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ARTICLE EIGHT OF THE FEDERAL RULES OF EVIDENCE: THE HEARSAY RULE

LARRY G. EVANS*

INTRODUCTION

This article will deal with the treatment of hearsay evidence by Article Eight of the Federal Rules of Evidence.¹ The history of the hearsay rule, as well as prior efforts at its codification, will be discussed. The development of the Federal Rules of Evidence will be traced through the Judicial Conference of the United States, the United States Supreme Court and the United States Congress.

The Federal Rules of Evidence contain eleven articles. Of these, only Article Eight, dealing with hearsay, will be addressed here. Necessarily, other articles will be mentioned, but only in the context of their effect upon Article Eight. For example, rules 405² and 608³ deal with reputation evidence of character, but they are also treated in rule 803(21)⁴ of Article Eight. Whenever significant, not only the final Article Eight rule but also the change from the original proposal of the Judicial Conference will be discussed.

Although the Federal Rules of Evidence in general, and Article Eight in particular, technically apply only to proceedings in the courts of the United States and before United States magistrates, it is safe to predict that their effect will be felt in many other forums. In much the same way that the Federal Rules of Civil Procedure have led the way in reform of civil procedure in many states, the Federal Rules of Evidence may well be the forerunner of evidentiary change in state courts and legislatures.

Even before formal adoption by Congress, some United States courts were citing portions of the new rules.⁵ Many state courts have

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1. 120 CONG. REC. 570 (daily ed. Feb. 6, 1974) (a bill to establish rules of evidence for certain courts and proceedings). The Federal Rules were passed by the House of Representatives on February 6, 1974, and then sent to the Senate. Pursuant to rule 1103 of the Bill, all citations to the rules will be to sections of the Federal Rules of Evidence.

2. FED. R. EVID. 405.

3. FED. R. EVID. 608.

4. FED. R. EVID. 803(21).

5. See *United States v. Metcalf*, 430 F.2d 1197, 1199 (8th Cir. 1970) (holding that the adoption of another's statement may constitute an incriminatory admission), *citing* what is

referred to the rules as well and have relied upon them in reaching their decisions.⁶ In addition, the Supreme Court of New Mexico adopted the proposed Federal Rules of Evidence virtually without change⁷ and the Nevada legislature adopted these rules in 1971 with only some changes in the area of privilege.⁸

Portions of the Article Eight changes will, under the right circumstances, make it advantageous to practice under the Federal Rules of Evidence, as opposed to practice under state rules, and forum shopping would not be an unexpected side effect of the adoption of the federal guidelines. With this in mind, whether practicing in state or federal court, on a small or large scale, in criminal or civil cases, a working knowledge of these new rules will be essential to the attorney so involved.

HISTORY AND DEVELOPMENT OF THE HEARSAY RULE

Wigmore has fixed the origin of the hearsay rule in the period between 1675 and 1690.⁹ The fundamental application of the rule has been to exclude from evidence all "extra-judicial testimonial assertions,"¹⁰ if offered to prove the truth of the facts contained therein. The basic reason for rejection of the evidence was that it had no inherent likelihood of truthfulness and it could not be probed and tested by cross-examination.¹¹ Since its origin, courts have created exceptions to the hearsay rule as particular types of evidence

now FED. R. EVID. 801(d)(2)(B); *United States v. Karnap*, 477 F.2d 390, 392 (4th Cir. 1973) (dealing with records of regularly conducted activity), *citing* FED. R. EVID. 803(6); *Briggs v. Zotos Int'l, Inc.*, 357 F. Supp. 89, 93 (E.D. Va. 1973) (permitting cross-examination of an expert on reputable authorities with which he is familiar), *citing* FED. R. EVID. 803(18).

6. Decisions from at least fifteen states have referred to the Federal Rules of Evidence. Representative of them are: *State v. Igoe*, 206 N.W.2d 291, 294 (N.D. 1973) admitting prior sworn inconsistent statements as substantive evidence, *following* FED. R. EVID. 801(d)(1); *Beavers v. State*, 492 P.2d 88, 93 (Alaska 1971) permitting prior, unsworn, inconsistent statements as proof of the facts contained therein, *citing* FED. R. EVID. 800(c)(2)(1); *Orr v. State Farm Mutual Auto. Ins. Co.*, 494 S.W.2d 295 (Mo. 1973) *citing* FED. R. EVID. 804 whereby a declarant may be "unavailable" if he testifies to a lack of memory on a subject; and, in a dissenting opinion, *see* *People v. Rodgers*, ___ Mich. ___, 193 N.W.2d 412, 419 (1971), where admissibility of a past recollection recorded is urged and FED. R. EVID. 803(5) is cited.

7. N.M. STAT. ANN. § 20-4-101 (1973).

8. NEV. REV. STAT. ch. 402, §§ 1-17, 27-37, 70-85, 96-168 (1971).

9. 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1364 (3d ed. 1940) [hereinafter cited as WIGMORE].

10. *Id.* at § 1361.

