



NOTICE OF CLE PROGRAM

The NDNY-FCBA's CLE Committee

Presents

“Trial Preparation and Relevance and Hearsay Refresher”

- 1. Trial Preparation:** This session will cover the steps that should be taken to prepare a case for trial in federal court. Topics will include assessment of the evidence necessary to prove your case; selection of a “theory of the case”; identifying potential witnesses and exhibits; determining how to “lay the foundation” for the admission of exhibits; identification of “problem” witnesses and developing strategies to deal with them; organizing documentary evidence and witness statements; familiarizing yourself with the courtroom and the judge; and preparing visual aids. This session will include discussion of Federal Rules of Evidence governing authentication [Rules 104(b), 901, and 902] and use of summary charts [Rule 1006].
- 2. Relevance and Hearsay Refresher:** This session is designed to highlight possible trial issues that may be the subject of motions *in limine* or trial objections, which often involve relevance and/or hearsay issues. This session will include discussion of Federal Rules of Evidence governing relevance [Rules 401, 402, 403, and 404(b)] and hearsay [Rules 801, 802, 803, 804, 805, 806, and 807].

Thursday, September 26, 2019

Presentation: 1:00 p.m. – 2:30 p.m.

Registration at: 12:30 p.m.

RSVP by Monday, September 16, 2019

**James T. Foley Courthouse
1st Floor Jury Assembly Room
445 Broadway
Albany, New York 12207**

Presenter:

Steven D. Clymer, Esq., Chief, Criminal and Appellate Divisions, United States Attorney's Office, Northern District of New York

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

“Trial Preparation and Relevance and Hearsay Refresher”

has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for 1.5 credits towards the **Skills** requirement *

This program is appropriate for newly admitted and experienced attorneys.

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

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If you have any suggestions for our CLE Programs please contact the Administrative Coordinator at the registration desk

STEVEN D. CLYMER is an Assistant United States Attorney [“AUSA”] and the Chief of the Appeals Division of the United States Attorney’s Office for the Northern District of New York. He graduated magna cum laude from Cornell University in 1980 with a Bachelor of Arts degree and magna cum laude from Cornell Law School in 1983. He began his legal career as an Assistant District Attorney in Philadelphia, where he worked from 1983 to 1986. He became a federal prosecutor in 1987 in the Central District of California (Los Angeles), where he worked until 1994. He held a number of supervisory positions there, including Chief of the Major Crimes Section. Steven returned to that Office from 2003 to 2005, serving as Chief of the Criminal Division. In addition, he was a Professor of Law at Cornell Law School from 1995 through 2010 and remains an adjunct professor there. He began working as an AUSA in the NDNY in 1998 and served as the Health Care Fraud Coordinator, Deputy Criminal Chief, and Criminal Chief before becoming Chief of the Appeals Division. His publications include *Are Police Free to Disregard Miranda?*, 112 Yale L.J. 447 (2002); *Compelled Statements From Police Officers and Garrity Immunity*, 76 N.Y.U. L.Rev. 1309 (2001); and *Unequal Justice: The Federalization of Criminal Law*, 70 So. Cal. L. Rev. 643 (1997).

**Northern District of New York
Federal Court Bar Association
Continuing Legal Education**

Relevance and Hearsay Refresher

Course Materials

FEDERAL RULES OF EVIDENCE 401-415 AND 801- 807

Rule 401. Test for Relevant Evidence

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.
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Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) **Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) **Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) **Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) **Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 405. Methods of Proving Character

(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

- (1) a guilty plea that was later withdrawn;
- (2) a nolo contendere plea;
- (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
- (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

- (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
 - (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.
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Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Rule 412. Sex-Offense Cases: The Victim

(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) Criminal Cases. The court may admit the following evidence in a criminal case:

- (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C) evidence whose exclusion would violate the defendant's constitutional rights.

(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.

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Rule 414. Similar Crimes in Child Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

- (1) "child" means a person below the age of 14; and
- (2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:
 - (A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
 - (B) any conduct prohibited by 18 U.S.C. chapter 110;
 - (C) contact between any part of the defendant's body — or an object — and a child's genitals or anus;
 - (D) contact between the defendant's genitals or anus and any part of a child's body;
 - (E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
 - (F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

The following definitions apply under this article:

(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(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.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) **A Declarant-Witness’s Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant’s testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) **An Opposing Party’s Statement.** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
 - these rules; or
 - other rules prescribed by the Supreme Court.
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Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:
(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded Recollection.** A record that:
(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

- (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the opponent does not show that the source of information nor or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the opponent does not show that the possible source of the information nor or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the opponent does not show that the source of information nor or other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community

— concerning the person’s birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person’s associates or in the community concerning the person’s character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

(24) [Other Exceptions .] [Transferred to Rule 807.]

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) **Former Testimony.** Testimony that:
 - (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
 - (B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
- (2) **Statement Under the Belief of Imminent Death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- (3) **Statement Against Interest.** A statement that:
 - (A) 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 the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
 - (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) **Statement of Personal or Family History.** A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions .] [Transferred to Rule 807.]

(6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 806. Attacking and Supporting the Declarant

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

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1993

AN OVERVIEW OF RELEVANCE AND HEARSAY: A NINE STEP ANALYTICAL GUIDE

Norman M. Garland [FN1]

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This Article is an analytical guide to the study of two major aspects of evidence: relevance and hearsay. The vehicle used by this guide is a step-by-step, nine question analysis, applicable to any admissibility of evidence problem. This guide should help one determine whether any item of evidence is admissible under the rules of evidence pertaining to relevance and hearsay.

The answers to the first four questions [FN1] determine whether any item of proffered evidence is admissible under the two components of relevancy: logical and legal relevancy. If the evidence in question is a statement, then the answers to questions five through nine will determine whether the evidence is admissible under the rules of hearsay.

The nine steps (questions) are: (1) What is the evidence? (2) What is the evidence offered to prove? (3) Does the evidence help? This third question may, for ease of analysis, be broken into two subdivisions: (a) Does the evidence offered tend to make some assertion of fact at issue in the case more or less likely to be true, than if the evidence is not admitted?; (b) How does the evidence tend to prove that for which it is offered? (4) Even if the evidence helps, is its probative value (i.e., its ability to prove an assertion of fact at issue) substantially outweighed by the danger of unfair prejudice, confusion of the issues, possibility of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? This question, presented in [Federal Rule of Evidence 403](#), requires a balancing of the costs and benefits of logically relevant evidence (this balancing concept will be referred to herein as the [Rule 403](#) balancing test). These first four questions constitute the analysis for logical relevance and the [Rule 403](#) balancing test.

The remaining five questions are: (5) Is the evidence a statement? (6) If so, is the evidence of the statement offered for the truth of the matter asserted (or, alternatively, does the statement have to be true to be probative)? (7) If so, is the statement either within an exemption from or an exception to the hearsay rule? (8) If the statement is not admissible under a traditional exemption from or exception to the hearsay rule, is it admissible under a catch-all exception (Rules 803(24) or 804(b)(5))? (9) Finally, in a criminal prosecution, is admission of the hearsay statement forbidden by the Confrontation Clause or required by the Due Process Clause?

By using this easily learned, step-by-step analysis, most of the difficult problems of the rules of evidence can be solved by the beginning student.

1. What is the evidence?

Although it seems self-evident, this question must be answered before the next steps in the analytical process may be pursued. Do not skip this step or go on to the subsequent questions without first articulating what the

evidence is. If more than one item of evidence in question exists, be sure to isolate each piece, each component. The best approach is to make a list of each item of evidence (i.e., is it a statement, a document, or a piece of physical evidence?).

One should be aware that step five (Is the evidence a statement?) is a “subset” of this question. “Statement” is a legal conclusion that requires the detailed analysis of step five. At this point, identification of the evidence should be by type: Is the evidence physical, such as a knife? Is it demonstrative, such as a model of the accident scene? Is it simply the observation of an incident as related by a witness in open court? Is it an utterance or conduct by some person which occurred out of court? Isolate and identify each piece of evidence. For example, each utterance is a discreet piece of evidence: All utterances by one person cannot be lumped together as a single evidentiary offer; some may be admissible under the rules of hearsay, which will be discussed in steps five through nine; other utterances may not be admissible.

2. What is the evidence offered to prove?

This step requires knowledge of the elements of substantive law pertaining to criminal and civil actions (e.g., murder, theft, negligence). Some element of a crime or civil cause of action, or some defense to either is always the ultimate object of the evidentiary offer. However, one usually seeks to prove some intermediate proposition leading to an element of the case. Issue spotting—a process familiar to law students—will provide the answer sought by the second question most of the time. However, as with issue spotting, the problem is not always what it first seems to be. Take care to clearly identify what it is that needs to be proven—spell it out completely.

For example, assume that V is dead, apparently a homicide victim, and D is charged with V's murder. The prosecution discovers that D wrote a love letter to V's wife and offers it in evidence. The evidence of the love letter is evidence of D's desire for V's wife, and is ultimately probative of the element of intent (or the intermediate fact of motive). [FN2] The letter is therefore logically relevant.

If one cannot articulate what the evidence is offered to prove, the possibility exists that the case has not been sufficiently thought out. One must either reanalyze what must be proven (i.e., what are the elements of the particular action), or creatively contemplate different ways that the elements can be proven by circumstantial evidence. If it is the former, merely start over again at this step and reanalyze the problem with the elements correctly stated. Again, write down the answer to this question.

3. Does the evidence help to prove that for which it is offered?

Two essential ingredients are necessary to answer this inquiry: First, the definition of logical relevance; and, second some consideration of the reasoning process. The syllogism is the most useful tool here.

As discussed above, this analysis consists of two parts: (a) Does the evidence tend to make it more or less likely that some assertion of fact at issue in the case is really true; (b) How does the evidence tend to do so? Actually, the first part cannot be answered without first answering the second. The two subdivisions of the question are merely a focusing mechanism for a general inquiry about how the evidence does help to prove or disprove the assertion.

A. Logical Relevance Defined

The modern approach to relevance breaks the definition into two components: logical relevance [FN3] and

the [Rule 403](#) balancing test. [\[FN4\]](#) Moreover, the modern view is that all relevant evidence is admissible, unless excludible for some reason other than irrelevancy, and all evidence that is irrelevant is inadmissible. [\[FN5\]](#) So, “‘relevant evidence’ [logically relevant] means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” [\[FN6\]](#) Evidence is logically relevant if it makes the fact of consequence more likely or less likely. So, the evidence may tend to prove or disprove the fact for which it is to be considered.

Evidence that is otherwise logically relevant “may be excluded if its probative value [logical relevance value] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” [\[FN7\]](#) This balancing test of [Rule 403](#) provides a basis for testing admissibility of evidence on policy grounds, as distinguished from testing on grounds of logical relevance. [\[FN8\]](#)

Only the definition of logical relevance will be considered in answering the third question, i.e., does the evidence tend to prove or disprove the proposition for which it is offered? Incorporating the definition into the question, the question becomes: Does the evidence have any tendency to make it more or less likely that the fact that the evidence is offered to prove is true than it would be without the offer of that evidence?

A few points are worth noting here. First, the evidence will be logically relevant if it has any tendency (even the slightest) to make the fact of consequence more or less likely. [\[FN9\]](#) Thus, the evidence does not have to conclusively prove the fact. The evidence does not even have to prove the fact clearly, beyond a reasonable doubt, or to a certainty. Perhaps the best exposition of this legal reality is McCormick's observation that: “A brick is not a wall.” [\[FN10\]](#) Whether the evidence is quantitatively enough to sustain the proponent's burden of proof goes to the sufficiency or the weight of the evidence, and is an altogether different question from whether the evidence is relevant. [\[FN11\]](#) Thus, if insufficient admissible and relevant evidence (a brick) is introduced on a point on which the proponent of the evidence bears the burden of proof, the proponent will lose that point and the case (the wall) even though all the evidence tended to prove that point.

Second, the definition states that the evidence is logically relevant if the evidence makes the asserted fact to be proven more (or less) likely to exist than the fact would be without the evidence. In other words, taking all things into consideration, and adding just this one piece of evidence, does the addition of it tip the scales even slightly? If so, then the evidence is logically relevant. [\[FN12\]](#)

Third, special rules of evidence govern the admissibility of statements. The analysis of the logical relevance of a statement to an issue in the case is the same as determining whether the statement is “offered for the truth of the matter asserted” (step six below). Thus, if the evidence is a statement, one may find it helpful to read the analysis following step six below at this point.

Now, considering all the various factors subsumed under the rubric, “logical relevance,” (i.e., (1) the evidence need only make the fact more or less likely; (2) “A brick is not a wall”; and (3) how the evidence “tips the scales,”) the result is that one need only be able to show that some likelihood is evident that the fact exists or does not exist from the evidence offered. This determination is all that the law requires by its definition of logical relevance.

B. Using a Syllogism: Identifying the Inference (Logical Premise)

The ultimate step in this process of articulating the logical relevance of any item of evidence requires accept-

ance of some premise that cannot be proven absolutely, but that is accepted based upon common human experience. [FN13] Behind every inference upon which the relevance of circumstantial evidence depends is a logical premise. By articulating both the inference and the premise, one will expose the sometimes surprising fact that the law of evidence, at least as it is applied to the definition of logical relevance, is principally predicated upon common sense. However, one must learn to articulate the assumed principle of common sense.

The crucial point here is that unless the premise is articulated, one cannot focus on why the evidence has some tendency to prove or disprove the fact for which it is offered. Thus, the question, “does the evidence help?” must be answered with an analysis of how the evidence helps, put in a syllogistic form, or at least in some form that articulates the otherwise unarticulated premise. For example, one who is seen running away from a building where a burglar alarm is ringing (and that building has been broken into), is more likely to be the burglar than if one had not been seen running from the building. [FN14] The premise will usually begin with a generalization, such as, “one who ...” or “people who....” Actually, in this example, the underlying, unarticulated premise is “people who flee from the scene of a crime are more likely guilty than if they did not flee.”

Many people have been exposed to formal logical reasoning and are aware of the two forms: inductive and deductive. The inductive form goes from the specific to the general. One reasons from specific points to a broader premise. The deductive form goes from the general to the specific. Either reasoning process is dependent upon a generalization. In the deductive form, the generalization is articulated and may be examined. An oversimplified example is useful.

The evidence, a love letter to V's wife states that D planned to kill V. Does this evidence demonstrate that D did in fact kill V? Assume that V is dead of an apparent homicide. The precise inquiry is: Why is it that evidence of D's plan to kill V tends to prove that D did, in fact, kill V? The inductive form of the reasoning process is: D planned to kill V, therefore D probably did kill V. The inference of D's guilt is predicated upon an unarticulated premise. By stating the reasoning in the deductive form, that premise may be exposed: One who has a fixed design to kill is more likely to kill. D had a fixed design to kill V; therefore D probably killed V. In formal logic, the first statement is called the major premise, the second statement the minor premise and the third statement, the conclusion. Also, remember that this evidence is not offered as conclusive on the issue of D's killing of V. If it were the only evidence, then the case against D would be insufficient to take to the jury (or, perhaps even to charge D with any crime).

The “truth,” or acceptability, of the underlying logical premise, however, is based upon common human experience, or common sense, not truth that is provable or even truth in some abstract, metaphysical sense. [FN15] One may, of course, debate how true that premise really is. The lawyer's job is advocacy and creativity in advancing arguments; [FN16] and so one must learn to articulate how D's fixed design has some tendency to make it more likely that D in fact killed V than it would be without the evidence of D's plan.

Another example will help. [FN17] The evidence is that after P's injury at D's machinery, D repaired the machinery. The evidence is offered to prove that D was conscious of negligence. The unarticulated premise is: People who make repairs of machinery after an accident show a consciousness of negligence. [FN18] D made such repairs. Therefore D was conscious of negligence, which tends to prove D's negligence. [FN19]

Thus, one must answer the question of how the evidence tends to prove the proposition for which it is offered and articulate the premise upon which it is based. Later, this Article demonstrates how this information is also utilized in the sixth step of this process to determine whether the evidence is hearsay. Therefore, it is im-

portant to spend whatever effort is required to answer this third inquiry.

4. Is the evidence, though logically relevant, inadmissible because it is unduly unfair?

Even though logically relevant (i.e., having probative value), evidence nevertheless may be excluded if to admit it would “entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme.” [FN20] Thus [Federal Rule of Evidence 403](#) provides that otherwise relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” [FN21] The federal rule does no more than codify the common law discretionary power of the judge to exclude otherwise relevant evidence on those, as well as other grounds. [FN22]

[Rule 403](#) is, by its terms, a balancing test for the admissibility of evidence. The cost of admission of otherwise relevant evidence is to be balanced against its probative worth, or benefit. Accordingly, the analysis is one of cost-benefit. If photographs of the victim of a murder are offered to prove the fact of death or even its cause, the court would have to balance the probative value against the potential for unfair emotional appeal to the jury that the pictures might have.

Some types of evidence recur in enough cases to warrant the creation of a special rule for this type of problem. [FN23] In such cases, rules have been established that predetermine the policy balance and state how such evidence should be treated. Examples of such rules are those dealing with evidence of character, [FN24] habit (or routine practice), [FN25] subsequent remedial measures, [FN26] compromise and offers to compromise, [FN27] payment of medical and similar expenses, [FN28] withdrawn pleas of guilty (or nolo contendere) and related discussions, [FN29] evidence related to liability insurance, [FN30] and rules determining the admissibility of evidence of a rape victim's past behavior. [FN31] All of these specific rules are particularized applications of the balancing test notion of [Rule 403](#).

No formula or bright line rule exists as to how to decide a [Rule 403](#) balancing question, other than to work with the language of the rule and articulate arguments and reasons. However, according to the language of [Rule 403](#), the cost to be weighed against the assumed probative value must be substantial, before the evidence is excluded. Moreover, most students, and many lawyers for that matter, fail to articulate which [Rule 403](#) ground they believe applies to exclude the otherwise relevant evidence. And, at the same time, they often fail to state how that ground will be manifested in the specific case. Failure to articulate either of these matters is an insufficient invocation of the rule.

[Rule 403](#) is also known as the rule of “legal relevance.” McCormick argues that this terminology is misleading and should be avoided. [FN32] Since the term is in general usage, it may be used.

5. Is the evidence a statement?

Having determined that the proffered evidence is logically and legally relevant from the first four steps of this process, it is now appropriate to consider whether the evidence is hearsay. The classic definition of hearsay and the one used here, is “an out-of-court statement, offered to prove the truth of the matter asserted.” [FN33] Thus, out-of-court statements are hearsay only if offered to prove the truth of the matter asserted, and hearsay evidence is inadmissible when it falls outside an exemption from the rule or an exception to the rule.

