerning the subject matter of the declarant’s statement;

**(2)** Persists in **refusing to testify** concerning the subject matter of the declarant’s statement **despite an order of the court** to do so;

**(3)** Testifies to a **lack of memory** of the subject matter of the declarant’s statement;

**(4)** Is unable to be present or to testify at the hearing because of **death or then existing physical or mental illness or infirmity**; or

**(5)** Is absent from the hearing and the **proponent of the statement has been unable to procure the declarant’s attendance** or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant’s attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant’s exemption, refusal, claim of lack of memory, inability, or absence is due to the **procurement or wrongdoing of the proponent** of a statement for the purpose of preventing the witness from attending or testifying.

**(b)** The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

**(1)** **Testimony given as a witness at another hearing** of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, **if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination**. If deposition testimony is admissible under either the rules stated in [Code Section 9-11-32](https://plus.lexis.com/document/?pdmfid=1530671&crid=1a276091-0450-4046-92ba-27666ab828c8&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A6348-FWK1-DYB7-W3MC-00000-00&pdtocnodeidentifier=AAYAAJAACAAF&ecomp=y4qkk&prid=96c2d534-83d4-44e5-9ddb-72dab34de936) or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

**(2)** In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while **believing** that his or her **death was imminent**, concerning the cause or circumstances of what the declarant believed to be impending death;

**(3)** A **statement against interest**. A statement against interest is a statement:

**(A)** Which a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

**(B)** **Supported by corroborating circumstances** that clearly **indicate the trustworthiness** of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

**(4)** A statement concerning the **declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history**, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared; or

**(5)** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, **procure the unavailability of the declarant** as a witness.

**O.C.G.A. §24-8-805**

**Hearsay within hearsay** is not excluded if each part of the combined statement is a valid exception.

**O.C.G.A. §24-8-806**

When a hearsay statement is admitted, the declarant may be attacked (and if attacked, supported) by evidence admissible if declarant had testified.

***Seventh question:* “Are the best interests of justice served by its admission?”**

**O.C.G.A. §24-8-807**

A statement not specifically covered by any law but having equivalent **circumstantial guarantees of trustworthiness** shall not be excluded by the hearsay rule, if the court determines that:

**(1)** The statement is offered as evidence of a material fact;

**(2)** The statement is **more probative on the point for which it is offered than any other evidence** which the proponent can procure through reasonable efforts; and

**(3)** The general purposes of the rules of evidence and the **interests of justice will best be served** by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it **makes known to the adverse party**, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

***Eighth question:* “Is it a statement by a child regarding sexual contact, an admission in a pleading, a confession or a medical narrative?”**

**O.C.G.A. §24-8-820**

Statements by a child under age 16 describing acts of sexual contact

There’s a whole podcast on this one…

**O.C.G.A. §24-8-821**

Allegations or admissions made in pleadings

**O.C.G.A. §24-8-822**

When an admission is allowed to be used, a party has a right have the whole admission and related conversations admitted

**Confessions:**

**O.C.G.A. §24-8-823**

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction.

**O.C.G.A. §24-8-824**

To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.

**O.C.G.A. §24-8-825**

The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it.

**O.C.G.A. §24-8-825** Medical Narratives- civil cases

**(a)** Upon the trial of any

1) civil proceeding

2) involving injury or disease,

3) any medical report in narrative form which has been

4) signed and

5) dated

6) by an **examining or treating licensed physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist**

(OR ANYONE ELSE WHO HATES TO COME TO COURT [MY ADDITION])

 **shall be admissible and received in evidence**

7) insofar as it purports to represent the **history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor**, by the person signing the report,

the same as if that person were present at trial and testifying as a witness;

8) provided, however, that such report and notice of intention to introduce such report shall first be provided to the adverse party at least 60 days prior to trial.

9) A statement of the qualifications of the person signing such report may be included as part of the basis for providing the information contained therein, and

10) the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis.

Any adverse party may object to the admissibility of any portion of the report, **other than on the ground that it is hearsay**, within 15 days of being provided with the report.

Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony.

The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

**(b)** The medical narrative shall be presented to the jury as depositions are presented to the jury and **shall not go out with the jury** as documentary evidence.

**Continuing witness rule issue!**

**Authentication, juvenile statements and privileges will be covered in later episodes!**

**[Wade] Thanks folks for tuning in…**

**[Tain] Two bits, four bits, six bits a dollar, all for the Good Judge-ment Podcast, stand up and holler!**

**[cue the cheering crowd]**