11. *Id.* at § 1362.

were deemed to be sufficiently trustworthy to warrant their exclusion from the rule. These common law exceptions may vary from state to state but are generally familiar to the bench and bar.

While each state was developing its own approach to the hearsay rule, the practice in the federal courts with respect to hearsay, as well as other problems of evidence, was confusing. When the Federal Rules of Civil Procedure¹² were adopted by the Supreme Court¹³ in 1937, none of the efforts toward codification of the law of evidence, later discussed in this article, had begun. Various rules dealt with the subject of evidence but only in a makeshift manner. Rule 43(a)¹⁴ attempted to guide the federal courts in looking for the appropriate rule of evidence. The courts could look to statutes of the United States, rules of evidence in United States courts used in suits in equity or the rule of evidence applied in the courts of a state where the federal court was sitting.¹⁵ However, in the years since enactment of the rule, consistent application has proven difficult.¹⁶ Rule 43(a) encourages admissibility and specifies that the rule or statute which favors the reception of the evidence governs. However, obvious problems are presented where, for instance, a state rule admits and a federal statute excludes a given type of evidence. Other problems have arisen where there has been no federal authority on an evidence question. In some cases, the federal court has followed what it considered to be the "best approach,"¹⁷ while in other cases, state law has been followed.¹⁸ When state court decisions have been found, federal courts have been faced with a dilemma: are only the decisions of the highest court in the state binding or are decisions of lower state courts binding as well?¹⁹

12. For a discussion of the background of the Federal Rules of Civil Procedure, see 1B J. MOORE, *FEDERAL PRACTICE* ¶ 0.521, at 5601 (2d ed. 1965).

13. The Supreme Court's rule-making power originated with the rule-making statute of 1934, 28 U.S.C. §§ 723(b) and (c) (1940), later repealed and replaced by the 1948 revision of the Judicial Code; the present provisions of the rule-making act may be found at 28 U.S.C. §§ 2072 and 2073 (1970).

14. FED. R. CIV. P. 43.

15. Rules of Decision Act, 28 U.S.C. § 1652 (1970).

16. For a discussion of the problem, see *Preliminary Study Of The Advisability And Feasibility Of Developing Uniform Rules Of Evidence For The Federal Courts*, 30 F.R.D. 73, 95 (1962).

17. *E.g.*, *Peoples Loan & Inv. Co. v. Travelers Ins. Co.*, 151 F.2d 437 (8th Cir. 1945).

18. *E.g.*, *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F.2d 871, 887 (6th Cir. 1943), *cert. denied*, 320 U.S. 800 (1944).

19. *Supra* note 16 at 97.

The first effort to codify and make uniform the hearsay rule, together with its exceptions, began in 1898.²⁰ In that year, the Massachusetts Hearsay Statute of 1898 was enacted:

No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.²¹

Years later, in 1939, the American Law Institute, with John H. Wigmore as its consultant, turned to the subject of evidence and in 1942 promulgated the 112 rules comprising the Model Code of Evidence.²² The Model Code proposed the admission of hearsay whenever the declarant had first hand knowledge of the facts declared and when the declarant was unavailable.²³ The Model Code proved to be far too radical a change in existing law and it was never accepted by any jurisdiction; however, its influence has been felt since the time of its adoption and it has had a substantial impact upon the Federal Rules of Evidence.²⁴

Beginning in 1948, upon the request of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, using the Model Code as a guide, began work toward codifying the rules of evidence. The Uniform Rules of Evidence, consisting of 72 rules, were approved by the commissioners in 1953 and were approved by the American Law Institute in 1954.²⁵ The Uniform Rules moved more slowly than the Model Code, basically codifying existing case law except for two important changes. The first would have made prior consistent or inconsistent statements of a witness, made out of court, admissible as substantive evidence of the facts contained therein.²⁶ This proposal has now finally found its way into

20. Act of June 16, 1898, ch. 535 [1898] Mass. Acts & Resolves (now MASS. GEN. LAWS ANN. ch. 233, § 65 (1956)).

21. *Id.*

22. MODEL CODE OF EVIDENCE (1942); see also McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L. REV. 661 (1942).

23. MODEL CODE OF EVIDENCE rule 503(a) (1942); see also McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559 (1955).

24. See, e.g., remarks of Albert E. Jenner, Esq., Chairman, Advisory Committee on Rules of Evidence, 46 F.R.D. 161, 173-81 (1969).

25. UNIFORM RULES OF EVIDENCE (1953); see also Gard, *Kansas Law and the New Uniform Rules of Evidence*, 2 KAN. L. REV. 333 (1954).