The first step in our inquiry is to determine whether the evidence is a statement. Of concern here is the legal definition from the Federal Rules of Evidence, [FN34] not the lay concepts of what a statement might be. By inquiring whether the evidence is a statement, the first element of the definition of hearsay is considered. If the conclusion is that the evidence is not a statement, then the evidence is not hearsay for that reason. Said another way, the evidence is definitionally excluded from the hearsay rule. The hearsay inquiry in that event is thus terminated. If the conclusion is that the evidence is a statement, the analysis must further continue on to determine whether the statement fits within other aspects of the definition of hearsay. Not all evidence in the form of a statement is hearsay evidence, as shall be seen. When the conclusion is that the evidence is not hearsay because it is not a statement, such conclusion was reached under the definition of what is a statement in the hearsay rule.

[Rule 801\(a\) of the Federal Rules of Evidence](#) defines a statement as: “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” This definition requires that an intent to assert exists before we may conclude that a statement exists. [FN35] The “statement” may be either in the form of an oral or written assertion or it may be in the form of assertive conduct. But the focus of the definition is that the hearsay declarant must intend to assert.

The definition talks about intent to assert on the part of the declarant when acting, speaking or writing. Such assertions constitute statements within the definition of a statement of the hearsay rule. As the drafters of the Federal Rules noted, “the key to the definition is that nothing is an assertion unless intended to be one.” [FN36] Most verbal evidence is easily determined to be a statement within the definition. However, sometimes people say or do something without intending to assert. Perhaps they ask a question, or give a direction, or just act in a way that communicates a belief, but is not a direct assertion. [FN37] In such an instance, if the action was not intended as an assertion, then the conduct is not a statement within the definition of hearsay. Such “nonassertive conduct” as a matter of definition is not hearsay; it is not a statement, because it is not intended as a statement.

For example, assume that the captain of a seagoing vessel, after inspecting the ship and before departing on a long journey across the ocean, takes his wife and two small children out for a weekend jaunt as a “farewell outing.” [FN38] Looking at the conduct of the captain, it may be taken to prove that he believed that the vessel was seaworthy. [FN39] However, absent some other evidence that the captain probably intended to go sailing; it is not likely that he intended to assert anything, much less assert something on the subject of the seaworthiness of the vessel, and thus, the conduct is not a statement within the definition of a statement for hearsay purposes. Therefore, the statement is not hearsay. This conclusion follows from the Federal Rules of Evidence, [FN40] because the ship captain's conduct constitutes what is known as nonassertive conduct. [FN41]

Actually, the form of such nonassertiveness on the part of the actor (or declarant) need not be conduct. It may be words and conduct together, or words alone. [FN42] Nonetheless, this category of nonstatement/non-hearsay is widely known as nonassertive conduct. [FN43]

Simply put, words alone, conduct alone, or words and conduct together are not a statement (and thus not hearsay) if the person acting, speaking, or both, does not intend to make an assertion. Please note that if the person makes an assertion, either in words or conduct alone or words and conduct together, but the assertion is offered as a basis for inferring something other than the truth of the matter asserted, the evidence is excluded from the definition of hearsay under [Federal Rule of Evidence 801\(c\)](#), not 801(a).

That such conduct or utterances are not hearsay is the result intended by the Federal Rules of Evidence. But, that result is not without controversy. In fact, there has been a debate on this point ever since the earliest discus-

sions of the decision in *Wright v. Doe dem. Tatham*. [FN44] However, the drafters of the Federal Rules have adopted the conclusion of McCormick that

conduct (other than assertions) when offered to show the actor's beliefs and hence the truth of the facts so believed, being merely analogous to and not identical with typical hearsay, ought to be admissible whenever the trial judge in his discretion finds that the action so vouched the belief as to give reasonable assurance of trustworthiness. [FN45]

Finally, the issue arises as to who decides the question of intent and how. The Advisory Committee's note provides the answer:

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule [Rule 801(a)] is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. [FN46]

Moreover, because the preliminary question of fact (intent) is one determining the admissibility of evidence, not merely a question of conditional relevancy, it is a question for the judge under [Federal Rule of Evidence 104\(a\)](#), not for the jury under [Federal Rule 104\(b\)](#). [FN47]

So, one category of acts or utterances that are not statements are those that are nonassertive. Thus the vast categories of exclusions [FN48] from the definition of hearsay exist because no "statement" exists in the first instance.

6. If the evidence is a statement, is the evidence of the statement offered for the truth of the matter asserted (or, alternatively, need the statement be true to be probative)?

The next step, or question, in the process is simply an application of the heart of the definition of hearsay using the language of [Rule 801\(c\) of the Federal Rules of Evidence](#). [FN49] [Rule 801\(c\)](#) provides that "a statement [as defined in [Rule 801\(a\)](#)], other than one made by the declarant while testifying, is hearsay if it is offered to prove the truth of the matter asserted." [FN50] The inquiry requires a determination whether the words contained in the statement (or the import of the conduct which is assertive) are only relevant if they are true. Actually, the analysis for this step is the same as the analysis of relevance in the first three. All that is necessary now is to adapt the relevance analysis to the definition of hearsay! [FN51]

It is important to see that this inquiry may be expressed as either: (1) is the evidence of the statement offered for the truth of the matter asserted; or (2) need the statement be true to be probative?

These statements are alternative formulations of the same question. Both statements are derived from the language of [Rule 801\(c\)](#): "offered in evidence to prove the truth of the matter asserted." Moreover, note that the analysis relating to determining the evidence's logical relevance will help in deciding whether the statement is being offered for the truth of the matter asserted.

A statement may be logically relevant in two ways: (1) the mere fact that it was made, or heard, by a particular person, regardless of its truth or falsity, may tend to establish an ultimate fact in the case; or (2) the statement may be relevant only if the statement is true. If the statement is relevant under alternative (1), then it is not hearsay. If the statement is relevant only if it is true, alternative (2), then it is hearsay, and admissible only if it fits within an exemption or exception to the exclusionary rule of hearsay. [FN52]

The hearsay rule is designed to eliminate the repetition in court of statements by out-of-court declarants without the opportunity for cross-examination [FN53] and observation by the jury. The testimony of every witness involves elements for the jury's review relating to perception, memory, narration and sincerity. [FN54] The hearsay rule seeks to eliminate or overcome the risks involved when a jury hears evidence of such statements without the opportunity to observe the declarant's demeanor, evaluate the declarant's ability to perceive, remember, narrate and be sincere, and to consider the effect of cross-examination. In short, the hearsay rule seeks to overcome these hearsay risks by either excluding such evidence or only letting it in if the risks are balanced by other factors. [FN55]

Before turning to some examples to clarify the foregoing, an important observation is in order. When we exclude from the operation of the hearsay rule those statements that are not offered for the truth of the matter contained in them, we establish a category of statements that are definitionally excluded from the hearsay rule.

Another category of statements that are exempted from the hearsay rule under the Federal Rules of Evidence are witnesses' prior statements and admissions by a party opponent. [FN56] The first exclusion category, of course, includes evidence that is not a statement, either because no statement was involved or because the evidence constituted nonassertive conduct or words. By contrast, in the following examples, the evidence excluded from the hearsay rule are statements, but they are not offered for the truth of the matter asserted (NOTMA). They fall into the following subcategories: (a) operative legal facts; (b) state of mind of the auditor; (c) state of mind of the declarant (circumstantial state of mind); (d) state of mind (knowledge) of the declarant on the "traces of the mind" theory; and (e) evidence that is otherwise not offered for the truth of the matter asserted (NOTMA), but to prove something else.

In each of the following examples the "significance of [the] ... offered statement lies solely in the fact that it was made; no issue is raised as to the truth of anything asserted, and the statement is not hearsay." [FN57]

A. Operative Legal Fact

Statements that are legally operative "create or extinguish legal rights, powers, or duties." [FN58] This category, known as operative legal facts, is also sometimes known as "verbal acts" or "verbal parts of an act." [FN59] The expression, "operative legal fact," seems to be preferred by the drafters of the Federal Rules of Evidence [FN60] and numerous commentators. [FN61] For purposes of specificity and clarity, "operative legal fact" shall be used here. As noted by the drafters of the Federal Rules of Evidence, an operative legal fact occurs when "the statement itself affects the legal rights of the parties or is a circumstance bearing on the conduct affecting their rights." [FN62] Actually, one might say that an operative legal fact occurs when the utterance of the very words themselves constitutes the legal effect.

One example of an operative legal fact that is easy to understand is an offer in a contract of sale. If A says to B, "I offer to sell you 20 widgets for \$50," the words uttered by A are significant merely because they were uttered. The words create in B the power to form a contract and constitute an element of a contract for sale. The statement need not be true to be probative of the fact of the formation of a contract. It is true that the words need to have been uttered, but this requirement may be proven by any witness who heard A speak. Such a witness could testify about hearing A utter the words, and then the witness could be cross-examined as to perception, memory, sincerity and clarity of communication. [FN63] If the witness was believed, an element of the contractual relationship would be proven by the mere fact that the words were uttered.

Some other examples also demonstrate that words of operative legal effect need only be uttered to be relev-

ant: e.g., words of donative intent accompanying the delivery of a gift; [FN64] solicitation of a bribe; solicitation for prostitution; [FN65] the utterances that constitute a slander; and the speaking of marriage vows. [FN66] Note that often, though not always, the operative legal fact utterance is an element of a crime, tort or contract.

B. State of Mind of the Auditor [FN67]

The first of four types of state of mind form the next subcategory of definitional exclusions from hearsay where the statement is not offered for the truth of the matter asserted. The first three state of mind categories are treated here as definitional exclusions from hearsay, the fourth is, strictly speaking, hearsay, but falls within the state of mind exception. [FN68] All four of these categories, as the label implies, involve statements that tend to prove the existence of a particular state of mind of a person.

Basically, a state of mind is, as the words suggest, what is in a person's head. Since we cannot see what is in a person's mind, we can only know their state of mind by what they say and do. This exclusion is the evidentiary application of the maxim "actions speak louder than words." Thus, it makes sense that we should consider evidence (words, conduct, or both) reflecting an individual's state of mind to be statements.

Note that in order for the definitional exclusions for state of mind (or the exception) to be used to admit evidence, the state of mind must be relevant. That is, under the analysis of the first three steps, we must have concluded that the pertinent state of mind is a fact of consequence to the outcome of the case.

Usually, evidence of state of mind is probative of what is in the mind of the person who makes utterances or engages in conduct that manifests the claimed state of mind. However, in the first exclusion for state of mind of the auditor, the acts or utterances of one person are claimed to create or affect the state of mind of another, who hears the utterance or observes the conduct.

A wonderful example of this exclusion [FN69] is the case of *Subramaniam v. Public Prosecutor*, [FN70] in which Subramaniam, a rubber tapper in Malaya, was found guilty of being in possession of ammunition in violation of government regulations. [FN71] In his defense he asserted that "he had been captured by terrorists, [and] at all times was acting under duress." [FN72] He sought to give evidence of what the terrorists said to him but was prevented from doing so. [FN73] On appeal, the court held that the evidence was not hearsay because it was offered, not to prove the truth of the statement, but "the fact it was made" to show that it might "reasonably have induced in him [the appellant] an apprehension of instant death if he failed to conform to their wishes." [FN74] In other words, the evidence of the statement was admissible to show its effect upon the appellant, the auditor of the statement.

Other examples include being put on notice or having knowledge; [FN75] showing motive; [FN76] or showing how the information that one possessed had a bearing on the reasonableness, good faith or voluntariness of that person's subsequent conduct. [FN77] For example, this information includes claimed grounds for fear of the victim asserted by the accused in a homicide case to support a claim of self-defense based on reasonable apprehension of danger. [FN78]

Another matter of passing concern in connection with this type of evidence, as well as other types of evidence, is where the evidence may be admissible for one purpose but inadmissible for another. For instance, a defendant in a homicide case may claim that he heard reports that the victim was a violent man, having attacked and killed or injured others. This evidence would be admissible to prove that the defendant was in fear of the victim to support the defendant's claim of self-defense. However, the evidence would not be admissible to prove

that the victim in fact was a violent person.

This result usually poses no difficult problem. Generally, the evidence would be admitted with an instruction to limit its use to the proper purpose, unless the need for such evidence is substantially outweighed by the danger of its improper use (or, as it has been colorfully stated, if the jury cannot forget that they were shown a blue horse). [FN79]

C. State of Mind of the Declarant (Circumstantial Evidence of State of Mind)

If a woman were to tell her husband that she has been having an affair with another man, the utterance, by the mere fact it was made, shows that the woman has lost affection for her husband. If offered for that purpose, then the utterance would not be hearsay. The words spoken need not be true to prove that affection is lacking. She need not in fact be having an affair; saying such a thing to one's spouse demonstrates a lack of affection. [FN80] On the other hand, if the wife said, "I have lost my affection for you," that utterance is a direct assertion of her state of mind. Such an assertion is a statement, and thus hearsay.

Another example of such circumstantial state of mind utterances is in the area of manifestations of mental incompetency. Evidence that a woman whose mental capacity was in question said, "I am the Pope," would probably be admitted as proof of her lack of capacity. [FN81] As McCormick notes, such an utterance "is offered as a response to environment, not to prove anything that may be asserted and is not hearsay." [FN82] As with the previous example, if the speaker said "I believe I am the Pope," the utterance would be assertive and would be hearsay. [FN83]

This subcategory of exclusion from the hearsay definition as a statement not offered for the truth of the matter asserted (NOTMA) is probably no different from nonassertive conduct discussed previously. [FN84] In fact, analytically this category is not offered for the truth of the matter asserted because the mere fact of the words having been uttered is circumstantial proof of a fact, just like the situation with nonassertive conduct. Also, just as with nonassertive conduct, the reason the utterance tends to prove the fact for which it is offered is that the utterance illustrates the declarant's belief in a condition necessary to support the inference that proves the point. [FN85] But, for the sake of ease of identification, it is wise to note this subcategory of exclusion and to carve it out.

D. State of Mind (Knowledge) of the Declarant on the "Traces of the Mind" Theory

This classification is another subcategory that is actually a species of circumstantial evidence. As with the last state of mind exclusion, carving out this class of utterances should make analysis easier. The focus of this subcategory is evidence of utterances that circumstantially prove the content of the declarant's mind in the form of knowledge, usually of particular facts, as opposed to memory or belief or other thoughts. The reasoning is circumstantial in this instance, as it is in the nonassertive categories, and is as follows: A person having peculiar knowledge, under certain circumstances, could only have obtained that knowledge by contact with an external reality giving the person that knowledge. Thus, having the knowledge supports the conclusion that the declarant in fact had contact with that external reality. One should note that the external reality must be proven by evidence other than that contained in the utterance of the declarant. Two examples will clarify this exclusion.

First, McCormick refers to "evidence that a person made statements indicating knowledge of matters likely to have been known only to X" to prove that the declarant was in fact X. [FN86] Another example is the oft-cited case of *Bridges v. State*, [FN87] discussed at length in McCormick when stating the "trace" of the mind or

“knowledge” theory. [FN88] In *Bridges*, the defendant was charged with child molestation. [FN89] At his trial, the state sought to introduce evidence of statements of the victim, a child of seven, describing to her mother and a police officer several exterior and interior details of the house in which she was allegedly assaulted. [FN90] Other evidence showed that this description perfectly matched the house and room where the defendant lived. [FN91] Therefore, the utterances were held not within the hearsay ban, but rather as a “‘trace,’ as it were, on her mind of her visit at the time of the crime.” [FN92] Said another way, the evidence is offered to show the impression that some alleged external reality made upon the mind of the declarant, to prove that declarant perceived (or experienced) the external reality.

In reasoning that the “trace” of the mind theory did in fact apply in *Bridges*, McCormick states as follows:

While it has been suggested that the evidence depended for its value upon the observation, memory, and veracity of the child, and thus shared the hazards of hearsay, the testimony nevertheless had value independently of these factors. Other witnesses had described the physical characteristics of the locale, and her testimony was not relied upon for that purpose. Once other possible sources of her knowledge were eliminated, which the court was satisfied was the case, the only remaining inference was that she had acquired that knowledge through a visit to the premises. [FN93]

As noted previously, [FN94] the fact that the evidence may be admissible for one purpose but inadmissible for another may be handled by a limiting instruction and the balancing test of [Federal Rule of Evidence 403](#).

E. Evidence That is Otherwise Not Offered for the Truth of the Matter Asserted (NOTMA)

When analyzing evidence to determine whether or not it is hearsay, one should keep in mind that not all evidence, even oral evidence, is hearsay. It is only hearsay when the evidence is of a statement made by an out-of-court declarant and is offered in court to prove the truth of the matter contained in the statement. Thus, much evidence may be found not to be hearsay merely because the evidence is not offered for the truth of a statement.

A wonderful example of this comes from a dispute over whether a person is dead or alive. In such an instance, an utterance by that person, whatever the content of the statement might be, is evidence that the person is alive, without the statement having to be true. [FN95] This result, of course stems from the fact that dead people cannot talk.

One must remember that all of the subcategories discussed in this section are particularized instances of utterances that are not offered for the truth of the matter asserted. They may be conveniently classified into subgroups because the type of circumstance in which they arise recurs with enough frequency to warrant separate treatment. However, they are merely examples, or instances of evidence in the form of words or conduct, or a combination of words and conduct, which is relevant without being offered for the truth of the content.

7. If the evidence of the statement is hearsay (i.e., offered for the truth of the matter asserted), is the statement within an exemption from or exception to the hearsay rule?

Even if evidence is in the form of a statement that is only logically relevant if offered for the truth of the matter asserted, the statement may nonetheless be admissible if it is within an exception to the hearsay rule. So far only exclusions arising from the very definition of hearsay have been considered here. Under this present step, or question, the evidence has already been determined to be hearsay under analysis of the first five questions.

Exceptions to the hearsay rule were developed over many years as legal commentators realized that many statements arise that, though hearsay, overcome basic hearsay risks, or for some other policy reason should be admitted into evidence. To consider in depth the rationale, policy and extent of the hearsay rule and its exceptions is beyond the scope of this Article. [FN96] But completing the process requires a determination whether the evidence which is being examined is within an exception to the hearsay rule. Thus, reviewing and applying one or more of the accepted exceptions to the hearsay rule is step number seven.