26. UNIFORM RULES OF EVIDENCE 63(1) (1953).

the Federal Rules of Evidence.²⁷ The second important proposal pertained to statements of recent perception by an unavailable witness.²⁸ Although not now a part of the Federal Rules of Evidence, the same proposal was made in the preliminary and revised drafts of the Judicial Conference²⁹ but it was deleted by Congress.³⁰ To date, the Uniform Rules have been enacted only in Kansas,³¹ the Virgin Islands³² and the Canal Zone.³³ However, rules of evidence have been codified in the states of California³⁴ and New Jersey,³⁵ both of which borrow heavily from the Model Code and the Uniform Rules. Many of the Federal Rules of Evidence have their origin in one of these prior codifications.³⁶

While the hearsay rule in this country was generally resisting efforts at legislative codification, evidence acts were enacted in England as early as 1843.³⁷ The common law hearsay rule in England

27. FED. R. EVID. 801(d)(1)(B).

28. UNIFORM RULES OF EVIDENCE 63(4)(c) (1953).

29. Preliminary draft, Proposed Rules of Evidence 804(b)(2), 46 F.R.D. 161, 377 (1969); revised draft, 51 F.R.D. 315, 438 (1971).

30. The Subcommittee on Criminal Justice voted to delete this proposal because it "created a new and unwarranted hearsay exception of great potential breadth." *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 176 (Supp. 1973) [hereinafter cited as *1973 Hearings Supp.*].

31. KAN. STAT. ANN. §§ 60.401-470 (Cum. Supp. 1973).

32. V. I. CODE ANN. tit. 5 §§ 771-956 (1967).

33. C. Z. CODE tit. 5 §§ 2731-2996 (1963).

34. CAL. EVID. CODE ANN. §§ 1-1605 (West 1966).

35. N.J. REV. STAT. §§ 2A:84A-1—84A-47 (Cum. Supp. 1973).

36. The preliminary draft of the proposed rules of evidence, published in March, 1969, and found in 46 F.R.D. 161-426 (1969), as well as the revised draft, published in March, 1971, and found in 51 F.R.D. 315-473 (1971), and the final draft approved by the Supreme Court and submitted to Congress, found in 56 F.R.D. 183-360 (1973), contain advisory notes following each article of the rules. These notes are explanatory of the rules and also contain citations to the Model Code of Evidence, the Uniform Rules of Evidence, the California Evidence Code, the Kansas Code of Civil Procedure and the New Jersey Evidence Rules. This article will occasionally show the relationship between a rule of the Federal Rules of Evidence and one or more of these codifications. However, no exhaustive treatment is intended. For the complete background of a particular rule and information as to whether it has ever been used elsewhere, the advisory notes should be consulted.

The Subcommittee on Criminal Justice of the House of Representatives, in publishing its revised draft, included certain comments following each article. However, the comments are not comprehensive and do not detail the rationale behind the changes. For more information on the Subcommittee's work and its reasons for the revisions, see *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2 (1973) [hereinafter cited as *1973 Hearings*].

37. The Evidence Act of 1843, 6 & 7 Vict. c. 85.

may be summarized as follows:

In *England*, hearsay evidence, that is to say, the evidence of a man who is not produced in court and who, therefore, cannot be cross-examined, as a general rule is not admissible at all.³⁸

The Evidence Act of 1938³⁹ provided that where direct, oral evidence of a fact would be admissible, any statement made by a person in a document intended to establish that fact would, on production of the original document, be admissible as evidence of that fact under certain conditions. Then, on October 25, 1968, the English Civil Evidence Act of 1968 became law.⁴⁰ Moving from the admission of hearsay in documents to practically the complete abolition of the hearsay rule, the Act provided that, in any civil proceeding, an out of court statement shall be admissible as evidence of any facts contained therein to the extent that it is proven to be admissible by virtue of the Act.⁴¹ The Act then provided that any such statement, oral or in a document, made by any person, whether called as a witness or not, is admissible as evidence of the facts stated therein.⁴² The Act further eliminated the common law exceptions to the hearsay rule by providing for such evidence to be admissible only by virtue of a statutory provision or by agreement of the parties. While hearsay is now admissible in civil cases in England, it should be noted that in civil cases, no right to a trial by jury exists except in cases of fraud, libel, slander, malicious prosecution, false imprisonment or seduction.⁴³

The latest effort to codify the hearsay rule in this country,⁴⁴ together with other rules of evidence, began in March, 1961, when the Judicial Conference of the United States approved a proposal of the Standing Committee on Rules of Practice and Procedure for

38. *Dysart Peerage Case*, 6 App. Cas. 503 (1881).

39. The Evidence Act of 1938, 1 & 2 Geo. 6, c. 28.

40. The Civil Evidence Act 1968, c. 64, § 1. The Civil Evidence Act 1972, c. 30, § 1 authorizes hearsay statements of opinion as well as hearsay statements of fact.

41. *Id.*

42. *Id.*

43. County Courts Act of 1959, 7 & 8 Eliz. 2, c. 22, § 94.

44. And perhaps abolish it. See comments of Mr. Frank Raichle, a member of the Advisory Committee wherein he suggests that "hearsay, in plain English, is gossip." 48 F.R.D. 39-78 (1969).

a Federal Rules of Evidence project.⁴⁵ Then, on March 8, 1965, the Chief Justice of the United States, under the program of the Judicial Conference, by virtue of authority conferred by 28 U.S.C. § 331, appointed the Advisory Committee on Uniform Rules of Evidence.⁴⁶ The advisory committee consisted of distinguished members of the federal bench, professors of law and members of the bar with substantial experience in the trial of cases.⁴⁷ The committee met until December, 1968, and on January 30, 1969, submitted to the Standing Committee on Rules of Practice and Procedure, its preliminary draft of the Rules of Evidence for the United States District Courts and Magistrates, the first full-fledged effort at codification since 1953.⁴⁸ The standing committee approved the rules and on March 31, 1969, submitted the proposed rules to members of the bench and bar and solicited comments by April 1, 1970.⁴⁹ In October, 1971, the full Judicial Conference of the United States, after some revisions, approved the proposed rules.⁵⁰

On November 20, 1972, the Supreme Court of the United States, with slight revisions, prescribed the Federal Rules of Evidence⁵¹ pursuant to 18 U.S.C. §§ 3402, 3771, & 3772, and 28 U.S.C. §§ 2702 & 2705, to govern procedure in the courts of the United States.⁵² The rules were to take effect on July 1, 1973, and the Chief Justice was authorized to transmit the new rules to Congress; but the Supreme Court did not act unanimously. Mr. Justice Douglas dissented.⁵³ He felt that the "fashioning of rules of evidence" was essentially a task for the judiciary and not for the legislature. He also questioned whether or not rules of evidence were included in "practice and procedure," as used in 28 U.S.C. § 2072, and he felt that the Court's approval of the rules was merely perfunctory, a rubber stamp of the work of the Judicial Conference. Although Wig-

45. 30 F.R.D. 73 (1962). The need for any code of evidence was questioned by many. See, e.g., the testimony of Hon. Arthur J. Goldberg, Former Justice of the Supreme Court of the United States, 1973 Hearings, *supra* note 36, at 142 and the testimony of Hon. Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit, *id.* at 246.

46. 36 F.R.D. 128 (1965).

47. For the full membership of the Advisory Committee, see 46 F.R.D. 162 (1969).

48. 46 F.R.D. 161 (1969).

49. *Id.*

50. 51 F.R.D. 315 (1971).

51. 28 U.S.C. § 2072 (1970) gives the Supreme Court the power to prescribe rules for practice and procedure in the United States District Courts.

52. 56 F.R.D. 183 (1973), 93 S. Ct. 1 (1972).

53. *Id.* at 185, 93 S. Ct. at 3.

more was deeply involved, as noted, in the formulation of the Model Code of Evidence, Mr. Justice Douglas cites him as authority for judicial development of rules of evidence.

The rules, however, were transmitted to Congress on February 5, 1973. During the years that the rules had been under consideration, certain of them had become quite controversial.⁵⁴ The rules regarding privilege, in particular, were being opposed in many quarters. Privilege would have been largely eliminated except for the attorney-client privilege and the new psychotherapist-patient privilege.⁵⁵ After extensive debate, Congress, feeling that additional time was required to consider the rules, and having received considerable comment on them, on March 30, 1973, passed Public Law 9312 which provided that the proposed rules would have no force or effect except to the extent, and with such amendments, as might be expressly approved by acts of Congress.⁵⁶

Thereafter, in February and March, 1973, the Special Subcommittee On Reform Of Federal Criminal Laws of the Committee on the Judiciary of the House of Representatives, chaired by Congressman William L. Hungate of Missouri, conducted extensive public hearings on the rules.⁵⁷ Organizations such as the American Hospital Association, the American Medical Association, the American Psychoanalytic Association and the American Psychological Association, as well as various representatives of the organized bar, appeared and testified before the Committee. The Subcommittee revised the rules and, on June 28, 1973, published the proposed rules as amended by the Committee and solicited comments for consideration prior to July 31, 1973.⁵⁸ The revisions that followed restored traditional privilege rules and generally eliminated many controversial portions of the rules. In September and October, 1973, the Committee conducted further hearings and made additional revisions. On October 10, 1973, the Subcommittee published a final draft of the proposed rules.⁵⁹ With minor changes, the final draft was approved by the Full Judiciary Committee of the House of Representa-

54. See correspondence from American Medical Association, 1973 *Hearings Supp.*, *supra* note 30, at 281.

55. 56 F.R.D. at 230.

56. 28 U.S.C.A. § 2071 (1973).

57. 1973 *Hearings*, *supra* note 36.

58. 1973 *Hearings Supp.*, *supra* note 30, at 144.

59. See *id.* at 357 for the results of those hearings.

tives.⁶⁰ After further changes, the Federal Rules were approved by the House of Representatives.⁶¹ As finally approved, the Rules apply to cases filed after the effective date of the Rules and to pending cases except where unjust or not feasible.⁶²

RULE 801: HEARSAY DEFINED

Hearsay is defined by rule 801(c) as an out of court statement offered to prove the truth of the matter asserted.⁶³ The statement may be oral or written or non-verbal, if intended as an assertion.⁶⁴ Having defined hearsay, the rules go on to state what it is not. It is important to remember the distinction between matters which are not considered hearsay and matters which are hearsay but which are nonetheless admissible because of some provisions of either rule 803, if the witness is available, or rule 804, if he is not available.