The Federal Rules of Evidence create two categories of exceptions to the hearsay rules in Rules 803 and 804(b). [FN97] The exceptions in Rule 803 apply whether the declarant is available or not; those listed in Rule 804 only apply if the declarant is unavailable. [FN98] Twenty-three specific exceptions listed in Rule 803 and four specific exceptions listed in Rule 804(b) exist. [FN99] In addition, Rules 803(24) and 804(b)(5) provide for a category of “other exceptions,” sometimes known as the “equivalency,” “catch-all,” or “residual” exceptions. [FN100] Essentially, these “other exceptions” categories apply in unusual cases where the evidence does not quite fit into one of the traditional exceptions; yet, the evidence is very probative and necessary and has substantial guarantees of trustworthiness. Whether these “catch-all” exceptions should be liberally or strictly construed has been the subject of wide variation in the federal courts. [FN101]

In addition, the [Federal Rules of Evidence Rule 801\(d\)](#) exempts from the definition of hearsay two major categories of evidence treated as exceptions to the hearsay rule at common law. These exemptions are certain kinds of prior statements of witnesses and admissions by a party opponent. Although they are classified under the Federal Rules of Evidence as definitional exemptions, this Article recommends that they be treated analytically as hearsay to avoid confusion. In other words, one should analyze prior statements of witnesses and admissions as statements under [Rule 801\(a\)](#) and as offered for the truth of the matter asserted under 801(c). Then one should consider whether 801(d) provides for admissibility as an exemption from the hearsay rule.

8. If the statement is not admissible under a traditional exemption from or exception to the hearsay rule, is it admissible under a catch-all exception (Rules 803(24) and 804(b)(5))?

Steps five through seven dealt with the mechanical, usually noncontroversial applications of the hearsay rule and the traditional exceptions to and exemptions from that rule. Answering this, the eighth question, requires knowledge and understanding of the basic policy considerations that underlie the hearsay rules. Rules 803(24) and 804(b)(5) are residual, “catch-all” exceptions, enacted by Congress to promote the “growth and development of the law of evidence in the hearsay area” [FN102] so that “the general purposes of these rules and the interests of justice” [FN103] will be served. Such language invites and necessitates policy-based analysis and argument.

As discussed previously, [FN104] the hearsay rule and its exceptions and exemptions are based on this rationale: Out-of-court statements are of suspect trustworthiness and probative value because the declarant was not under oath at the time the statement was made, and the declarant's perception, demeanor and veracity are not subject to cross-examination in front of a jury that can judge the credibility and weight to be given to the statement. The exceptions are based on the theory that some types of statements, because of the circumstances under which they are made, are sufficiently trustworthy and of such probative value that the risks of using hearsay are outweighed by the trier of fact's need to consider the evidence if a just and reliable result is to be obtained. [FN105] Rules 803(24) and 804(b)(5) are expressions of these theories.

The controversy over these residual exceptions centers mainly on how narrowly Congress intended them to

be construed, since Rules 803(24) and 804(b)(5) were innovative when enacted and the parameters still are not known. The legislative history suggests they should be given a narrow scope. The House originally rejected these exceptions. [FN106] The Senate adopted them and its views prevailed in Conference. [FN107] But the Senate Judiciary Committee's notes contain this caveat: "It is intended that the residual exceptions will be used very rarely and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions in rule 803 and 804(b)." [FN108]

The language of Rules 803(24) and 804(b)(5) lays out five requirements for admission of a hearsay statement that does not fall within a traditional exception. These requirements are: (1) "circumstantial guarantees of trustworthiness" that are "equivalent" to those underlying the other exceptions; (2) the statement is offered as evidence of a material fact (apparently, this excludes its use on collateral matters such as impeachment); (3) the statement is more probative on the issue for which it is offered than other reasonably available evidence; (4) the general purposes of [[the] rules and the interests of justice will be served; and (5) sufficient advance notice, including the declarant's name and address, of the intention to use the statement is given the adverse party to allow that party "a fair opportunity to meet it" [FN109] (presumably, this statement means an opportunity both to oppose the admission of the statement and to counteract its effects if admitted).

The case law supporting these exceptions at the time of their adoption is sketchy. Both the advisory committee's notes to 803(24), [FN110] and the Senate Judiciary notes, [FN111] refer to the pre-Federal Rules of Evidence case of *Dallas County v. Commercial Union Assurance Co.*, [FN112] as a good example of the anticipated application of the residual exceptions. In that case, the county was suing its insurance company over structural damage sustained by the county courthouse, which the plaintiff alleged was caused by a fire started by lightning. [FN113] The defendant contended that the damage antedated the lightning strike and thus was not covered by the casualty policy sold by defendant. [FN114] To support this contention, the defendant offered a local newspaper account, over fifty years old, of a fire that had occurred during the construction of the courthouse. [FN115] The plaintiff argued that the newspaper account, clearly hearsay (it was offered to prove the fact of the earlier fire), did not fall within either the business records (803(6)) or ancient documents (803(16)) exceptions. [FN116]

The appellate court held that admission was nonetheless proper because it was highly improbable that a small-town newspaper reporter would fabricate such a story. [FN117] This result constitutes the "equivalent circumstantial guarantee of trustworthiness" required by the present rules. [FN118] The evidence was highly probative of a material fact—the cause of the damage to the courthouse—and was likely more probative than calling witnesses to testify about their memories of a relatively unremarkable fire that occurred more than fifty years before. [FN119] Finally, it was in "the interests of justice" [FN120] that the jury should hear the statement (the account in the paper) and evaluate its weight because the story would not likely inflame or confuse the jury.

A leading post-Federal Rules of Evidence case applying the residual exceptions is *United States v. Leslie*. [FN121] The defendant's accomplices had given testimony exonerating the accused. [FN122] The prosecution sought to impeach this testimony with incriminating statements made by the accomplices at the time of their arrest. [FN123] The appellate court held that the prior statements were admissible as substantive evidence (for the truth of the matter asserted, i.e., the defendant's guilt), despite not being made under oath as required by *Federal Rule of Evidence 801(d)(1)(A)*. [FN124] The statements were found sufficiently trustworthy because they were made after a valid waiver of Miranda rights, they were close in time to the events in question, and the declarants were on the stand. [FN125] The statements of the defendant's accomplices were also highly probative. [FN126]

Grand jury testimony, not subject to cross-examination and thus not within 804(b)(1), is an area with conflicting case law. One court rejected the use of grand jury testimony at trial under the residual exceptions because the prosecutor's use of leading questions and high-pressure tactics at the grand jury proceedings made the statement's reliability questionable. [FN127] In different factual settings, however, the statements have been admitted. [FN128]

A major issue surrounding the use of the residual exceptions is whether statements that just miss falling within a traditional exception can nonetheless be admitted under Rules 803(24) or 804(b)(5). In a leading federal trial court decision, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, [FN129] the judge decided that Congress intended the residual exceptions to be used only in “exceptional and unanticipated” situations, and therefore should not be used in most “near miss” cases. [FN130] The Zenith court drew a distinction between “well-defined” traditional exceptions and “amorphous” ones, however, and opined that “near misses” in the latter situations could be admissible. [FN131] The Third Circuit rejected this formulation because it “puts the federal evidence rules back into the straitjacket from which the residual exceptions were intended to free them.” [FN132] The status of the near miss doctrine was recently summarized by Professor Myrna Raeder: “Although many judges cannot recognize a near miss when they see it, those who can do not hesitate to apply the residual clauses to evidence that the drafters specifically considered and rejected. The rare language supporting the near miss theory is either in dicta [FN133] or has been overruled.” [FN134]

The availability of the declarant, or an “equivalent” witness, to testify at trial is also an important factor. Obviously, the declarant's unavailability is an express condition to the use of 804(b)(5).

The “unavailability” criterion may be injected into 803(24) without separate explanation by the requirement that the statement be more probative on the issue than other reasonably available evidence. If the declarant is available to testify, the argument is that the declarant's live testimony is more probative than an out-of-court, hearsay statement. [FN135] Courts have also held that the availability of other, comparable witnesses, precludes the use of Rules 803(24) and 804(b)(5). [FN136] These areas must be discussed in an analysis of Rules 803(24) and 804(b)(5)—policy-based argument is mandated.

First, focus on the circumstances surrounding the declarant when the statement was made. Look for “circumstantial guarantees of trustworthiness.” Does the situation lend peculiar reliability to the statement? Does any bias or vested interest exist that would undermine the declarant's veracity? Please note that the United States Supreme Court's recent decision in *Idaho v. Wright* specifically held that corroboration is not a factor to be considered when evaluating trustworthiness for confrontation clause challenges. [FN137] Thus, even if the federal courts were to consider corroboration in deciding trustworthiness under the catch-alls, the courts would be in awkward position if the same evidence could not be introduced in a criminal case when the same court eliminates corroboration from its trustworthiness evaluation for confrontation clause purposes. [FN138]

Second, measure the statement's probative value on a material issue against other available evidence. Is the issue for which the statement is offered in serious dispute? If so, how probative is the statement (i.e., how much does it tend to prove the proposition)? What other evidence is available to the proponent?

Third, consider the availability of the declarant, or comparable witnesses, to testify. Actually, this consideration falls under the “more probative than other available evidence” requirement. Is a witness, who can be subpoenaed, available who can testify to the events referred to in the hearsay statements? Is there a peculiar significance to the statement that may permit its introduction even though “equivalent” live testimony can be ob-

tained? Did either party contribute to the unavailability of the declarant to testify?

Accordingly, this suggested analysis is heavily fact-dependent. No one knows the exact parameters of Rules 803(24) and 804(b)(5). In contrast to the known, traditional exceptions, where the preconditions to admissibility are known and the proponent merely must show that the statement was made under those circumstantial preconditions, the residual exceptions allow the proponent to both delineate the preconditions that justify the exception (guarantees of trustworthiness) and show how the particular statement meets the test. This result is simply creating a new exception.

The final step in answering this question is to show how the proposed exception would promote “the interests of justice.” Should the jury be allowed to hear the statement because a just verdict would be questionable in its absence? How “fair” is it to all parties? Remember, no conclusion is wrong under Rules 803(24) and 804(b)(5) if one analyzes the facts and advances a plausible argument as to why the statement should or should not be admissible.

In June, 1990, the United States Supreme Court held that Idaho's residual hearsay exception—nearly identical to Federal Rule 803(24)—was not a firmly rooted exception for Confrontation Clause purposes. In *Idaho v. Wright*, [FN139] the Court held that hearsay statements of a child allegedly molested by the defendant could not be admitted within the state's residual hearsay exception without violating defendant's Confrontation Clause rights. [FN140] This ruling underscores the necessity of coordinating the analysis under the catch-alls with the confrontation clause analysis in a criminal case.

9. In a criminal prosecution, is admission of the hearsay statement forbidden by the Confrontation Clause or required by the Due Process Clause under *Chambers v. Mississippi*?

A. Confrontation Clause

A literal reading of the Sixth Amendment, which guarantees criminal defendants the right “to be confronted with the witnesses against” them, [FN141] would exclude any use of hearsay statements against the defendant. After all, when a hearsay statement is admitted for the truth of its contents, the declarant is either unavailable to testify by definition (Rule 804), or may be absent (Rule 803 exceptions apply without regard to availability), and thus the defendant cannot “confront” the declarant-witness.

In the case of *Ohio v. Roberts*, the Supreme Court rejected this interpretation as “unintended and too extreme.” [FN142] The Court held:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. [FN143]

One may have noticed some overlap between this language and the analysis under question eight regarding the residual hearsay exceptions, e.g., “particularized guarantees of trustworthiness;” a “showing that [the declarant] is unavailable,” and “indicia reliability.” In a prior case, the Court rejected the theory “that the overlap [between hearsay evidentiary rules and the constitutional right] is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay ... as they existed at common law.” [FN144] For all of Justice White's protestations in that case, one should note that in practice many statements that are admiss-

ible under the Federal Rules of Evidence will likely be admissible under the Confrontation Clause.

However, the rule laid down in *Roberts* [FN145] appeared to have added a requirement that the prosecution must show that the declarant was unavailable before a hearsay statement was admissible. [FN146] In *Roberts*, the Ohio prosecution had introduced preliminary hearing testimony of the witness against the accused. [FN147] The United States Supreme Court found sufficient indicia of reliability in that testimony to satisfy its newly fashioned Confrontation Clause test, but with the required showing of unavailability satisfied. [FN148] However, Rule 803 exceptions and Rule 801(d)(2) exemptions apply without regard to declarant's availability to testify at trial.

Thus the Court, in *United States v. Inadi* [FN149] had to face the argument that the confrontation clause requires a showing of unavailability even though Federal Rule of Evidence 801(d)(2)(E) does not. In *Inadi*, the defendant argued that the government must, under the principles of *Roberts*, demonstrate that the defendant's alleged co-conspirators, whose statements were sought to be used against the defendant under 801(d)(2)(E), were unavailable to testify before admission of their statements was proper. [FN150] The Court rejected that argument, holding that “*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.” [FN151] The Court reasoned that co-conspirators' out-of-court statements, unlike former testimony, are not “only a weaker substitute for live testimony”; [FN152] rather, such co-conspirators' statements, have “independent evidentiary significance,” [FN153] “derive much of their value from the fact they are made in a context very different from trial,” [FN154] and are “usually irreplaceable as substantive evidence.” [FN155] Finally, the Court engaged in a benefits and burdens analysis in concluding that such statements are admissible without a showing of unavailability. [FN156]

A number of important questions were left unanswered by *Inadi*. First, when, if ever, does the Confrontation Clause require a showing of unavailability before an out-of-court declarant's statement, (other than those of co-conspirators) may be admitted at trial? Further, what is the relationship, if any, between the finding of reliability for satisfaction of the hearsay exceptions or exemptions and the finding of reliability for Confrontation Clause purposes? The *Inadi* Court used a reliability standard [FN157] to decide whether an unavailability rule for Confrontation Clause purposes should exist, while the *Roberts* Court utilized a reliability standard to answer Confrontation Clause questions, assuming a showing of unavailability.

In *Bourjaily v. United States*, [FN158] decided the year after *Inadi*, the Supreme Court again considered the admissibility of co-conspirators' statements over a claim of confrontation clause violation. *Bourjaily* argued that the “bootstrapping” [FN159] effect of considering the questioned co-conspirators' statements in order to decide whether to admit the same statements, caused the modern co-conspirators' exemption under the Federal Rules of Evidence not to be a “firmly rooted” exception to the hearsay rule. [FN160] The result would be to require a finding of indicia of reliability in the questioned statement independent of the statement being qualified under the Federal Rules exemption. In *Bourjaily*, the Court held that the second prong of *Roberts*, independent indicia of reliability, was “not mandated by the Constitution,” [FN161] since the “co-conspirator exception [sic] to the hearsay rule is firmly enough rooted in our jurisprudence ... [to meet the test] under this Court's ruling in *Roberts*...” [FN162]

Most recently, the United States Supreme Court considered the rules laid down in *Roberts* and *Inadi* as they relate to other “firmly rooted” exceptions to the hearsay rule. In *White v. Illinois*, [FN163] the Court rejected the appellant's assertion that *Roberts* required a declarant be produced at trial or be found unavailable before his out

of court statement is admissible, unless the testimony was being introduced under the co-conspirator exception under Inadi. The White Court stated that the testimony, which had been admitted at trial under both the spontaneous declarations and statements made for medical treatments exceptions, was admissible because it had sufficient guarantees of reliability and trustworthiness to satisfy the Confrontation Clause. [FN164] As in Inadi, the statements at issue were made in a context that could not be replicated in court. [FN165] Further, little benefit was to be gained by requiring availability. [FN166] Because the testimony was considered admissible under “firmly rooted” hearsay exceptions, the statements satisfied the Inadi criteria. [FN167]

White thus appears to establish the rule that Inadi implied; that the Confrontation Clause is satisfied so long as the proffered hearsay testimony comes within a firmly rooted exception. The question then becomes what qualifies as “firmly rooted.” What remains to be seen is whether a showing of unavailability is necessary for all of the exceptions under Federal Rule 803 [FN168] (excluding the catch-alls under 803(24)), or whether the list is limited to common law exceptions in existence before the Federal Rules.

In the recent case of Idaho v. Wright, [FN169] the United States Supreme Court considered questions relating to catch-all exceptions, unavailability requirements and Confrontation Clause complaints, in relation to hearsay evidence admitted against a defendant in a child molestation case. The Wright Court reaffirmed the principles set forth in Roberts and Inadi, and elucidated in Bourjaily. [FN170] Since the trial court had found the child declarant in Wright incapable of communicating with the jury, no issue existed regarding the required showing of unavailability. [FN171] The Wright Court then considered whether the hearsay had been admitted under a firmly rooted hearsay exception. [FN172] The child's statements regarding the molestation incident, made to a pediatrician, had been admitted under Idaho's residual exception that was identical to Federal Rule 803(24). [FN173] The Court specifically noted that “Idaho's residual hearsay exception ... is not a firmly rooted hearsay exception for Confrontation Clause purposes.” [FN174]

Thus, the Court moved to the second prong of the Roberts test, and determined that the State had not borne its burden of showing “particularized guarantees of trustworthiness” in the child's statements. [FN175] Although the Court affirmed the Idaho Supreme Court's reversal of the accused's conviction, the Wright Court held that the particularized guarantees of trustworthiness must be assessed from a totality of the circumstances but limited to those circumstances “that surround the making of the statement and that render the declarant particularly worthy of belief.” [FN176]

Thus, under these rulings, if one determines that a statement is admissible under a traditional hearsay exception or exemption, then the constitutional rules may be satisfied, unless the evidence is admissible under the catch-alls. Notwithstanding the similar language of the residual exceptions, 803(24) and 804(b)(5), and the constitutional rules laid down in the Roberts-Inadi-Wright-White line of cases, no overlap arises between the two, so that a statement that satisfies the residual exceptions' admission standards will not necessarily satisfy the Roberts rule. [FN177] Moreover, although statements falling within traditional hearsay exceptions or exemptions, which could be deemed “firmly rooted,” and would not require a showing of independent indicia of reliability (particularized guarantees of trustworthiness), it remains to be seen which such categories of statements have no required showing of unavailability.

Confrontation Clause problems arise especially with Rule 804 exceptions, particularly when prior testimony of an unavailable declarant is sought to be introduced under 804(b)(1). Again, Rule 804 exceptions apply only if the declarant is unavailable, as defined in Rule 804(a). The Supreme Court's rulings appear to mandate a stronger showing of unavailability when a criminal defendant's confrontation rights are at issue.