STATEMENTS WHICH ARE NOT HEARSAY

Rule 801(d)(1)(A): Prior Statements by Witness

A statement is not hearsay if—

(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition⁶⁵

The first type of statement which is not hearsay is the prior inconsistent statement under oath. This rule departs from the majority rule at common law which is that prior statements inconsistent with the testimony of the declarant as a witness at the trial may be used to impeach the witness, but that such statements are not substantive evidence of the facts stated.⁶⁶ The question of whether

60. See generally H.R. REP. No. 93-650, 93d Cong., 1st Sess. (1973).

61. 120 CONG. REC. 569-70 (daily ed. Feb. 6, 1974).

62. 120 CONG. REC. 316 (daily ed. Jan. 30, 1974).

63. FED. R. EVID. 801(c).

64. FED. R. EVID. 801(a).

65. FED. R. EVID. 801(d)(1)(A). It should be noted that all quotations from the Federal Rules of Evidence are taken from the rules as finally approved by the House of Representatives as found at 120 CONG. REC. 306-18 (daily ed. Jan. 30, 1974), and 120 CONG. REC. 543-70 (daily ed. Feb. 6, 1974).

66. United States v. Small, 443 F.2d 497 (3d Cir. 1971); Shearer v. Cantrell, 145 Ind.

the use of such a statement against a criminal defendant is violative of his sixth amendment right of confrontation was answered in the negative in *California v. Green*,⁶⁷ a case arising under the California Evidence Code with a provision similar to that of rule 801(a).⁶⁸ The requirement that the prior inconsistent statement be under oath was not included in the preliminary draft of the Judicial Conference,⁶⁹ nor in the subsequent revisions thereto,⁷⁰ but was included in the final draft of the House Judiciary Committee.⁷¹ The preliminary and revised drafts would have made *all* prior inconsistent statements admissible for the purpose of proving the truth of the matters contained therein. The rule does not require the declarant's prior sworn testimony to have been in the same case. It need only to have been sworn. The rule differs from rule 603 of the Model Code of Evidence,⁷² as well as rule 63 of the Uniform Rules.⁷³ The view of the Second Circuit, as expressed in *United States v. Cunningham*,⁷⁴ is adopted by the Subcommittee as an acceptable compromise; however, *Cunningham* represents the minority view.⁷⁵

It is submitted that the rule overemphasizes the importance of prior sworn testimony. Wigmore says that the oath is merely an incident of cross-examination and does not furnish an independent testing method.⁷⁶ Having shown a prior inconsistency under oath, the statement is admissible as proof of the matters contained therein. It seems strange to suppose that a witness whose veracity under oath is under attack should be assumed to have earlier testified truthfully under oath. A prior inconsistent statement, not under oath, would be covered by rule 613(b)⁷⁷ which continues the familiar

App. 693, 252 N.E.2d 514 (1969); *United States v. Desist*, 277 F. Supp. 690 (S.D.N.Y. 1967), *aff'd*, 384 F.2d 889, *aff'd*, 394 U.S. 244, *reh. denied*, 395 U.S. 931 (1969).

67. 399 U.S. 149, 154 (1970).

68. CAL. EVID. CODE § 1235 (West 1966).

69. 46 F.R.D. 161, 331 (1969).

70. 51 F.R.D. 15, 413 (1971); 56 F.R.D. 183, 293 (1973).

71. H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 90 (1973).

72. MODEL CODE OF EVIDENCE rule 603 (1942).

73. UNIFORM RULES OF EVIDENCE 63 (1953).

74. 446 F.2d 194 (2d Cir. 1971).

75. C. McCORMICK, McCORMICK ON EVIDENCE § 39, at 78; § 251 at 601 (Cleary ed. 1972) [hereinafter cited as McCORMICK].

76. WIGMORE § 1362.

77. FED. R. EVID. 613(b) provides:

(b) Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the

requirements of laying a proper foundation and giving the witness a chance to explain. Rule 607⁷⁸ discards the so-called "voucher" rule, thereby permitting the credibility of the witness to be attacked by any party, including the party calling him.

The inclusion of prior sworn depositions is surprising.⁷⁹ By including depositions, the rule goes even further than *Cunningham*.⁸⁰ Frequently, a deposition is taken only for discovery and is not intended to be used as evidence and does not, therefore, include any meaningful cross-examination. Nevertheless, the *presence* of an oath, even without the presence of cross-examination, makes a prior statement admissible as proof of the facts contained therein. Furthermore, it might be noted, the fact that the word "hearing" is used would presumably include sworn testimony at administrative hearings, coroner's inquests⁸¹ and license suspension hearings, which frequently do not include any cross-examination at all. Whenever an oath is involved, however perfunctory it may have been, the prior statement takes on added significance. If an oath was part of the prior statement, even if cross-examination was not, the statement becomes admissible. This approach is questionable: it certainly would not have been approved by Wigmore as can be seen from the following:

[T]he testing required by the Hearsay rule is spoken of as cross-examination *under oath*. But it is clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule.