In *Barber v. Page*, [FN178] the Court found a Confrontation Clause violation where prior testimony of a declarant, who was imprisoned in another state, was admitted at trial. [FN179] Under Rule 804(a)(5), a declarant is unavailable if his presence at the proceeding cannot be obtained “by process or other reasonable means.” [FN180] The declarant in *Barber* was not subject to compulsory process since he was in another state. [FN181] However, the Court held that the prosecutor could have secured the declarant's presence by other means and that failure to do so was short of the necessary “good faith” effort. [FN182] In a criminal case, therefore, the declarant's unavailability under Rule 804 must be real, not strategic or feigned.

The other consideration under the Confrontation Clause and the use of prior testimony is the defendant's opportunity to cross-examine the declarant at the prior hearing. Under Rule 804(b)(1), “the party against whom the testimony is now offered” (the defendant) must have “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” [FN183] This formulation appears to satisfy the Court's interpretation of the confrontation clause as well. Dicta in the *Roberts* decision strongly hinted that the Court would find a meaningful “opportunity to ... develop the testimony” by the defendant sufficient to satisfy the Confrontation Clause even if actual questioning by the defendant was not undertaken. [FN184] But the Court has never expressly adopted that rule.

The defendant must have a meaningful chance to develop the testimony, however. In *Pointer v. Texas*, [FN185] the Court held the defendant's rights were violated because he was not represented by counsel at the prior hearing and therefore could not have effectively cross-examined the declarant. [FN186]

A final consideration exists: State rules of evidence which allow wider use of statements by unavailable declarants than do the Federal Rules may face strict judicial scrutiny. In *Douglas v. Alabama*, [FN187] the trial court allowed the state to use a confession by the defendant's alleged accomplice which incriminated the defendant. [FN188] Such a statement would not be admissible against the defendant under the Federal Rules. The Court rejected its use under Alabama's law of evidence as well, since the declarant had exercised his Fifth Amendment privilege not to testify and thus the defendant never had any opportunity to examine the declarant. [FN189]

B. Is the Statement's Admission Required Under the Due Process Clause (*Chambers v. Mississippi*)?

This final question (or second part of the final question) has more of an academic than practical significance; this step is included in this guide for academic purposes. It is important to understand that the Supreme Court's decision in *Chambers v. Mississippi* [FN190] would not have been necessary had Mississippi been using the Federal Rules of Evidence in 1973.

In *Chambers*, the Court held that the defendant's Fourteenth Amendment due process rights were violated because highly reliable and probative hearsay statements that impliedly exonerated the accused were excluded from evidence. [FN191] *Chambers* had been convicted of killing a police officer; the primary evidence against him was that the dying officer had fired down an alley where gunfire had originated, wounding the defendant, who was then arrested. [FN192]

The defendant sought to prove that Gable McDonald had shot Officer Liberty. [FN193] McDonald had signed a sworn confession of his guilt; he later repudiated it, saying he had been influenced by promises that he would not be prosecuted. [FN194] This evidence was admitted when McDonald testified at trial. [FN195]

The defendant then sought to have McDonald declared an adverse witness so that he could be cross-ex-

amined as to other statements McDonald had made which incriminated him. [FN196] The trial court refused because McDonald's repudiations of his confession did not directly "point the finger" at Chambers and thus was not technically adverse. [FN197] Under Mississippi law at that time, the "party voucher" rule prevented the defendant from cross-examining McDonald, since the defendant had called McDonald to the stand. [FN198] Thus, extrinsic evidence that would discredit McDonald's story that he had fabricated the confession could not be introduced. [FN199] [Federal Rule of Evidence 607](#) abolished the party voucher rule.

The defendant's attempts to introduce McDonald's incriminating statements through the testimony of the persons to whom the statements were made were thwarted because of the hearsay rule. [FN200] Mississippi law allowed against-interest statements into evidence only if the statement was adverse to the declarant's pecuniary or proprietary interests. Once again, the statements would have been admissible under [Federal Rule of Evidence 804\(b\)\(3\)](#), which includes statements contrary to penal interest. The end result was that the only evidence Chambers managed to get to the jury was "a single written confession countered by an arguably acceptable renunciation," [FN201] and he was convicted.

The Supreme Court reversed on due process grounds:

We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with the traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial. [FN202]

It is difficult to know what application Chambers may have. It is nearly inconceivable that a due process violation could occur under the Federal Rules of Evidence, which are steadily being adopted in the states (including Mississippi). One should at least be aware that such a result has occurred and is a good argument for abandoning the archaic party voucher rule.

Conclusion

This concludes the analysis of hearsay and relevance using this introductory nine step guide. Use of it as a process will yield an answer on admissibility that should square with the prevailing standards under the Federal Rules of Evidence as interpreted by the courts.

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[FN1]. The formulation of these questions, particularly questions two and three, are based upon an approach taken by the late John Kaplan in his teacher's manual for David W. Louisell et al., *Cases and Materials on Evid-*

ence (1st ed. 1968).

[FN2]. This hypothetical, used to explain probative value, is from Edmund M. Morgan, *Basic Problems of Evidence* 185-88 (1961), reprinted in John Kaplan et al., *Cases and Materials on Evidence* 70-71 (7th ed. 1992).

[FN3]. [Fed.R.Evid. 401](#).

[FN4]. [Fed.R.Evid. 403](#). As will be more fully discussed later, [Rule 403](#) is sometimes referred to as legal relevance and is the subject of the fourth question.

[FN5]. [Fed.R.Evid. 402](#).

[FN6]. [Fed.R.Evid. 401](#).

[FN7]. [Fed.R.Evid. 403](#) (emphasis added).

[FN8]. See [Fed.R.Evid. 403](#) advisory committee's note.

[FN9]. It is useful here to consider the distinction between direct and circumstantial evidence. Direct evidence, usually testimony, is evidence that, if believed, resolves a matter in issue. Circumstantial evidence may also be in the form of testimony, but even if the circumstances depicted as true are true, additional reasoning is required to accept the proposition to which it is directed. [John W. Strong et al., McCormick on Evidence § 185, at 369 \(4th ed., student ed., 1992\)](#). As McCormick notes, in terms of the distinction between circumstantial and direct evidence, “direct evidence from a qualified witness offered to help establish a provable fact can never be irrelevant. Circumstantial evidence, however, can be offered to help prove a material fact, yet be so unrevealing as to be irrelevant to that fact.” *Id.* Finally, note that the value of direct and circumstantial evidence is the same: “Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.” [California Jury Instructions Criminal No. 2.00](#), at 21-22 (5th ed. 1988).

[FN10]. [Strong, supra note 9, § 185, at 339](#).

[FN11]. The question of the sufficiency of proof is interesting because it is not specifically covered by any of the rules of the Federal Rules of Evidence. Rather, the sufficiency is determined by the definition of the standard of proof, as determined by the procedural rules governing the type of case and trial in which the evidence is offered. For example, in a typical civil trial in state or federal court the standard of proof is by a preponderance. The “law” with respect to the burden of proof is, likewise, generally not treated by the Federal Rules of Evidence, or comparable state statutes. But see [Fed.R.Evid. 301, 302](#) (relating to presumptions for reference to some aspects of the burden of proof).

[FN12]. However, the evidence on a particular issue may be so overwhelming that further evidence is unnecessary. In that event, even if the evidence “tips the scale” a little more, the judge may exclude it as cumulative and unnecessary under [Rule 403](#).

[FN13]. Acceptance of a premise that cannot be proven absolutely, but is grounded in human experience, is a form of judicial notice, albeit judicial notice of nonevidentiary facts. More precisely, judicial notice of adjudicative facts, as governed by [Fed.R.Evid. 201](#), is just the opposite of the unprovable premise; while judicial notice of legislative or evaluative facts, not governed by any rules of evidence or proof, are just like the unprovable premises discussed in the text accompanying this note. See [Fed.R.Evid. 201](#) advisory committee's note (quoting

Thayer, “ ‘[i]n conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.”); see also [Fed.R.Evid. 401](#) advisory committee's note (“Whether the relationship [relevancy of evidence to fact to be proven] exists depends upon principles evolved by experience or science, applied logically to the situation at hand.”).

[FN14]. Wigmore argued that the inductive form is sufficient and that it is unnecessary to express the reasoning in deductive form. See George F. James, *Relevancy, Probability and the Law*, 29 Cal.L.Rev. 689, 694-99 (1941), for a discussion and criticism of Wigmore's view. The discussion in the text here is predicated upon James' analysis. The portion of James' article containing this discussion, although included in earlier editions, (David W. Louisell et al., *Cases and Materials on Evidence* 12-16 (2d ed. 1972)), is no longer included in John Kaplan et al., *Cases and Materials on Evidence* (7th ed. 1992).

[FN15]. One might be troubled over the question of who decides that the “common sense” of the premise is “true.” Since the judge decides questions of admissibility (competency) of evidence, most of the arguments over the validity of the premise (articulated or not) will be answered by the judge's ruling on an objection as to relevance. See [Fed.R.Evid. 104\(a\)](#).

[FN16]. “The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof.... Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.” [Fed.R.Evid. 401](#) advisory committee's note.

[FN17]. James, *supra* note 14, at 694-99.

[FN18]. Actually, there may be a number of other premises upon which this premise is built: One who repairs machinery after an accident thereby acknowledges that the machinery is in need of repair, that the repair could be made, and therefore the failure to repair previously constitutes negligence.

[FN19]. Note that [Fed.R.Evid. 407](#) would require this otherwise logically relevant evidence of a subsequent remedial measure to be inadmissible on policy grounds. As will be examined in the section dealing with the fourth step, whether the evidence is legally relevant, [Rule 407](#) represents a predetermined answer to a recurring problem balancing policy grounds for excluding evidence against logical relevance grounds for admitting the evidence.

[FN20]. [Fed.R.Evid. 403](#) advisory committee's note.

[FN21]. [Fed.R.Evid. 403](#).

[FN22]. See [Strong](#), *supra* note 9, § 185, at 340 n. 27. Both McCormick and the advisory committee's note to [Rule 403](#) observe that the Rule does not include surprise as a ground for exclusion. A continuance is noted as the appropriate remedy for a claim of surprise.

[FN23]. See [Fed.R.Evid. 401](#) advisory committee's note (“[S]ome situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rules 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of [Rule 403](#).”).

[FN24]. See [Fed.R.Evid. 404, 405](#).

[FN25]. See [Fed.R.Evid. 406](#).

[FN26]. See [Fed.R.Evid. 407](#).

[FN27]. See [Fed.R.Evid. 408](#).

[FN28]. See [Fed.R.Evid. 409](#).

[FN29]. See [Fed.R.Evid. 410](#).

[FN30]. See [Fed.R.Evid. 411](#).

[FN31]. See [Fed.R.Evid. 412](#).

[FN32]. [Strong, supra note 9, § 185, at 341](#).

[FN33]. This is a paraphrase of the basic definition of hearsay contained in [Fed.R.Evid. 801\(c\)](#).

[FN34]. [Fed.R.Evid. 801\(a\)](#).

[FN35]. Note that the person who has the intent to assert and makes a “statement” is known as the hearsay declarant. The hearsay declarant is the person who made the statement out-of-court, not the in-court witness who now wishes to repeat the statement.

[FN36]. [Fed.R.Evid. 801\(a\)](#) advisory committee's note.

[FN37]. For a wonderful analysis of the definition of assertion in the Federal Rules of Evidence, see Roger C. Park, “I Didn't Tell Them Anything About You”: Implied Assertions Under the Federal Rules of Evidence, 74 [Minn.L.Rev. 783, 793-801 \(1990\)](#).

[FN38]. This hypothetical is an enhanced version of that used by Baron Parke in his opinion in *Wright v. Doe dem. Tatham*, 112 Eng.Rep. 488 (Exch.Ch.1837). See also [Laurence H. Tribe, Triangulating Hearsay, 87 Harv.L.Rev. 957, 960 \(1974\)](#) (discussing a similar hypothetical and referring to Baron Parke's hypothetical).

[FN39]. The evidence is the conduct of the captain. The evidence is offered to prove that the vessel is seaworthy. It does tend to do so because a captain of a seagoing vessel would only take his family out in the vessel on the sea if he believed it was seaworthy. Therefore the vessel is more likely seaworthy than if we had no evidence of the captain's conduct. Of course, the next inquiry—the one focused on in the text—is whether the captain's conduct was intended as an assertion and hence a statement for purposes of the hearsay rule.

[FN40]. One should note that the result under [Fed.R.Evid. 801\(a\)](#) of the ship captain's conduct not being a statement is just the opposite of the result under the common law as *Wright v. Doe dem. Tatham* articulated. See also [Charles T. McCormick, The Borderland of Hearsay, 39 Yale L.J. 489, 502-04 \(1930\)](#). As the Advisory Committee states:

Other non-verbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the

condition and hence properly includible within the hearsay concept.... Admittedly evidence of this character is untested with respect to the perception, memory and narration (or their equivalents of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.

[Fed.R.Evid. 801\(a\)](#) advisory committee's note (emphasis added).

[FN41]. See [Fed.R.Evid. 801\(a\)](#) advisory committee's note.

[FN42]. “[B]ut words not of assertion, but of action, such as the offer of a position (to show the offeree's skill) or the letters in *Wright v. Tatham* itself.” McCormick, *supra* note 40, at 502-03. The example of the offer of a position to show the skill of the offeree means that the inherent belief of the offeror in the skill of the offeree is taken as evidence that the offeree has such skill. Thus, the president of a bank offered John a position as Chief Teller, such offer is evidence that John is possessed of the skills and character traits, which a trusted Chief Teller would require, such as honesty. Under the Federal Rule definition, the words of the offer by the president of the bank would not be a statement since they were not intended by the president to assert that belief, but rather merely to extend the offer to John. Please note that Professor Park points out that this type of example is really a case of an assertion (statement) offered for something other than the matter asserted, and thus not hearsay within the definition of [Fed.R.Evid. 801\(c\)](#). Park, *supra* note 37, at 797-98.

In *Wright v. Doe dem. Tatham*, letters were sent to the testator treating the testator as though he were capable of making business and social decisions (thus evidencing a belief on the part of the writers of the letters that the testator had sufficient mental capacity as would equal testamentary capacity). These letters were offered as evidence that the testator was of sound mind and thus that his will was valid. The court held that the letters were inadmissible for this purpose. Under the Federal Rules, *Wright* would be decided differently—the letters would be admitted as nonassertive conduct (here verbal conduct).

[FN43]. The Advisory Committee speaks of “verbal assertions” (which “can scarcely be doubted” as being intended as an assertion), “nonassertive nonverbal conduct” (which is treated as non-statement/non-hearsay) and “nonassertive verbal conduct” (which is governed by “similar considerations” as is nonverbal conduct). [Fed.R.Evid. 801\(a\)](#) advisory committee's note. For discussion, criticism, and compilation of commentators' comments see [Olin G. Wellborn, The Definition of Hearsay in the Federal Rules of Evidence, 61 Tex.L.Rev. 49 \(1982\)](#).

[FN44]. Wellborn, *supra* note 43, at 55-64.

[FN45]. McCormick, *supra* note 40, at 504.

[FN46]. [Fed.R.Evid. 801\(a\)](#) advisory committee's note (citing John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 *Vand.L.Rev.* 741, 765-67 (1961)).

[FN47]. For a full discussion of the distinction between [Fed.R.Evid. 104\(a\)](#) and [Fed.R.Evid. 104\(b\)](#) questions, see [Norman Garland & Jay Schmitz, Of Judges and Juries: A Proposed Revision of Federal Rules of Evidence 104](#), 23 *U.C. Davis L.Rev.* 77 (1989).

[FN48]. This use of the term “exclusion” in conjunction with the hearsay rule will be referred to again. “Exclusion” means that the evidence under consideration is excluded from the definition of hearsay, under the hearsay rule, by its terms; exclusions also exist from the hearsay definition. Exclusions are not to be confused with exceptions to the hearsay rule. Exceptions apply to statements that are hearsay but are nonetheless admiss-

ible in evidence because they are within certain categories of evidence that the law allows for various policy reasons.

[FN49]. [Fed.R.Evid. 801\(c\)](#) provides that “[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.”

[FN50]. The reference in [Rule 801\(c\)](#) “other than one made by the declarant while testifying at the trial or hearing” seems to confuse many students. However, it simply acknowledges that a witness testifying in court does not give evidence that is hearsay merely because his or her testimony constitutes evidence in the form of statements. Such a witness's testimony is not violative of the hearsay rule, unless the witness repeats a statement that was made out of court and which is offered for the truth of the matter contained in the out-of-court statement.

[FN51]. The definition of hearsay in [Rule 801\(c\)](#) incorporates the notion of relevance. The language, “offered to prove” the truth of the matter, requires a determination of what the questioned item of evidence is being offered for. That, in turn, triggers the process discussed in the first three steps presented here.

[FN52]. The distinction between alternatives (1) and (2) is illustrated by an example. In a negligence action, the evidence is a statement by an employee of defendant who is not available to testify: “The floor is wet and slippery.” If the plaintiff offers the statement to show that the floor of defendant's store was dangerously unsafe (i.e., wet and slippery), the statement is hearsay; it is relevant to the issue of breach of duty/unreasonable risk of harm only if the statement is true (disregarding for purposes of this analysis of whether the statement is hearsay or not, that the statement may be admissible as an admission by a party opponent or a present sense impression).

On the other hand, if the defendant offers the same statement to show that the plaintiff had notice of the slippery floor and thus either was contributorily negligent or assumed the risk of injury, the statement is not hearsay. If the plaintiff heard the warning (a conditioning fact), it is logically relevant to the issue of notice, regardless of the statement's truth or falsity. The reason is that the statement is not offered to prove that the floor was wet and slippery (that fact must be shown by other evidence, e.g., the plaintiff's testimony); rather, its purpose is to show that a statement was made to plaintiff, that, in ordinary human experience, would cause the person who heard it to exercise appropriately greater caution, regardless of the statement's truth. Any person who heard this statement could testify to that fact. This illustration is loosely based on the case of [Safeway Stores, Inc. v. Combs](#), 273 F.2d 295 (5th Cir.1960).

[FN53]. Wigmore called cross-examination “the greatest legal engine ever invented for the discovery of truth.” 5 John H. Wigmore, *Evidence* § 1367 (Chadbourn rev. 1974).

[FN54]. [Fed.R.Evid. art. VIII](#) advisory committee's note (introductory note refers to only three factors: perception, memory, and narration; sincerity is said to be “merely an aspect” of the other three).