[A] statement made under oath is, merely as such, equally obnoxious to the hearsay rule. It is thus apparent that the essence of the hearsay rule is a requirement that

witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801 (d) (2).

78. FED. R. EVID. 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him."

The so-called "voucher" rule, by which a party is said to vouch for the credibility of any witness he calls, was criticized in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

79. WIGMORE § 1376, at 58.

80. 446 F.2d 194 (2d Cir. 1971).

81. See WIGMORE § 1374.

testimonial assertions shall be subjected to the test of cross-examination, and that the judicial expressions . . . coupling oath and cross-examination had in mind the oath as merely an ordinary accompaniment of testimony given on the stand subject to the essential test of cross-examination.⁸²

Rule 801(d)(1)(B): Fabrication

A statement is not hearsay if—

(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive⁸³

Rule 801(d)(1)(B) is a very liberal treatment of the recent fabrication rule. Upon an implied charge of recent fabrication, all prior consistent statements become admissible. Since no time element is required, the consistent statement could follow the inconsistent statement.⁸⁴ There is no requirement that the witness first deny that he made the prior inconsistent statement, though this is now required by some jurisdictions.⁸⁵ Further, the rule does not specify who must have made the “charge” against the witness. Consequently, the charge may have come from another witness and not from the prior inconsistent statements of the witness on the stand.

Thus, a prior consistent statement is admissible, as proof of the facts stated, even if not under oath, once an adverse party charges, expressly or impliedly, that there has been a recent fabrication or improper influence or motive. The prior consistent statement need not have been written.⁸⁶ Since a prior consistent statement would be substantive evidence of the facts contained therein, a witness could be impeached by a non-sworn prior inconsistent statement, used only for impeachment, and rehabilitated by a prior consistent

82. *Id.* § 1362, at 7.

83. FED. R. EVID. 801(d)(1)(B).

84. Some states require that prior consistent statements must precede inconsistent ones. See collection of cases at Annot., 75 A.L.R.2d 909 (1961).

85. *Id.*

86. FED. R. EVID. 801(a)(1).

statement which would be evidentiary. The use of prior unsworn inconsistent statements will have to be carefully examined so that counsel does not unwittingly allow into evidence a consistent statement whose probative value will be greater than the inconsistent statement.

Rule 801(d)(1)(C): Out-of-Court Identifications

A statement is not hearsay if—

(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him.⁸⁷

This rule allows into evidence out-of-court identifications, including those made at a lineup. The rationale for the exclusion of such a statement from the hearsay rule is twofold: (1) the witness is now present and now subject to cross-examination regarding his prior identification and (2) the prior identification is probably more reliable than an in-court identification. Thus, rather than finding an exception for prior identifications, the framers of the rules excluded them from the operation of the hearsay rule. The evidence is received as direct, substantive evidence of the identity of the defendant and not merely as evidence corroborative of other testimony of the witness making the identification, which is the present majority rule.⁸⁸

The rule is limited in its application to prior statements of identification made by the witness on the stand and does not apply to testimony of persons merely present when the identification was made. Their testimony might, however, come in under some exception to the hearsay rule such as, for example, a present sense impression.⁸⁹ The rule represents a balancing of considerations between the unprepared but possibly emotional out-of-court identification as compared with the unemotional but probably prepared, and possibly coached, in-court identification. The rule finds the former identification to be more reliable.

Other problems, however, are presented with an out-of-court

87. FED. R. EVID. 801(d)(1)(C).

88. See Annot., 71 A.L.R.2d 452 (1960).

89. FED. R. EVID. 803(1). See notes 110-15 *infra* and accompanying text.

identification at a police lineup. The right of an accused to be represented by counsel at such a lineup and his further right to be confronted by witnesses are not within the scope of this article. Those problems are discussed at some length in *Gilbert v. California*.⁹⁰

Admissions by a Party-Opponent

In addition to prior statements by the witness on the stand, which are excluded from the operation of the hearsay rule, prior admissions by a party-opponent are also excluded from the rule's operation by rule 801(d)(1)(C).⁹¹ Traditionally, admissions of a party have enjoyed a preferred position and have been regarded as a unique by-product of the adversary system.⁹² They have always been treated as exceptions to the hearsay rule rather than matters to be excluded from the operation of the rule.⁹³ Because they are not considered hearsay, no showing of trustworthiness is required. The admissions may be the party's own or they may be representative admissions. If an agent makes the admission, it does not have to be shown that the scope of his agency included the making of admissions. It is sufficient to show that the scope of his agency included the matter with which the admission was concerned.