[FN55]. The hearsay risks may be “overcome” by falling within an exception to the hearsay rule (or a definitional exclusion) in that the circumstances of the making of the statement may be such as to be inherently trustworthy. Or, the evidence may be so necessary that, under the circumstances, and in combination with the increased inherent trustworthiness of the situation, the law provides for that class of statements to be admitted within an exception to the hearsay rule. Or, as with admissions by a party opponent, the rules have permitted the evidence to come in as a product of the adversary system. See [Fed.R.Evid. art. VII](#) advisory committee's note (introductory note to Article VIII of the Federal Rules of Evidence). Of course, considerations of confrontation and due process must be ameliorated within this approach. See discussion *infra* part 9.

[FN56]. The Federal Rules of Evidence also create categories of statements that are not hearsay. These categories are specified in [Fed.R.Evid. 801\(d\)](#). Two species of statements are defined: Prior statements by a witness and admissions by a party-opponent. These species of statements were treated as hearsay at common law and were considered admissible as exceptions to the hearsay rule. See, e.g., [Cal.Evid.Code § 1235](#) (prior inconsistent statements); [Cal.Evid.Code § 1238](#) (statements of identification); [Cal.Evid.Code § 1220](#) (a party's own admission); [Cal.Evid.Code § 1223](#) (co-conspirator's admissions). For ease of understanding, this category of statements, defined as nonhearsay by the Federal Rules of Evidence shall be called exemptions from the hearsay rule.

[FN57]. See [Fed.R.Evid. 801\(c\)](#) advisory committee's note.

[FN58]. Park, *supra* note 37, at 794.

[FN59]. See [Fed.R.Evid. 801\(c\)](#) advisory committee's note. One should note, however, that the expressions “verbal acts” or “verbal parts of an act” are confusing, to say the least. Often, these expressions are used interchangeably with another confusing expression, *res gestae*. It is far more accurate to use the more specific terminology that is applicable; in this case, for instance, the term operative legal fact.

[FN60]. *Id.*

[FN61]. McCormick refers to *res gestae*, the term often applied to verbal acts, and other aspects of the hearsay rule and its exceptions, as a “nebulous concept.” [Edward W. Cleary et al., McCormick on Evidence § 249, at 733 n. 6 \(3d ed. 1984\)](#). See also [Strong, supra note 9, § 249, at 471-72](#) (discussing the term *res gestae* as it applies to spontaneous statements). The third edition of McCormick on Evidence contains a Westlaw Reference for the term *res gestae* as a “useless harmful shibboleth.” [Edward W. Cleary et al., McCormick on Evidence § 288, at 836 \(3d ed. 1984\)](#).

[FN62]. [Strong, supra note 9, § 249, at 471-72](#).

[FN63]. In other words, the witness could be questioned and satisfy all the requirements that the hearsay rule is aimed at recognizing. See [Fed.R.Evid. art. VIII](#) advisory committee's note (introductory note).

[FN64]. Examples of this form of operative legal fact appear in Kaplan, *supra* note 2, at 126 in the reproduced examination of Professor Morgan's 1946 Summer Term Harvard Law School Examination. Question 10 asks: “On the issue whether a transfer of a chattel from D to X was a sale or a gift, D's statement accompanying the transfer, ‘I am giving you this chattel as a birthday present.’ ”

Question 11, on the same examination asks: “On the issue in 10, D's statement the day following the transfer, ‘I gave you the chattel as a birthday present.’ ”

[FN65]. See [Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control, 54 Cal.Rptr. 547 \(Ct.App.1966\)](#).

[FN66]. See Kaplan, *supra* note 2, at 126 (Prof. Morgan's exam question no. 1).

[FN67]. No specification of this exclusion exists in the Federal Rules of Evidence, or the accompanying Advisory Committee's Notes. McCormick includes a category covering this matter, [Strong, supra note 9, § 249, at 430-31](#) (entitled “Some Out-of-Court Utterances Which Are Not Hearsay”; the pertinent portion is sub-headed “Utterances and writings offered to show effect on hearer or reader”). See also 6 John H. Wigmore, *Evidence* § 1789 (Chadbourn rev. 1976).

[FN68]. See discussion *infra* part 7.

[FN69]. Kaplan, *supra* note 2, at 93.

[FN70]. 100 Sol.J. 566 (P.C.1956), reprinted in Kaplan, *supra* note 2, at 93.

[FN71]. *Id.*

[FN72]. *Id.*

[FN73]. *Id.*

[FN74]. *Id.*

[FN75]. See, e.g., *Safeway Stores, Inc. v. Combs*, 273 F.2d 295 (5th Cir.1960) (statement by store manager “Lady, please don't step in that ketchup,” just before she did and slipped); *Player v. Thompson*, 193 S.E.2d 531 (S.C.1972) (testimony that inspector said in presence of defendants that tires were defective, to prove notice of that condition).

[FN76]. See *Fed.R.Evid. 801(c)* advisory committee's note (citing *Emich Motors v. General Motors*, 181 F.2d 70 (7th Cir.1950), *rev'd on other grounds*, 340 U.S. 558 (1950)) (letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company).

[FN77]. See, e.g., *Johnson v. Misericordia Community Hosp.*, 294 N.W.2d 501 (Wis.Ct.App.1980) (action for negligence in hiring physician and granting surgical privileges; records and reports of other hospital's committee not hearsay to show information available to defendant).

[FN78]. See, e.g., *Knapp v. State*, 79 N.E. 1076 (Ind.1907), reprinted in Kaplan, *supra* note 2, at 72.

[FN79]. See *Fed.R.Evid. 105* (limited admissibility) and *Fed.R.Evid. 403* (exclusion of relevant evidence on grounds of prejudice, etc.).

[FN80]. A wife saying such a thing to her husband at least satisfies the requirements of the definition of logical relevance on the issue of loss of affection. The fact of the utterance makes it more likely that the wife lacks affection for her husband than if the utterance had not been made.

This hypothetical is used by *Strong*, *supra* note 9, § 269, at 462, and is based upon a case appearing in Kaplan, *supra* note 2, at 210 (appearing in the casebook under the section treating the state of mind exception to the hearsay rule; nonetheless it is an appropriate vehicle to demonstrate the distinction between the exclusion and the exception). In this case, *Adkins v. Brett*, 193 P. 251 (Cal.1920), an action for damages for alienation of affection, plaintiff sought to introduce evidence that his wife stated, among other things, that she had gone automobile riding with the defendant, had dined with him, had received flowers from him, and that he was able to give her a good time, and the plaintiff was not.

[FN81]. See Edmund M. Morgan, *Basic Problems of Evidence* 248-50 (1961), reprinted in Kaplan, *supra* note 2, at 70-71. See also *Strong*, *supra* note 9, § 274, at 482. McCormick uses the example of the utterance, “I am King Henry the Eighth.”

[FN82]. Morgan, *supra* note 81, at 248-50. McCormick notes that in this area (i.e., proof of mental condition) whether the utterance is assertive or nonassertive matters not, for the evidence will come in to prove the speaker's mental state:

Thus it makes no difference whether declarant says, "I am Henry the Eighth," or "I believe that I am Henry the Eighth. Both are offered as evidence of irrationality, and niceties of form should not determine admissibility. If, nevertheless, it is argued that abnormal conduct can be simulated, thereby becoming assertive and therefore hearsay, a short answer is that in that event the evidence would be admissible under the hearsay exception [for state of mind]....

Id.

[FN83]. Id.

[FN84]. See *supra* notes 36-47 and accompanying text.

[FN85]. Here, just as with other nonassertive communication, the words or conduct are offered to show belief, to show the fact believed. But, as with other nonassertive communication, the utterance is not taken to prove its content in order to prove the belief. See *supra* notes 40, 45 and accompanying text. For example, the utterance: "I have been happier in New York than in any other place," when offered to prove the speaker's intent to remain in New York is nonassertive, and thus not offered for the truth of the matter contained in the utterance. See Strong, *supra* note 9, § 269, at 472. On the other hand, if the speaker had said, "I intend to spend the rest of my life here in New York," then that utterance would be a statement of intent and if offered to prove the intent would be assertive and hearsay.

[FN86]. Id.

[FN87]. 19 N.W.2d 529 (Wis.1945), *reh'g* denied, 19 N.W.2d 862 (Wis.1945). The Bridges principle was applied in *United States v. Muscato*, 534 F.Supp. 969, 975-78 (E.D.N.Y.1982), which discusses Bridges in detail. See also excerpt from *Graham C. Lilly, An Introduction to the Law of Evidence* 213-14 (2d ed. 1987), reprinted in Kaplan, *supra* note 2, at 87.

[FN88]. See Strong, *supra* note 9, § 250, at 435. The reference to the "trace" of the mind was eliminated in the third edition of McCormick, now the subject is dealt with under the heading of "knowledge." Edward W. Cleary et al., *McCormick on Evidence* § 250, at 741-42 (3d ed. 1984).

[FN89]. Bridges, 19 N.W.2d at 530.

[FN90]. Id. at 534.

[FN91]. Id. at 536.

[FN92]. Edward W. Cleary et al., *McCormick on Evidence* § 250, at 435 (4th ed. 1992).

[FN93]. Id. § 250, at 436.

[FN94]. See *supra* note 79 and accompanying text.

[FN95]. Strong, *supra* note 9, § 250, at 435. Here, the author notes that in answering the question whether a person is alive at a particular time, it would not matter whether he said, "I am alive," or "Hi, Joe." No cases are

cited to support this example. However, the authors include in the current edition of their casebook a “made-up case” (cited as 32 Muc. 352 (standing for made-up cases)). Kaplan, *supra* note 2, at 91.

[FN96]. See, e.g., Fed.R.Evid. art. VIII advisory committee's note (introductory note).

[FN97]. Fed.R.Evid. 803, 804(b).

[FN98]. *Id.* (Rule 804(a) defines unavailability for purposes of the 804 exceptions).

[FN99]. *Id.*

[FN100]. *Id.*

[FN101]. See, e.g., Edna S. Epstein et al., *Emerging Problems Under the Federal Rules of Evidence*, 1983 A.B.A.Sec.Litig. 279-94, reprinted in Kaplan, *supra* note 2, at 311-17. See also Myrna S. Raeder, *Confronting the Catch-Alls*, 6 A.B.A.Sec.Crim.Just. 30 (1991) (reviewing the catch-alls in criminal cases).

[FN102]. Fed.R.Evid. 803(24) advisory committee's note.

[FN103]. Fed.R.Evid. 803(24), 804(b)(5).

[FN104]. See *supra* notes 53-55 and accompanying text.

[FN105]. The theory underlying the hearsay exemptions under the Federal Rules of Evidence is probably not a balance of trustworthiness over hearsay risks. Rather, admissions by party opponents exempted from the hearsay rule under Fed.R.Evid. 801(d)(2) are grounded upon the nature of the adversary system. See Fed.R.Evid. 801(d)(2) advisory committee's note. The exemption for witnesses' prior inconsistent statements is based more on trustworthiness. See Fed.R.Evid. 801(d)(1)(A) advisory committee's note (citing and quoting a report from the California Law Revision Commission). Prior consistent statements are exempted largely due to the nature of the adversary system. It is mainly within the power of the opponent to determine the admissibility of such statements. See Fed.R.Evid. 801(d)(1)(B) advisory committee's note. The exemption for prior identification manifests a recognition of the need to examine all the surrounding circumstances of an in-court identification. See Fed.R.Evid. 801(d)(1)(C) advisory committee's note.

[FN106]. Fed.R.Evid. 803(24) Senate Judiciary Committee notes.

[FN107]. *Id.*

[FN108]. *Id.*

[FN109]. Fed.R.Evid. 803(24), 804(b)(5).

[FN110]. Fed.R.Evid. 803(24) advisory committee's note.

[FN111]. *Id.*

[FN112]. 286 F.2d 388 (5th Cir.1961).

[FN113]. *Id.* at 390.

[FN114]. *Id.*

[FN115]. *Id.*

[FN116]. *Id.* at 391.

[FN117]. *Id.* at 397.

[FN118]. Fed.R.Evid. 803(24), 804(b)(5).

[FN119]. *Dallas County*, 286 F.2d at 396-97.

[FN120]. Fed.R.Evid. 803(24)(c), 804(b)(5)(c).

[FN121]. 542 F.2d 285 (5th Cir.1976).

[FN122]. *Id.* at 287.

[FN123]. *Id.*

[FN124]. *Id.* at 289-90.

[FN125]. *Id.*

[FN126]. *Id.*

[FN127]. *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir.1977).

[FN128]. *United States v. Carlson*, 547 F.2d 1346 (8th Cir.1976), cert. denied, 431 U.S. 914 (1977); *United States v. Garner*, 574 F.2d 1141 (4th Cir.1978), cert. denied, 439 U.S. 936 (1978).

[FN129]. 505 F.Supp. 1190 (E.D.Pa.1980).

[FN130]. *Id.* at 1263.

[FN131]. *Id.* at 1264. See also *United States v. Oates*, 560 F.2d 45 (2d Cir.1977).

[FN132]. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 302 (3d Cir.1983), rev'd on other grounds, 475 U.S. 574 (1986). See also Raeder, *supra* note 101, at 33.

[FN133]. *Oates*, 560 F.2d at 74, 77-78.

[FN134]. Raeder, *supra* note 101, at 33.

[FN135]. See *United States v. Mathes*, 559 F.2d 294 (5th Cir.1977).

[FN136]. See *DeMars v. Equitable Life Assur. Soc'y*, 610 F.2d 55 (1st Cir.1959) (other medical experts could testify to the facts contained in the unavailable doctor's medical report); *United States v. Fredericks*, 599 F.2d 262 (8th Cir.1979) (testimony of other eyewitnesses).

[FN137]. *Idaho v. Wright*, 497 U.S. 805 (1990).

[FN138]. See Raeder, *supra* note 101, at 36.

[FN139]. 497 U.S. 805 (1990).

[FN140]. *Id.* at 818.

[FN141]. U.S. Const. amend. VI. This right was made applicable to the states under the Fourteenth Amendment Due Process Clause. See *Ohio v. Roberts*, 446 U.S. 56 (1980).

[FN142]. *Roberts*, 446 U.S. at 63.

[FN143]. *Id.* at 66 (citations omitted).

[FN144]. *California v. Green*, 399 U.S. 149, 155 (1970).

[FN145]. See *supra* notes 142-43 and accompanying text.

[FN146]. *Roberts*, 446 U.S. at 65.

[FN147]. *Id.* at 59.

[FN148]. *Id.* at 75.

[FN149]. 475 U.S. 387 (1986).

[FN150]. *Id.* at 390.

[FN151]. *Id.* at 394.

[FN152]. *Id.*

[FN153]. *Id.*

[FN154]. *Id.* at 395-96.

[FN155]. *Id.* at 396.

[FN156]. *Id.* at 396-400.

[FN157]. For an interesting discussion of the *Roberts* and *Inadi* decisions, see Michael H. Graham, *The Confrontation Clause, The Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 *Minn.L.Rev.* 523 (1988).

[FN158]. 483 U.S. 171 (1987).

[FN159]. *Id.* at 176. “Bootstrapping” in the context of the use of co-conspirators’ statements means finding the preliminary facts of existence of the conspiracy, the defendant’s and declarant’s participation in it, and the making of the questioned co-conspirators’ statement in the course of and furtherance of the conspiracy, not by evidence independent of the statement itself, but taking into account the questioned statement.

[FN160]. *Id.* at 182-83.

[FN161]. *Id.* at 182.

[FN162]. *Id.* at 183.

[FN163]. 112 S.Ct. 736 (1992).

[FN164]. *Id.* at 742-43.

[FN165]. *Id.* at 742.

[FN166]. *Id.*

[FN167]. *Id.* at 743.

[FN168]. One should note that the Court approved the admissibility of evidence falling within the statements for medical diagnosis exception in *White* even though the statement there involved an assertion of identity of the perpetrator of the injury. Such an expanded version of the exception exceeds the scope intended by the drafters of the Federal Rules of Evidence. See *Fed.R.Evid. 803(4)* advisory committee's note. *Cleary, supra note 61, § 292, at 465 nn. 10-11.*

[FN169]. 497 U.S. 805 (1990).

[FN170]. Namely, the Wright Court restated “[t]he two-pronged test of *Roberts*, that the Court did not adopt an across-the-board unavailability test in *Roberts*, and that the co-conspirators’ ‘exception’ was ‘firmly rooted’ enough under the *Roberts* standard not to require independent indicia of reliability.” *Id.* at 814-15.

[FN171]. The Wright Court stated “[f]or purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause.” *Id.* at 816.

[FN172]. *Id.* at 817.

[FN173]. *Id.* at 811-12.

[FN174]. *Id.* at 817.

[FN175]. *Id.* at 818. Note that the Wright Court used the quoted phrase to equate with the “indicia of reliability” prong of *Roberts*, citing language in *Roberts*, *Bourjaily*, and *Lee v. Illinois*, 476 U.S. 530 (1986). *Wright*, 497 U.S. at 817.

[FN176]. *Id.* at 819. The State argued that particularized guarantees of trustworthiness could be shown by a totality of the circumstances, including other trial evidence corroborating the statement. *Id.* The Wright Court rejected that argument. *Id.* Moreover, the state supreme court found that lack of procedural safeguards necessitated the finding of lack of trustworthiness. *Id.* The Wright Court rejected that reasoning. *Id.*

[FN177]. In fact, the Federal Rules of Evidence are, in at least one respect, more restrictive than the requirements of the Confrontation Clause. See, e.g., *California v. Green*, 399 U.S. 149 (1970) (noting in dictum that

prior statements of a witness, subject to cross-examination at trial, were constitutionally admissible for the truth of the matter asserted even though the prior statements were not made under oath). The Federal Rules of Evidence allow a prior inconsistent statement not made under oath to be used only for the purpose of impeaching the credibility of a witness. [Fed.R.Evid. 613](#). See also *Dutton v. Evans*, 400 U.S. 79 (1970) (Stewart, J., writing a rather elusive plurality opinion regarding the use of co-conspirators' statements).

[FN178]. [390 U.S. 719 \(1968\)](#).

[FN179]. *Id.* at 720.

[FN180]. [Fed.R.Evid. 804\(a\)\(5\)](#).

[FN181]. [390 U.S. at 720](#).

[FN182]. *Id.* at 724-25.

[FN183]. [Fed.R.Evid. 804\(b\)\(1\)](#).

[FN184]. *Ohio v. Roberts*, [446 U.S. 56, 63 \(1980\)](#).

[FN185]. [380 U.S. 400 \(1965\)](#). Pointer made the Confrontation Clause applicable to the states under the Fourteenth Amendment. *Id.* at 403.

[FN186]. *Id.* at 407.

[FN187]. [380 U.S. 415 \(1965\)](#) (Douglas was the companion case to Pointer).

[FN188]. *Id.* at 416-17.

[FN189]. *Id.* at 419-20.

[FN190]. [410 U.S. 284 \(1973\)](#).

[FN191]. *Id.* at 302.

[FN192]. Interestingly, the officer's conduct may have been a nonverbal statement; his conduct was an expression of his belief that the gunfire had come from the alley. If the officer intended to communicate that belief, then the conduct would be a statement, and inadmissible unless it was a dying declaration under [Fed.R.Evid. 804\(b\)\(7\)](#); the question would then be whether the policeman had knowledge of impending death.

[FN193]. *Chambers*, [410 U.S. at 289](#).

[FN194]. *Id.* at 287-88.

[FN195]. *Id.* at 289.

[FN196]. *Id.* at 291.

[FN197]. *Id.* at 291-92.

[FN198]. *Id.* at 294. The voucher or witness voucher rule holds that the party who calls a witness vouches for the witness' credibility and is bound by the testimony; that party cannot impeach the witness unless the witness is declared "hostile" or "adverse" by the court. *Id.*

[FN199]. *Id.* at 294.

[FN200]. *Id.* at 289.

[FN201]. *Id.* at 294.

[FN202]. *Id.* at 302-03.
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REFLECTIONS ON THE RULE AGAINST HEARSAY

Irving Younger*

The rule against hearsay has a peculiar shape. Four words long as Federal Evidence Rule 802 puts it, "hearsay is not admissible," it proceeds immediately to that fearsome prepositional phrase, "with exceptions . . ." And the exceptions, in the formulation of Federal Evidence Rules 803 and 804, run to some 2,500 words.¹ If the rule were stretched from where we sit to the football stadium, the exceptions would reach Miami.²

This parlous state of affairs is similar to astronomy's before Copernicus. Ptolemy set a motionless earth in the center and, calculating from there, accounted for the observed positions of the heavenly bodies, though by an elaboration of cycles, epicycles, deferents, and equants quite enough to drive a man mad. When Copernicus proclaimed the sun immobile with the planets revolving around it, he wrought an exquisite simplicity. Every thinker knows that as a proof, a proposition, a theory becomes complicated, the less the chance that it is true; and if "truth" be too chimerical a measure, then the less its elegance, the more muted the mental pleasure it furnishes.³

Imagine, if you please, that we display to a practitioner of one of the "exact" or "rigorous" branches of knowledge our cherished rule against hearsay with all its exceptions piled up

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1. Nor are the Federal Evidence Rules unique. Compare CAL. EVID. CODE §§ 1200-1205 (West 1966)(rule against hearsay and general provisions, 50 lines of type), *with id.* (exceptions to the rule against hearsay, 429 lines of type). See also E. FISCH, NEW YORK EVIDENCE (2d ed. 1977)(pages 446-56 dealing with the rule, pages 457-589 with the exceptions).

2. These words were intended to be spoken at the University of South Carolina School of Law Auditorium in Columbia, South Carolina.

3. This principle of parsimony, also known as "Ockham's razor," was frequently used in philosophical proofs at least as early as William of Ockham (1285-1349). See 8 THE ENCYCLOPEDIA OF PHILOSOPHY 307 (P. Edwards ed. 1967).

behind it and that we inquire of him, as a friendly but intelligent stranger to the law, what he makes of it.

"Redo your experiments," he responds.

"Lawyers don't do experiments," quoth we.

"Then redo your theory," he remarks, "and cease troubling me with the needless mystifications of a jejune discipline."

Our friend's impatience brings it home to us that the structure of hearsay theory has taken on a shape ungainly and ill-proportioned. This lack of comeliness suggests something amiss with the method by which we lawyers have elaborated our most famous rule of evidence. Since things ought not to be left so sadly out of joint, let me try to bemuse the leaden-footed minutes you have allotted me by attempting a more satisfactory expression of the rule against hearsay.

We were taught in law school that cross-examination is the central feature of a common-law trial. Deprive the adversary of cross-examination, and the evidence will not be received against him. The name we attach to this sort of evidence which is inadmissible for no other reason than the lack of opportunity to cross-examine, is hearsay; and the rule against hearsay is a way of giving effect to the judgment that, unless it can be cross-examined, evidence ought not to be admitted. The vice of hearsay, in a word, is the lack of opportunity to cross-examine. That is why we define hearsay in terms of cross-examination. Hearsay is evidence that depends for its probative value upon the credibility of someone who cannot be cross-examined.⁴ Or, in somewhat shorter form, hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement.⁵

I claim, however, that cross-examination or its absence is a ring around the target, not the bull's-eye. I suggest that what the law gives the adversary is protection, not against uncross-examined evidence, but against unreliable evidence. Although the principal assurance of reliability is cross-examination, it is not the sole assurance. When we point to cross-examination as the basis of the rule against hearsay, therefore, we are a few degrees off center. It is to reliability we should look.

"Perhaps," I hear you say, "but we're not putting our money on a mere assertion. It's demonstration we want."

4. See 1 S. GREENLEAF, EVIDENCE 111-12 (1842).

5. See FED. R. EVID. 801(c).

I acknowledge your demand and report that, seeking to satisfy you, I turned to two sources. I went first to the library, and then to the computer. In the library, I found three lines of cases to support my idea that the rule against hearsay is really a rule against unreliable evidence. The first line of cases consists in battle-pieces, large canvases on which can be observed heroic judges seizing the monster hearsay by its scaly neck and hacking it to pieces.

For example, in *Dallas County v. Commercial Union Assurance Co.*,⁶ the tower of the Dallas County Courthouse in Selma, Alabama, collapsed. Since the insurance covered loss due to lightning, that is what the county claimed to have caused the catastrophe, adducing some charred timbers for proof. The defendants sought to avoid coverage by disputing the cause: the charred timbers, they asserted, were remnants of a fire that had occurred in 1901. To support their contention, the defendants offered a copy of the Selma Morning Times for June 9, 1901, describing the fire. The county's objection was overruled, and the court of appeals affirmed a jury verdict in defendants' favor as follows:

There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence. In 1901 Selma, Alabama, was a small town. Taking a common sense view of this case, it is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire. He is without motive to falsify, and a false report would have subjected the newspaper and him to embarrassment in the community. The usual dangers inherent in hearsay evidence, such as lack of memory, faulty narration, intent to influence the court proceedings, and plain lack of truthfulness are not present here. To our minds, the article published in the Selma Morning Times on the day of the fire is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later.

. . . We do not characterize this newspaper as a "business record," nor as an "ancient document," nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy,

6. 286 F.2d 388 (5th Cir. 1961).

relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds.⁷

In *State v. Gause*,⁸ the defendant appealed his conviction for murdering his wife. The trial judge had admitted the victim's will, which contained expressions of fear that her husband would kill her, as well as evidence of oral statements to the same effect. After reviewing the precedents characterizing such declarations as non-hearsay so long as the victim's state of mind is in issue⁹ but as hearsay when it is not, the court said:

We fail to apprehend some of the nice distinctions with which the courts play in applying the hearsay rule.

. . . .

We note that in the cases on this and related points the courts often resort to strained logic to attain the desired result. In determining the identity of the person committing a murder, the fact that the victim had reason to fear the defendant has some probative value. The indicia of reliability of the hearsay statements are as certainly present on the question of identity as they are on the issue of accident or suicide. We fail also to grasp the attempted distinction regarding when the state of mind of the victim is or is not in issue. We are not impressed with pious instructions to the jury which tell them to consider the statements of the victim only for the purpose of determining the victim's state of mind.

Courts have tended to permit hearsay to be introduced in evidence when, for some reason or other, such evidence has a special reliability. . . . In examining the evidence objected to here, we find that although it does not completely fit into any of the well recognized categories of exceptions to the hearsay rule, it does have a special reliability.

. . . .

Let us meet the problem head-on, brush aside the sophistry, and say that when expressions of fear by a murder victim, though they may be hearsay, are relevant, have probative value on the issue of identity, and when in human experience they have sufficient reliability, they should be admitted in

7. *Id.* at 397-98.

8. 107 Ariz. 491, 489 P.2d 830 (1971).

9. The victim's state of mind would have been in issue had the defendant raised a claim of suicide or self-defense, which he did not.

evidence.¹⁰

These are not the only examples,¹¹ but they suffice to exhibit the victory of "reliability" over "hearsay." The second kind of case is a domestic interior wherein a competent and efficient judge goes about the homely business of deciding an apparently everyday hearsay point, but with just enough décolletage to permit us to make out the real basis of the receipt or exclusion of hearsay, and, lo, it is reliability.

In *Vincent v. Thompson*,¹² the question was whether Dr. Thompson had administered a certain drug to plaintiffs' daughter. When plaintiffs testified that Dr. Thompson admitted it, the drug manufacturer objected on the ground of hearsay. The court quoted from an earlier case as follows:

"The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. Exceptions to the hearsay rules are being broadened and created where necessary. . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts in civil cases."¹³

Applying these considerations to *Vincent*, the court held the hearsay to be admissible: "Under the circumstances, the only way the hearsay evidence could be deemed inadmissible against Parke, Davis would be by a rigid and slavish adherence to a black-letter rule. We should not thus elevate form over substance in disregard of the requirements of justice."¹⁴

Having come this far, let me give voice to an objection many of you doubtless might raise were you inclined to be uncivil.

10. 107 Ariz. at 494-95, 489 P.2d at 833-34 (citation omitted).

11. Others are *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975); *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968); *Hew v. Aruda*, 51 Hawaii 451, 462 P.2d 476 (1969); *Woll v. Dugas*, 104 N.J. Super. 586, 250 A.2d 775 (1969). In Massachusetts, "a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant." MASS. GEN. LAWS ANN. ch. 233, § 65 (West 1959).

12. 50 A.D.2d 211, 377 N.Y.S.2d 118 (1975).

13. *Id.* at 225, 377 N.Y.S.2d at 131 (quoting *Fleury v. Edwards*, 14 N.Y.2d 334, 341, 200 N.E.2d 550, 554, 251 N.Y.S.2d 647, 653 (1964)).

14. *Id.* at 225, 377 N.Y.S.2d at 131 (citations omitted).

Granted, you would say, reliability figures significantly in these cases, perhaps even to the supersession of cross-examination. But what difference does it make? Suppose courts continued to use the old categories, making sidelong references to reliability from time to time. Would we be any the poorer? My answer: I do not know whether we would be poorer. I do know that a forthright recognition of the bases of decision, in plain English, calling things by their right name, would contribute something, perhaps much, to the coherence of the law and its maturation as a genuinely intellectual calling.

To illustrate my point, I remind you of *Palmer v. Hoffman*.¹⁵ There, supporting its defense to a claim of negligence, the railroad offered its engineer's report. Hearsay, argued the railroad, but admissible as a business record. The Supreme Court affirmed the trial court's refusal to admit the report because, it said, the report was "not a record made for the systematic conduct of the business as a business."¹⁶

Now pair with *Palmer v. Hoffman* a decision of the Appellate Division in New York, *Matter of Ronald B.*¹⁷ The subject of the appeal was an adjudication of juvenile delinquency on account of the juvenile's possession of an operable handgun. After arresting the juvenile and finding the gun, the police had sent it to the ballistics laboratory for testing. The laboratory report was offered as a business record; the juvenile objected on the authority of *Palmer v. Hoffman*; and the court held the report admissible because it "does further the business of the police department."¹⁸

Instead of balderdash about an accident report not part of the railroad's business while a ballistics report is part of the police department's business, would it not be more satisfactory to face up to the obvious? The report in *Palmer v. Hoffman* was inadmissible because the court did not trust it. The report in *Matter of Ronald B.* was admissible because the court did trust it. Railroad engineers involved in accidents may lie. Ballistics

15. 318 U.S. 109 (1943).

16. *Id.* at 113.

17. 61 A.D.2d 204, 401 N.Y.S.2d 544 (1978).

18. *Id.* at 208, 401 N.Y.S.2d at 547. The court referred to reliability, but in connection with the general acceptance that suffices to excuse what would otherwise be the requirement of expert testimony about the scientific basis of a technical device. This has nothing to do with the point at issue in *Ronald B.*

tests do not. This is the reading of *Palmer v. Hoffman* we are given in Federal Evidence Rule 803(6).¹⁹ It is heard as a kind of echo in *Matter of Ronald B.* But were the echo sounded *forte* and in C major, were the court in a case like *Palmer v. Hoffman* or *Matter of Ronald B.* to say the record is admissible because it is reliable and for no other reason, the tears of pride would run down my cheeks, and I suspect yours too.

Before leaving this second kind of case, there is a last point to be made, requiring recitation of yet another example. In *Potter v. Baker*,²⁰ the plaintiff claimed to have been struck at an intersection by defendant's car. On the issue of defendant's negligence, plaintiff offered to testify that, when she came to, some moments after the impact, she heard a pedestrian exclaim to another, "God, he [defendant] rushed the light." The trial judge sustained defendant's objection on the ground the hearsay was unreliable. The intermediate appellate court reversed on the ground the hearsay was admissible as an excited utterance, and the supreme court reversed again, affirming the trial judge's ruling. In such matters, the appellate court must not substitute its judgment for the trial court's. If the latter's ruling is reasonable, it will be affirmed.²¹

Observe what *Potter* adds to the discussion. It places on the judge the responsibility to determine, at the threshold and as a matter of sound discretion, whether the evidence is reliable enough to be admitted. If the judge decides that it is unreliable as he did in *Potter*, he excludes the evidence. If he decides otherwise, he admits it. What follows from this? You shall see, ladies and gentlemen, you shall see.

19. Under Federal Evidence Rule 803(6), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if 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, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. RULE EVID. 803(6).

20. 162 Ohio St. 488, 124 N.E.2d 140 (1955).

21. *Id.* at 500, 124 N.E.2d at 146-47.

My third line of cases is the line, chiefly in the United States Supreme Court, construing the sixth amendment right of confrontation. There is an enormous number of things to say about these cases. Here, my purpose is simply to sketch out a preliminary view of the way in which they are affecting the law of hearsay.

The sixth amendment right of confrontation is a guarantee that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²² In 1965, the Supreme Court set out to develop a definition of confrontation, devoting roughly one case per term for five years to various aspects of the problem.²³ But a review of those cases is not to the point.²⁴ What is, rather, is that today the right of confrontation is separated into two branches. In one, the right of confrontation assures that the defendant's cross-examination of persons who take the stand against him will have the broadest possible scope.²⁵ The other branch tries to answer the question when the right of confrontation permits or forbids hearsay to be received against the defendant. *California v. Green*²⁶ held that, so long as the defendant can cross-examine the hearsay declarant, either at the time of utterance or at trial, the right of confrontation does not bar receipt of the hearsay. In *Dutton v. Evans*,²⁷ however, it seems that the Court changed its mind. *Dutton* teaches that the test of confrontation is reliability. Putting it less opaquely, when hearsay is offered against the defendant in a criminal case, an objection under the confrontation clause will be overruled if the hearsay is reliable.²⁸

22. U.S. CONST. amend. VI.

23. See *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970); *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

24. Such a review may be found in Younger, *Hearsay and Confrontation*, 2 NAT. J. CRIM. DEF. 65 (1976).

25. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *Salazar v. State*, 559 P.2d 66 (Alaska 1976); *People v. Simmons*, 36 N.Y.2d 126, 325 N.E.2d 139, 365 N.Y.S.2d 812 (1975); *State v. Jalo*, 27 Oreg. App. 845, 557 P.2d 1359 (1976). This branch of the right of confrontation does not bear upon the subject of this lecture.

26. 399 U.S. 149 (1970).

27. 400 U.S. 74 (1970). In *Dutton*, no single opinion had the support of a majority of the Justices. The comments that follow in the text are addressed to Justice Stewart's plurality opinion.

28. *Id.* at 89-90. After summarizing the relevant circumstances surrounding the hearsay, Justice Stewart stated:

Whether one follows *California v. Green* or *Dutton v. Evans*, the method of analysis remains the same. When the prosecutor tenders hearsay, there are two objections to be considered. First, the hearsay objection, resolved by application of the jurisdiction's law of hearsay. If the objection is sustained, the prosecutor goes to something else. If the objection is overruled, defense counsel proceeds to the second objection, violation of the right of confrontation. That objection is determined by reference to the Supreme Court's attempts to say what confrontation is.²⁹ The two objections must be treated separately because they rest upon wholly different doctrinal foundations, as both Justice White for the majority in *Green*³⁰ and Justice Stewart for the plurality in *Evans*³¹ were at pains to say.

Now, as I read the recent cases on this second branch of the right of confrontation, a subtle pattern has begun to emerge. The courts are tending no longer to apply the two-step approach of *Green* and *Evans*. Instead, judges are inclining to reduce the two steps to one, something along these lines: Is the hearsay reliable enough to be admissible under the confrontation clause? If it is, ipso facto, it is admissible despite the rule against hearsay. In a metaphor, the confrontation clause has become a door. When the door is open, hearsay is admitted. When the door is closed, hearsay is excluded. The door is open when the hearsay is reliable. The test of the admissibility of hearsay therefore, is its reliability.

In *United States v. Medico*,³² the first of three illustrations of this pattern I propose to lay before you, the defendant was convicted of bank robbery. He owned a car with a certain license number. A bank teller was permitted to testify that that very

These circumstances go beyond a showing that Williams [the hearsay declarant] had no apparent reason to lie to Shaw [the prosecution witness]. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Id. at 89 (plurality opinion) (Stewart, J.).

29. That is, the trial judge must decide whether the law is *California v. Green*, *Dutton v. Evans*, or something else. See, e.g., *United States v. Puco*, 476 F.2d 1099, 1102-05 (2d Cir. 1973); *State v. Lunn*, 82 N.M. 526, 484 P.2d 368, 369-72 (1971).

30. 399 U.S. at 155-56.

31. 400 U.S. at 86-87.

32. 557 F.2d 309 (2d Cir. 1977).

license number was given the teller by a customer who received it from a passerby as the license number of the get-away vehicle. Affirming, the court remarked in text that "several factors contribute to the reliability of [the teller's] testimony,"³³ and in a footnote stated: "The Sixth Amendment guarantee of confrontation, therefore, should not blind us to the reality that the question of the admission of the hearsay statements, whether in a criminal or civil case, turns on due process considerations of fairness, reliability and trustworthiness."³⁴

In *United States v. West*,³⁵ the grand-jury testimony of one Brown had been admitted against the defendant after Brown's murder. Affirming the conviction, the court said:

Whether the circumstantial guarantees of trustworthiness of Brown's grand jury testimony are equivalent to those which arise from cross or direct examination . . . we need not determine. In this unusual case, those guarantees were probably greater.