RULE 802: THE HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.⁹⁴

The preliminary draft of the Federal Rules of Evidence made hearsay inadmissible except as provided by these rules, the rules of civil and criminal procedure and Acts of Congress.⁹⁵ The revised draft deleted the rules of civil and criminal procedure and substituted rules adopted by the Supreme Court.⁹⁶ The final version requires that any Supreme Court rule be prescribed, not adopted, by the Supreme Court, pursuant to statutory authority, thus assuring congressional control over further amendments to the rules and fur-

90. 388 U.S. 263 (1967).

91. FED. R. EVID. 801(d)(2).

92. MCCORMICK at § 262.

93. *Id.*

94. FED. R. EVID. 802.

95. 46 F.R.D. 161, 343 (1969).

96. 51 F.R.D. 315, 418 (1971).

ther reducing the likelihood of mere adoption by the Supreme Court of Judicial Conference recommendations.

Rules 1102 and 1103 prescribe the process for amending the Federal Rules of Evidence.⁹⁷ A new section is added to the United States Code, 28 U.S.C. § 2076, whereby the Supreme Court may prescribe amendments; however, such amendments are not to take effect if either House of Congress should disapprove of the Court's viewpoint.⁹⁸

The amendments to the existing Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, necessitated by the Federal Rules of Evidence and ordered by the Supreme Court on November 20, 1972,⁹⁹ and December 18, 1972,¹⁰⁰ are approved to become effective together with the Federal Rules of Evidence themselves.¹⁰¹ Examples of existing rules and Acts of Congress which would come within the exception to rule 802 may be found in the advisory committee notes.¹⁰²

RULE 803: HEARSAY EXCEPTIONS—AVAILABILITY IMMATERIAL

The exceptions to the hearsay rule, applicable regardless of whether the declarant is available to testify, are listed in this rule. The rule includes many of the familiar hearsay exceptions, expands some of them and adds some new ones. The preliminary draft of rule 803 did not speak of exceptions but rather spoke of "illustrations" of admissible hearsay.¹⁰³ The preliminary draft also included rule 803(a) which gave to the courts discretion in admitting hearsay statements if "the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available."¹⁰⁴ The 1971 revision changed this approach and reverted to the traditional method of setting forth specific exceptions and dropped 803(a) but added 803(24) whereby courts were given discretion to admit statements not specifically covered by the exceptions but "having com-

97. FED. R. EVID. 1102-03.

98. FED. R. EVID. 1103.

99. 56 F.R.D. 183, 184 (1973).

100. *Id.* at 186.

101. FED. R. EVID. 1103(3).

102. 56 F.R.D. at 299.

103. 46 F.R.D. at 345.

104. *Id.*

parable circumstantial guarantees of trustworthiness."¹⁰⁵ Rule 803(24) was subsequently removed by Congress in its entirety so that the list of exceptions is, once again, complete. Any new exceptions will have to come through the amendment process and cannot be judicially created.

The evidence permitted by an 803 exception, as well as by any other provisions of the hearsay rules, does not automatically become admissible. Tendered evidence might be deemed inadmissible because of other provisions of these rules,¹⁰⁶ or because of other existing exclusionary principles,¹⁰⁷ but the exclusion of evidence under one exception of rule 803 does not make it generally excludable. It might still qualify under another exception. For example, a memorandum or record might not qualify as a recorded recollection under rule 803(5)¹⁰⁸ but might qualify as a record of a regularly conducted business activity under rule 803(6).¹⁰⁹

Rules 803(1), 803(2) and 803(3): Spontaneity

(1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.¹¹⁰

These three rules describe exceptions to the hearsay rule for

105. 51 F.R.D. at 422.

106. See, e.g., FED. R. EVID. ARTICLE IV, RELEVANCY AND ITS LIMITS.

107. E.g., state-created rules of privilege.

108. FED. R. EVID. 803(5). See notes 127-35 *infra* and accompanying text.

109. FED. R. EVID. 803(6). See notes 136-42 *infra* and accompanying text.

110. FED. R. EVID. 803(1)-(3).

statements made by a declarant before, during or immediately after an event. Their trustworthiness derives from the spontaneity of the statement and the fact that fabrication is unlikely since the declarant is merely reacting to an uncontrived event.¹¹¹ None of the exceptions, it should be noted, require identification of the declarant.

All of these exceptions, at one time or another, have been part of the so-called *res gestae* and they are therefore discussed together. It should be noted that there is a welcome absence from these Rules of any incorporation of the *res gestae* doctrine. *Res gestae* has become a vague and inexact term often used as a catch-all response to an opponent's objection to hearsay evidence. It is not unusual to hear *res gestae* advanced as a rationale for admission of hearsay when a better and more precise reason exists. That practice terminates with the passage of these Rules.

Rule 803(1) deals with present sense impressions. This exception, well-recognized by the writers,¹¹² frequently came in under the *res gestae* umbrella. While the common law exception confined itself to statements made while the event was being perceived, this rule includes impressions "immediately thereafter." This change was first urged by rule 512(a) of the Model Code.¹¹³ The rule, however, must be carefully distinguished from rule 803(3)¹¹⁴ since 803(1) and 803(3) might include the same statement. However, the statement comes in as proof of the event described under 803(1) but, under 803(3), if the statement is one of memory or belief, it cannot be used to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of the declarant's will.