. . . .

It should not be surprising that the same circumstances suffice to meet the requirements of [Rule] 804(b)(5) [of the Federal Evidence Rules] and of the Confrontation Clause.³⁶

Finally, in *United States v. Oates*,³⁷ we have a case in which the confrontation door was closed. At trial, the judge overruled defendant's objection to the receipt of two documents purporting to be the official report and worksheet of the chemist who analyzed as heroin the substance seized from the defendant. On appeal, the government argued that the report was admissible under Federal Evidence Rules 803(6) ("records of regularly conducted activity"), 803(8) ("public records and reports"), and 803(24) ("other exceptions"). Other evidence casts considerable doubt upon the reliability of the report. The court of appeals reversed:

We thus consider it clear that Congress has expressed a firm intention that, if there are plausible doubts that evidence fitting within the literal terms of a hearsay exception could sur-

33. *Id.* at 315.

34. *Id.* at 314, n.4.

35. 574 F.2d 1131 (4th Cir. 1978).

36. *Id.* at 1136, 1138.

37. 560 F.2d 45 (2d Cir. 1977).

vive confrontation analysis, the hearsay exception should be construed with considerable flexibility so that the court can, if possible, avoid deciding the constitutional question.³⁸

Which is as much as to say that receipt or exclusion of hearsay under the rule against hearsay will be determined by deciding whether it is admissible or inadmissible under the confrontation clause, which in turn is as much as to say that the receipt of hearsay depends upon its reliability.

There is my account of what I found in the library. Come with me now to the computer room and gaze upon the console. You must understand that were I to lay a finger upon that console, I would instantly short out the computer, the university, and probably the Strategic Air Command. Consequently, I did not lay a finger upon the console. I prevailed upon Daniel Cohn, of the Massachusetts Bar, then a third-year law student at Cornell, to devise and run a LEXIS program to suit my purpose.

The program had a presupposition, and I had better reveal it. I believe that lawyers and judges usually sense the inadequacies of legal theory and, though they may be unable or unwilling to put it into words, act upon their impression by ignoring the theory. I believe too that when lawyers and judges ignore the theory, it is too bad for the theory, not for the lawyers and judges. It is time then to change the theory.

If I am right that the rule against hearsay is not a rule against uncross-examined evidence but rather is a rule against unreliable evidence, it would comport with the beliefs I have just stated to you to conclude that lawyers and judges act accordingly: that is, hearsay is received when it is reliable, without regard to doctrinal niceties. And since trial lawyers are rational men and women, able for themselves to determine what is reliable and reluctant to offer evidence only to see it excluded, does it not follow that reliable hearsay will be offered most of the time and that most of the time hearsay will in fact be admitted? That is what I used the computer to try to find out. In how many cases is hearsay admitted, without regard to the nature of the analysis undergirding the decision?

Here are the results:³⁹

38. *Id.* at 79.

39. Mr. Cohn's description of his method is as follows:

	Sampling of federal cases (Courts of Appeals and District Courts) since July 1976		Arizona Supreme Court 1976-77	Sampling of New York cases (all courts) 1973-77		
	number of cases	%	number of cases	%	number of cases	
Hearsay admitted	77	82%	40	81%	41	
Harmless error to admit hearsay	21		6		6	
Hearsay excluded	22	18%	11	19%	37	
	Sampling of Georgia Supreme Court 1973-77		Sampling of Illinois Supreme Court 1960-77		Sampling of Missouri Supreme Court 1973-77	
	number of cases	%	number of cases	%	number of cases	%
Hearsay admitted	50	78%	27	67%	26	76%
Harmless error to admit hearsay	9		5		9	
Hearsay excluded	17	22%	16	33%	11	24%

I first tried a program that summoned all cases containing the word "hearsay." Most of the cases thus summoned, however, dealt with sufficiency of evidence and were thus irrelevant. I then asked LEXIS for all cases containing the word "hearsay" and, within forty words of it, a word containing the letters ADMI, INADMI, ALLOW, EXCLU, PERMI, or IMPERMI. LEXIS told me how many cases fit that description. If the number was manageable (as in the case of Arizona), I looked at all of them. In the other instances, I sampled the cases at random. Between one-fourth and one-half of the cases summoned turned out to concern problems other than the admissibility of hearsay at trial. They were rejected, as were cases involving parole hearings or other administrative proceedings. Even in the instance of Arizona, this research probably did not disclose all cases that considered hearsay problems. But that is unimportant. The crucial thing is that everything I did was neutral as between admitting or excluding the hearsay evidence. The program was calculated to search no harder for cases excluding the evidence than admitting it, and, when I chose sample cases from among those summoned by the program I did so at random. Thus I believe that the proportion of cases admitting the hearsay to those excluding it fairly represents the practice in each of the jurisdictions I surveyed.

This first, tentative, incomplete, and flawed attempt to find out by computer what actually happens in court when hearsay is offered in evidence tends to confirm my hypothesis. There is no rule against hearsay. Hearsay is usually admitted.⁴⁰ The basis of receiving it is its reliability. Thus, there is only a rule against unreliable evidence. If and when everyone agrees, we will rewrite our statutes or reformulate the common law something like this:

“Hearsay is admissible”

But since, when I talked about *Potter v. Baker* some while ago⁴¹ I promised that you would see what follows from it, let me continue my draft in this manner:

“ . . . unless the court decides as a preliminary question that the hearsay could not reasonably be accepted by the finder of fact as trustworthy. The finder of fact remains free to disbelieve admitted hearsay.”

Having given the world this proposed new rule, I know three things to a certainty. First, I know that it will be attacked as novel. But surely it is not for that reason wrong. Second, I know that it will be attacked on the ground that under it, rulings on hearsay will be unpredictable. But no less predictable, I should think, than under the present hodgepodge. Third, I know that it will be attacked on the ground that it is unrealistic to think that lawyers and judges can be as straightforward as adoption of the new rule would require. There, alas, I have no defense.⁴²

Letter from Mr. Cohn to *South Carolina Law Review* (August, 1980), on file with *South Carolina Law Review*.

40. Even in New York, where the percentage of cases excluding hearsay is highest, hearsay is admitted more than half the time.

41. See text following note 20 *supra*.

42. But then again, perhaps I do. The Bench and Bar of England have accepted reform of the rule against hearsay similar to the one proposed here. See The Civil Evidence Act, 16 & 17 Eliz. 2, c. 64 (1968); LAW REFORM COMMITTEE, THIRTEENTH REPORT, CMD No. 2964, at 9-10 (1966); CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, CMD No. 4991, at 137-39 (1972).

NDNY FCBA

RELEVANCE AND HEARSAY REFRESHER

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Relevance and Hearsay

Introduction

- Why a course on evidence law?
- Why focus on relevance and hearsay?
- Course materials
 - Relevant FRE (but not ACN)
 - Hearsay flowchart

Relevance and Hearsay

Introduction

- Why a course on evidence law?
- Why focus on relevance and hearsay?
- Course materials
 - Relevant FRE (but not ACN)
 - Garland article
 - Out-dated portions: references to FRE 803(24) and FRE 804(b)(6) – residual hearsay exception now in FRE 807; pre-*Crawford* confrontation clause law

Relevance and Hearsay

Introduction

- Why a course on evidence law?
- Why focus on relevance and hearsay?
- Course materials
 - Relevant FRE (but not ACN)
 - Hearsay flowchart
 - Garland article
 - Younger article

Relevance and Hearsay

Relevance

- FRE 401 and 402

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Relevance and Hearsay

Relevance

- **FRE 401 and 402**

Rule 401. Test for Relevant Evidence

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.

Relevance and Hearsay

Relevance: FRE 401

- “Relevance” is a relational concept: you cannot tell if evidence satisfies FRE 401 unless you know what fact it is offered to prove.
- See, e.g., *Davis v. Rodriguez*, 364 F.3d 424, 436 (2d Cir. 2004) (in an excessive force case, evidence of the crime that the police officer believed the plaintiff had committed was relevant to whether the force used was excessive for the crime under investigation even if not relevant if offered to show whether there was probable cause to arrest the plaintiff).

Relevance and Hearsay

Relevance: FRE 401

- “Relevance” is a relational concept: you cannot tell if evidence satisfies FRE 401 unless you know what fact it is offered to prove.
- **The threshold for “relevance” is very low – “any tendency,” not “preponderance of the evidence”**
 - Assess the case with the evidence and without it.
 - Does the proffered evidence make the existence of a fact of consequence to the case more or less likely?

Relevance and Hearsay

Relevance: FRE 401

- Matters of witness credibility and the reliability of evidence are matters of consequence
- *See, e.g., United States v. Escalera*, 536 Fed.Appx. 27, 33 (2d Cir. 2013) (evidence of drug transaction in which the defendant was not involved was relevant to the credibility of a witness who was involved in the transaction).; *see also United States v. Quattrone*, 441 F.3d 153, 185 & n.31 (2d Cir. 2006) (dispute unrelated to the charges was relevant because it went to credibility).

Relevance and Hearsay

Relevance: FRE 401

- There is no legal test for relevance. Rather it is based on common sense, human experience, scientific principles, or empirical information

Relevance and Hearsay

Relevance: FRE 401

- There is no legal test for relevance. Rather it is based on common sense, human experience, scientific principles, or empirical information
- Evidence or testimony about events or matters not described in the complaint or answer, or occurring at a different time or place than the events or matters at issue should raise relevance concerns

Relevance and Hearsay

Relevance

- **FRE 403**

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Relevance and Hearsay

FRE 403

- FRE 403 is based on the recognition that relevant evidence can carry “baggage.”

Relevance and Hearsay

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 - “Accuracy baggage” – “unfair prejudice, confusing the issues, misleading the jury”

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 - “Accuracy baggage” – “unfair prejudice, confusing the issues, misleading the jury”
 - “Efficiency baggage” -- “undue delay, wasting time, or needlessly presenting cumulative evidence”
- **Accuracy baggage:**
 - May cause jury to decide a case based on emotion, an impermissible inference (such as a propensity inference); or misuse of evidence (such as use of an out-of-court statement to prove the truth of the matter asserted).

Relevance and Hearsay

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- **Concerns about the baggage must “substantially outweigh” the probative value of the evidence.**

Relevance and Hearsay

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- Accuracy baggage:
 - May cause jury to decide a case based on emotion, an impermissible inference (such as a propensity inference); or misuse of evidence (such as use of an out-of-court statement to prove the truth of the matter asserted)
- Concerns about the baggage must “substantially outweigh” the probative value of the evidence.
- **Considerable judicial discretion: use of a balancing test; the district court “may exclude”**

Relevance and Hearsay

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Relevance and Hearsay

Relevance

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Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially **outweighed** by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Relevance and Hearsay

FRE 403

- Rule 403 balancing test:
 - **Probative value of the evidence**
 - How compelling is the challenged evidence?
 - How important to the case?
 - How reliable?

Relevance and Hearsay

FRE 403

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Relevance and Hearsay

FRE 403

- Rule 403 balancing test:
 - **Probative value of the evidence**
 - How compelling is the challenged evidence?
 - How important to the case?
 - How reliable?
 - **Accuracy or efficiency concerns**
 - **Alternative means of proving the same fact without the baggage can diminish the “probative value” of the challenged evidence**
 - See *Old Chief v. United States*, 519 U.S. 172, 184 (“what counts as the Rule 403 ‘probative value’ of an item of evidence . . . may be calculated by comparing evidentiary alternatives.”)
 - See ACN to FRE 403: “In reaching a decision whether to exclude on grounds of unfair prejudice . . . [t]he availability of other means of proof may also be an appropriate factor.”
 - See ACN to FRE 404(b): “The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof”

Relevance and Hearsay

The Remaining Relevance Rules

- FRE 404(a) & 405: Character Evidence
- FRE 404(b): Other Act Evidence
- FRE 406: Habit Evidence
- FRE 407 to 411: Specialized Relevance Rules
 - FRE 407: Subsequent Remedial Measures
 - FRE 408: Compromise Offers and Negotiations
 - FRE 409: Offers to Pay Medical and Similar Expenses
 - FRE 410: Pleas, Plea Discussions, and Related Statements
 - FRE 411: Liability Insurance
- FRE 412-415: Sexual Offenses & Sexual Assault Cases
 - FRE 412: The Federal “Rape-Shield” Statutes
 - FRE 413: Similar Act Evidence in Criminal Sexual Assault Cases
 - FRE 414: Similar Act Evidence in Criminal Child Molestation Cases
 - FRE 415: Similar Act Evidence in Civil Cases Involving Sexual Assault or Child Molestation

Relevance and Hearsay

Hearsay: The Definition

- “An out-of-court statement offered to prove the truth of the matter asserted”
 - “Statement”
 - “Out-of-court”
 - “Offered to prove the truth of the matter asserted”

Relevance and Hearsay

Hearsay Defined

- **FRE 801(a) & (b)**

Rule 801(a): “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

Relevance and Hearsay

Hearsay Defined

- **FRE 801(a) & (b)**

Rule 801(a): “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

- Note the focus on a person’s communication of fact-based information (an assertion) orally, in writing, or through non-verbal assertive conduct

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- Note the focus on a person’s communication of fact-based information (an assertion) orally, in writing, or through non-verbal assertive conduct

Rule 801(b): “Declarant” means the person who made the statement.

Relevance and Hearsay

Hearsay Defined

- **FRE 801(c)**

Rule 801(c)(1): “the declarant does not make while testifying at the current trial or hearing”

Relevance and Hearsay

Hearsay Defined

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Rule 801(c)(1): “the declarant does not make while testifying at the current trial or hearing”

- Note that “out-of-court” in the definition of hearsay means “not before the fact-finder in the current trial or hearing”

Relevance and Hearsay

Hearsay Defined

- **FRE 801(c)**

Rule 801(c)(1): “the declarant does not make while testifying at the current trial or hearing”

- Note that “out-of-court” in the definition of hearsay means “not before the fact-finder in the current trial or hearing”
- An “out-of-court” statement can be made in court in the same proceeding but not before the fact-finder (pretrial hearing testimony can be “hearsay”)

Relevance and Hearsay

Hearsay Defined

- **FRE 801(c)**

Rule 801(c)(2): “a party offers [the statement] in evidence to prove the truth of the matter asserted in the statement.”

Relevance and Hearsay

Hearsay Defined

- **FRE 801(c)**

Rule 801(c)(2): “a party offers [the statement] in evidence to prove the truth of the matter asserted in the statement.”

- Truth of the matter that the declarant intended to assert when he made the out-of-court statement

Relevance and Hearsay

Hearsay Defined

- **FRE 801(c)**

Rule 801(c)(2): “a party offers [the statement] in evidence to prove the truth of the matter asserted in the statement.”

- Truth of the matter that the declarant intended to assert when he made the out-of-court statement
- Offered in court to prove the truth of what the declarant intended to assert when he/she made the out-of-court statement

Relevance and Hearsay

Hearsay: The Definition

- “An out-of-court statement offered to prove the truth of the matter asserted” means
 - An oral, written, or non-verbal fact-based assertion;
 - That was not made before the fact-finder in the current hearing or other proceeding;
 - When that assertion is offered in court to prove what the declarant intended to communicate when he made the assertion.

Relevance and Hearsay

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Relevance and Hearsay

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Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

The rule against hearsay expresses the view that a person's fact-based assertion, when offered to prove its truth, should be tested before the fact-finder by oath, observation of demeanor, and cross-examination, unless an exception applies.

Relevance and Hearsay

“Non-Hearsay”

- Rule 801(c)(2): “a party offers [the statement] in evidence to prove the truth of the matter asserted in the statement.”

Relevance and Hearsay

“Non-Hearsay”

- Rule 801(c)(2): “a party offers [the statement] in evidence to prove the truth of the matter asserted in the statement.”
- An out-of-court statement is “non-hearsay” when it is not offered to prove the truth of the matter that the declarant intended to assert but instead is offered to prove something that is not dependent on the truth of what the declarant asserted

Relevance and Hearsay

“Non-Hearsay”

- Rule 801(c)(2): “a party offers [the statement] in evidence to prove the truth of the matter asserted in the statement.”
- An out-of-court statement is “non-hearsay” when it is not offered to prove the truth of the matter that the declarant intended to assert but instead is offered to prove something that is not dependent on the truth of what the declarant asserted
- Note that this is a “relevance question,” not a hearsay question – is there a relevant non-hearsay use (one not dependent on the truth of what the declarant intended to assert) of the out-of-court statement?

Relevance and Hearsay

“Non-Hearsay”

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- An out-of-court statement is “non-hearsay” when it is not offered to prove the truth of the matter that the declarant intended to assert but instead is offered to prove something that is not dependent on the truth of what the declarant asserted
- Note that this is a “relevance question,” not a hearsay question – is there a relevant non-hearsay use (one not dependent on the truth of what the declarant intended to assert) of the out-of-court statement?
- If “yes,” it is not hearsay

Relevance and Hearsay

“Non-Hearsay”

- *Rivera v. Incorporated Village of Farmingdale*, 29 F. Supp. 3d 121, 136 (E.D.N.Y. 2013) (report recommending ways to redevelop housing without discriminating against Hispanic residents was hearsay if offered to prove that better redevelopment options were available but admissible as non-hearsay if offered to show that **city was on notice** of possible alternatives after receiving report; court was to consider a limiting instruction).
- *Abrams v. Dep’t of Public Safety*, 764 F.3d 244, 252 (2d Cir. 2014) (supervisors’ statements to African American applicant for position on elite detective unit that he would not “fit in” were admissible without regard to their truth as **evidence of discrimination**)
- *United States v. Balboa*, 2013 WL 6196606 (S.D.N.Y. 2013) (telephone call admissible to show **effect of statements on party who heard them** in call)
- *United States v. Mergen*, 764 F.3d 199, 207 (2d Cir. 2014) (use of a person’s out-of-court statement **to impeach** him is a non-hearsay use).

Relevance and Hearsay

“Non-Hearsay”

- Categories of Non-Hearsay (not exclusive):
 - **Legally operative statements / “verbal acts”**
 - Out-of-court statements that have legal effect merely because they were said
 - **State of mind of the declarant**
 - Note that the declarant’s state of mind must be relevant
 - Such statements also may be admissible under FRE 803(3) (present mental condition exception)
 - **Effect on the listener**
 - Note that the effect on the listener must be relevant
 - **Impeachment**

Relevance and Hearsay

Hearsay Exceptions

- Statements that are “not hearsay” by definition under FRE 801(d);
 - FRE 801(d)(1) “exceptions”
 - FRE 801(d)(2) “exceptions”
- FRE 803 exceptions
- FRE 804(b) exceptions
- FRE 807: residual hearsay exception

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Two categories of definitional “not hearsay”:
 - Rule 801(d)(1) “exceptions” – out-of-court statements by a declarant who testifies as a witness. These apply only when the declarant testifies.

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Hearsay “Exceptions” – “Not Hearsay” By Definition

- Two categories of definitional “not hearsay”:
 - Rule 801(d)(1) “exceptions” – out-of-court statements by a declarant who testifies as a witness. These apply only when the declarant testifies.
 - Rule 801(d)(2) “exceptions” – out-of-court statements by a party to the lawsuit or a person associated with the party in specified ways and offered into evidence against the party by the opponent in the lawsuit

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- Two categories of definitional “not hearsay”:
 - Rule 801(d)(1) “exceptions” – out-of-court statements by a declarant who testifies as a witness. These apply only when the declarant testifies.
 - Rule 801(d)(2) “exceptions” – out-of-court statements by a party to the lawsuit or a person associated with the party in specified ways and offered into evidence against the party by the opponent in the lawsuit
 - Sometimes statements in these categories are referred to as “non-hearsay”

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

Rule 801(d) Statements That Are Not Hearsay.

A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant’s testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1) “exceptions”:
 - The out-of court declarant must testify and be subject to cross-examination about the earlier out-of-court statement
 - A witness who cannot recall an incident under cross-examination is still “subject to cross-examination about the prior statement.” See *United States v. Owens*, 484 U.S. 554, 557, 561-64 (1988).

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Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - When a declarant testifies as a witness, all of his prior inconsistent statements are admissible as non-hearsay (not offered to prove the TOMA to impeach).

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - When a declarant testifies as a witness, all of his prior inconsistent statements are admissible as non-hearsay (not offered to prove the TOMA to impeach).
 - Rule 801(d)(1)(A) determines which of a declarant’s prior out-of-court statements are admissible substantively – to prove the truth of the matter asserted in the out-of-court statement.

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - When a declarant testifies as a witness, all of his prior inconsistent statements are admissible as non-hearsay (not offered to prove the TOMA to impeach).
 - Rule 801(d)(1)(A) determines which of a declarant’s prior out-of-court statements are admissible substantively – to prove the truth of the matter asserted in the out-of-court statement.
 - If a lawsuit turns on proof of the truth of a certain fact, impeachment alone is not sufficient to prove the fact.

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - The declarant must testify in the present trial or hearing and be subject to cross-examination concerning the earlier statement

Relevance and Hearsay

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A statement that meets the following conditions is not hearsay:

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(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - The declarant must testify in the present trial or hearing and be subject to cross-examination concerning the earlier statement
 - The earlier statement must have been made under penalty of perjury
 - The earlier statement must be “inconsistent” with the testimony in the present trial or hearing
 - The earlier statement must have been made at a trial, hearing, deposition or other proceeding

Relevance and Hearsay

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Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - What earlier statements qualify as “inconsistent?”
 - See *United States v. Truman*, 688 F.3d 129, 142 (2d Cir. 2012) (testimony at trial is “inconsistent” if a witness who earlier answered questions about certain facts now denies them, claims to forget, or refuses to answer questions about them)

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(A): Prior Inconsistent Statements
 - The earlier statement must have been made at a trial, hearing, deposition or other proceeding
 - Morale of the story: if a witness has testimony critical to your case and there is any chance that the witness will forget the facts or testify differently at trial, depose the witness.

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(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

- Rule 801(d)(1)(B): Prior Consistent Statements
 - Prior consistent statements can be relevant for non-hearsay (not truth of the matter asserted) purposes:
 - They are relevant to rehabilitate a witness by:
 - Rebutting claims of poor memory
 - Putting apparently inconsistent statements in context
 - Rebutting a claim that a witness’s testimony is tainted by an improper influence or motive (especially when the prior consistent statement predates such influence or motive)

Relevance and Hearsay

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- Rule 801(d)(1)(B): Prior Consistent Statements
 - Prior consistent statements can be relevant for non-hearsay (not truth of the matter asserted) purposes:
 - They are relevant to rehabilitate a witness by:
 - Rebutting claims of poor memory
 - Putting apparently inconsistent statements in context
 - Rebutting a claim that a witness’s testimony is tainted by an improper influence or motive (especially when the prior consistent statement predates such influence or motive)
 - **FRE 801(d)(1)(B): when the declarant testifies and is subject to cross-examination concerning the prior statement, if the statement is admissible to rehabilitate, it also is admissible substantively (to prove the truth of the matter asserted)**

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

Rule 801(d) Statements That Are Not Hearsay.

A statement that meets the following conditions is not hearsay:

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

Relevance and Hearsay

Hearsay “Exceptions” – “Not Hearsay” By Definition

Rule 801(d) Statements That Are Not Hearsay.

A statement that meets the following conditions is not hearsay:

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity

- Any out-of-court statement by a party to litigation is admissible when offered against that party, without regard to the content of the statement
- There is no “against interest” requirement in this rule
- Do not confuse this rule with the “statement against interest rule” under FRE 804(b)(3)

Relevance and Hearsay

Laying the Foundation for the Admission of Hearsay:

- **See FRE 104(a): “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”**
- **A court can consider the content of a hearsay statement when determining whether the proponent has satisfied the requirements of a hearsay exception**

Relevance and Hearsay

Laying the Foundation for the Admission of Hearsay:

- **See FRE 104(a): “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”**
- A court can consider the content of a hearsay statement when determining whether the proponent has satisfied the requirements of a hearsay exception

Rule 801(d)(2): Statements That Are Not Hearsay.

“. . . . The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).”

Relevance and Hearsay

FRE 803 Exceptions

- Whether the declarant is available and whether the declarant testifies does not matter for purposes of FRE 803
- May matter for purposes of admissibility under FRE 403 if the testimony is cumulative

Relevance and Hearsay

FRE 803 Exceptions

- Whether the declarant is available and whether the declarant testifies does not matter for purposes of FRE 803
- May matter for purposes of admissibility under FRE 403 if the testimony is cumulative
- FRE 803 does not guarantee admissibility of testimony or evidence – it only addresses whether testimony or evidence of an out-of-court statement overcomes a hearsay objection
- There may be an objection to the same evidence on some other basis

Relevance and Hearsay

FRE 803 Exceptions

Rule 803. Exceptions to the Rule Against Hearsay

The following **are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:**

Relevance and Hearsay

FRE 803 Exceptions

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Relevance and Hearsay

FRE 803 Exceptions

FRE 803(1) and (2):

- *United States v. Mejia-Valez*, 855 F. Supp. 607, 613-15 (E.D.N.Y. 1994) (telephone calls to 911 in which callers described a shooting that they just witnessed fell within both exceptions)
- *Mohamed v. Laz Parking*, 79 F. App'x 482, 483-84 (2d Cir. 2003) (customer complaint to garage supervisor after plaintiff garage attendant yelled at her and hit her car was an “excited utterance”)
- Consider any account of events that is substantially contemporaneous or any communication of a startling event that occurs soon thereafter as possibly admissible over a hearsay objection under these rules:
- Examples:
 - Notes of a meeting
 - Surveillance notes
 - Text messages or telephone call

Relevance and Hearsay

FRE 803 Exceptions

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:
(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

Relevance and Hearsay

FRE 803 Exceptions

FRE 803(3):

- One use of FRE 803(3) is the use of a declarant's statement of his present intent to act in the future as circumstantial evidence that the declarant did what he said that he intended to do. This is the so-called *Hillmon* doctrine. See *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892).

Relevance and Hearsay

FRE 803 Exceptions

FRE 803(3):

- One use of FRE 803(3) is the use of a declarant's statement of his present intent to act in the future as circumstantial evidence that the declarant did what he said that he intended to do. This is the so-called *Hillmon* doctrine. See *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892).
- See *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000) (“A declarant's out-of-court statement as to his intent to perform a certain act in the future is not excludable on hearsay grounds” and permitting such evidence to show that declarant acted in conformity with his stated intent)

Relevance and Hearsay

FRE 803 Exceptions

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Relevance and Hearsay

FRE 803 Exceptions

FRE 803(5):

- It is important to distinguish “**past recollection recorded**” -- a hearsay exception under FRE that permits a witness who no longer recalls something that he once knew and accurately recorded or documented when it was fresh in his mind to read from the record – from “**present recollection refreshed**” – which is a trial tactic (not a hearsay exception) that enables a litigant to “jump-start” a forgetful witness’s present memory by showing the witness a document or item that has such effect
- See *Brown v. Almager*, 2008 WL 1827640, at *9, n.16 (C.D. Cal. Apr. 22, 2008) (describing difference under California Evidence Code).

Relevance and Hearsay

FRE 803 Exceptions

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the opponent does not show that the source of information nor or the method or circumstances of preparation indicate a lack of trustworthiness.

Relevance and Hearsay

FRE 803 Exceptions

FRE 803(6):

- Note that so-called “business records” do not admit themselves. You must have:
 - A custodian of records or “another qualified witness” must testify to the requirements in FRE 803(6) to lay the foundation for the admission of a business record;
 - A certification under FRE 902(11) or 902(12); or
 - A stipulation
- There are advantages to interviewing a custodian of records about any business records you plan to use, even if you do not call the custodian as a witness

Relevance and Hearsay

FRE 803 Exceptions

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(8) **Public Records**. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the opponent does not show that the source of information nor or other circumstances indicate a lack of trustworthiness.

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

- Operates as a rule of preference: if the declarant is available or can, through reasonable efforts be made available, these hearsay exceptions do not apply and the proponent must call the declarant as a witness
- If, however, the proponent can establish that the declarant is not available (as defined in the rule), then the exceptions apply if their requirements are satisfied

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that **a privilege applies**;
- (2) **refuses to testify about the subject matter despite a court order to do so**;
- (3) testifies to **not remembering** the subject matter;
- (4) cannot be present or testify at the trial or hearing because of **death or a then-existing infirmity, physical illness, or mental illness**; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

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Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a)(5):

- Obligation to use “process or other reasonable means” to obtain the presence at trial of the declarant before resorting to the “former testimony” [804(b)(1)] or forfeiture by wrongdoing [804(b)(6)] exceptions;

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a)(5):

- Obligation to use “process or other reasonable means” to obtain the presence at trial of the declarant before resorting to the “former testimony” [804(b)(1)] or forfeiture by wrongdoing [804(b)(6)] exceptions;
- Obligation to use “process or other reasonable means” to obtain the presence at trial or a deposition of the declarant before resorting to the other 804(b) exceptions;

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a)(5):

- Obligation to use “process or other reasonable means” to obtain the presence at trial of the declarant before resorting to the “former testimony” [804(b)(1)] or forfeiture by wrongdoing [804(b)(6)] exceptions;
- Obligation to use “process or other reasonable means” to obtain the presence at trial or a deposition of the declarant before resorting to the other 804(b) exceptions;
- *See Colon v. Porliar, 2012 WL 3241466, at *2 (N.D.N.Y. Aug. 7, 2012)* (“Courts have found that a witness does not qualify as “unavailable” due to a mere absence from a hearing where the proponent does not establish that any reasonable, good faith steps were taken to procure presence.”).

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a)(5):

- Obligation to use “process or other reasonable means” to obtain the presence at trial of the declarant before resorting to the “former testimony” [804(b)(1)] or forfeiture by wrongdoing [804(b)(6)] exceptions;
- Obligation to use “process or other reasonable means” to obtain the presence at trial or a deposition of the declarant before resorting to the other 804(b) exceptions;
- *See Colon v. Porliar*, 2012 WL 3241466, at *2 (N.D.N.Y. Aug. 7, 2012) (“Courts have found that a witness does not qualify as “unavailable” due to a mere absence from a hearing where the proponent does not establish that any reasonable, good faith steps were taken to procure presence.”).
- **Cannot resort to the Rule 804 exceptions if you “procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from attending or testifying.”**

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(b)(1): Former Testimony

- Testimony in a deposition or earlier proceeding or trial of a now-unavailable witness;

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(b)(1): Former Testimony

- Testimony in a deposition or earlier proceeding or trial of a now-unavailable witness;
- Party against whom offered – or, in a civil case, a predecessor in interest – had an opportunity and similar motive to develop that testimony

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(b)(1): Former Testimony

- Testimony in a deposition or earlier proceeding or trial of a now-unavailable witness;
- Party against whom offered – or, in a civil case, a predecessor in interest – had an opportunity and similar motive to develop that testimony
- Courts interpret the “predecessor in interest” requirement very broadly: *Pacelli v. Nassau Cnty. Police Dep't*, 639 F. Supp. 1382, 1386 (E.D.N.Y. 1986) (“sufficient if party with opportunity and similar motive in first proceeding “shares a ‘community of interest’ with . . . the party in the second trial”); *In re Master Key Antitrust Litig.*, 72 F.R.D. 108, 109 (D. Conn. 1976) (government, when litigating an antitrust action, was a “predecessor in interest” of plaintiffs in later class action lawsuit)

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(b)(1): Former Testimony

- See *also* Fed. R. Civ. P. 32: Using depositions in court proceedings
 - (a) Using Depositions.
 - (1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:
 - (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
 - (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
 - (C) the use is allowed by Rule 32(a)(2) through (8).

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement that:

(A) 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 the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Relevance and Hearsay

FRE 804 Exceptions

Rule 804(a). Hearsay Exceptions When the Declarant is Unavailable

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

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Relevance and Hearsay

FRE 807: Residual Hearsay Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has **equivalent circumstantial guarantees of trustworthiness**;
- (2) it is offered **as evidence of a material fact**;
- (3) it is more **probative on the point for which it is offered than any other evidence** that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the **interests of justice**.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Relevance and Hearsay

FRE 805: Multiple Hearsay

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Relevance and Hearsay

FRE 806: Impeachment of Hearsay Declarants

Rule 806. Attacking and Supporting the Declarant

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Relevance and Hearsay

FRE 804 Exceptions

Rule 806: Impeachment of Hearsay Declarant

- *United States v. Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997) (“A hearsay declarant may therefore be impeached by showing that the declarant made inconsistent statements.”);
- *United States v. Moskowitz*, 215 F.3d 265, 270 (2d Cir. 2000) (“Rule 806 renders Rule 608’s impeachment rules [permitting impeachment by testimony concerning opinion and reputation or by cross-examination about specific instances of conduct showing a character for untruthfulness] applicable to a declarant's out-of-court statements.”), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

NDNY FCBA TRIAL PREPARATION

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YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

- **Get your documents organized for trial:**
 - Methods of file organization:
 - Subject files
 - Witness files
 - Legal issues files
 - Binders v. file folders
 - Digital v. paper documents
 - OCR and word searches
 - Identification of sources of materials
 - Pretrial discovery obligations: Fed. R. Civ. Pro. 26(a)(3)

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

- **Shape Your Case:**

- Develop a “theory of the case”
- Determine an “order of proof”
- Determine what you and your opponent must prove to win
 - Draft proposed jury instructions and use them as a guide
 - Must consider the necessary evidence as to each “element” of each cause of action and/or defense
- Determine if additional investigation/interviews are necessary
- Give consideration to the “big picture,” how the facts in your case will look to a non-attorney

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

• **Identify and Prepare for Potential Witnesses:**

- Need to determine what you may decide to prove (recalling that trials are dynamic) and how you will prove it.
 - What occurred does not matter; what you can prove is what matters
- Subpoena necessary witnesses and documents
 - See Fed. R. Civ. Pro. 45
- Prepare a file for each witness
 - Questions to be asked
 - Multiple copies of prior statements
- Develop a strategy of meeting with and preparing witnesses and potential witnesses

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

• **Identify and Prepare for Potential Witnesses:**

- Identify and prepare for potentially problematic witnesses
 - Child witnesses, elderly witnesses, hostile witnesses, forgetful witnesses, witnesses with significant impeachment baggage
 - Research witnesses – do not learn of their baggage from “opponent” during trial
 - Be aware of “tools” for use with problematic witnesses
 - Refreshing recollection; impeachment of own witness [FRE 607]; admission of prior inconsistent statements to prove the truth of the matter asserted [FRE 613 & 801(d)(1)(A)]; use of prior consistent statements [FRE 801(d)(1)(B)]

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

• **Identify and Prepare for Potential Exhibits:**

- Need to be familiar with rules regarding authentication of evidence
 - FRE 104(b); 901; 902
- Identify which witness will “lay the foundation” for which exhibits you plan to introduce at trial
- Obtain certifications under FRE 902(11) or 902(12) to establish the admissibility of business records without the need to call a custodian of records at trial
- Attempt to work out stipulations

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

• **Identify and Prepare for Potential Exhibits:**

- Determine whether summary charts will be useful in the presentation of your case
 - Need to be familiar with FRE 1006
 - Need to identify the witness who can lay the foundation for the admission of the summary chart
 - Need to give thought to the best way to present the summarized information/evidence

“The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.”

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

• **Identify and Prepare for Potential Exhibits:**

- Determine whether you have any trial notice or disclosure obligations:
 - FRE 415(b): Sex Abuse and Child Molestation Cases
 - FRE 612: Writings Used to Refresh Memory
 - FRE 613: Witness's Prior Statement
 - FRE 1006: Summary charts
- Identify in advance possible objections to your witnesses or evidence and be prepared to meet them
 - Motions *in limine*
 - During trial

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

- **Prepare for Your Opponent's Case:**

- Conduct investigation of opponent's witnesses for purposes of preparing cross-examination
 - Character for truthfulness
 - Bias or motive
 - Incapacity
 - Prior Inconsistent Statements
 - Contradictory evidence
- Do the same for your own witnesses to prepare to front unfavorable evidence and plan for rehabilitation

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

- **Investigate the “Playing Field”:**

- Be familiar with the local rules and the assigned judge’s policies, preferences, and practices
- See <https://www.nynd.uscourts.gov/federal-rules-local-rules-general-orders>
- Examples:
 - *Voir dire* practices
 - Jury selection practices
 - Preferences for use of exhibits
 - Preferences for objections

PREPARATION, PREPARATION, PREPARATION

YOUR CASE HAS BEEN SET FOR TRIAL – NOW WHAT??

WHAT DO YOU NEED TO DO TO GET READY?

- **Investigate the “Playing Field”:**

- Determine the technological capabilities of the courtroom
- See <https://www.nynd.uscourts.gov/courtroom-technology> and <https://www.nynd.uscourts.gov/courtroom-technology-faq>
- Make sure that you can effectively present your visual and audio aids during trial

PREPARATION, PREPARATION, PREPARATION