An example of a present sense impression may be found in *Houston Oxygen Co. v. Davis*,¹¹⁵ wherein the court allowed a witness to testify that he had heard a woman exclaim that the occupants of a car which passed her four miles from the scene of an accident "must have been drunk." Since, in the court's view, there had not been enough time for either a faulty memory or a calculated misstatement, the woman's impression was deemed trustworthy.

111. WIGMORE §§ 1747, 1750; McCORMICK § 288.

112. WIGMORE §§ 1747, 1750; McCORMICK § 298.

113. MODEL CODE OF EVIDENCE rule 512(a) (1942).

114. FED. R. EVID. 803(3).

115. 139 Tex. 1, 161 S.W.2d 474 (1942).

Rule 803(2) admits excited utterances, also sometimes brought in under *res gestae*. This evidence derives its reliability, according to McCormick,¹¹⁶ from the "excitement which suspends the powers of reflection and fabrication." It is submitted, however, that such excitement might also suspend the power of observation.¹¹⁷ Nonetheless, the exception is not only retained but also broadened so that the statement may "relate to" the event.¹¹⁸ In balance, however, it is doubtful that much new evidence will come in under this exception though the possibility of abuse of this exception will continue to exist. Excited clergymen will continue to disappear while leaving their excited utterances behind them. However, courts, and particularly juries, have demonstrated that they are well equipped to handle a misuse of this exception.

Rule 803(3) combines several common law exceptions, each, again, occasionally called *res gestae*. As stated by the advisory committee, it is essentially a specialized application of the 803(1) exception.¹¹⁹ Mental, emotional or physical reactions of a witness are admissible but, as before, not to prove a fact remembered or believed, except in the case of wills.

Rule 803(4): Statements for Purposes of Medical Diagnosis or Treatment

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.¹²⁰

Statements made by a patient for the purpose of diagnosis or treatment are made admissible by this exception as proof of the facts contained therein. The fact that the exception is drawn in the disjunctive is significant. Heretofore, some courts have distinguished between statements given for purposes of treatment and

116. MCCORMICK § 297.

117. See comment at 48 F.R.D. 39, 54 (1969).

118. See 51 F.R.D. 424 (1971).

119. 56 F.R.D. at 305.

120. FED. R. EVID. 803(4).

those given merely for diagnosis, admitting the former and excluding the latter.¹²¹ The theory has been that patients are more likely to be truthful when they are in need of treatment than when they are in need of testimony.¹²² The distinction is eliminated by this rule. This change is unfortunate because the distinction was valid and based upon experience. When a plaintiff, for example, has consulted a physician for the sole purpose of securing his testimony, the history given to the physician might be exaggerated or untrue. His motive and purpose could well be the attainment of successful testimony, not successful treatment. While admitting such statements, some courts have done so not to establish the truth of the statements but to show the basis of the doctor's opinion.¹²³ This distinction also is removed, the advisory committee noting that juries seldom made the distinction anyway.¹²⁴ It should be noted, however, that not everything a patient says comes in under this exception. A description of the event in question for example, not necessary for a diagnosis or treatment, is excluded.

The exception places no limitation on the class of persons to whom the statement may be given. It may be given to anyone if given for the purpose of medical diagnosis or treatment, including nurses, ambulance attendants and, presumably, members of the family furnishing first aid. Where the statement is given to a nurse who in turn records it in the records of the physician, the physician may testify to the statement. The statement to the nurse would be admissible under rule 803(4), the doctor's testimony would be admissible under rule 803(6)¹²⁵ and the double hearsay problem would be eliminated by rule 805.¹²⁶ This presents a good illustration of the way in which the various parts of Article Eight can be coordinated.

121. *Chicago and Northwestern Ry. v. Garwood*, 167 F.2d 848, 859 (8th Cir. 1948), and cases cited therein; *Nutt v. Black Hills Stage Lines, Inc.*, 452 F.2d 480, 483 (8th Cir. 1971).

122. *See United States v. Nickle*, 60 F.2d 372 (8th Cir. 1932).

123. *See, e.g., Durham Mfg. v. Hutchins*, 115 Ind. App. 479, 59 N.E.2d 444 (1945); *Wise v. Monteros*, 93 Ariz. 124, 379 P.2d 116 (1963); *Tycer v. Hartsell*, 184 Ore. 310, 198 P.2d 263 (1948).

124. 56 F.R.D. 183, 306 (1973).

125. FED. R. EVID. 803(6) (records of regularly conducted activity). *See* notes 136-42 *infra* and accompanying text.

126. FED. R. EVID. 805 (hearsay within hearsay). *See* note 201 *infra* and accompanying text.

Rule 803(5): Recorded Recollection

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.¹²⁷

Rule 803(5) contains the doctrine of past recollection recorded, long recognized as an exception to the hearsay rule.¹²⁸ Under the rule, the prior recollection is admitted upon a showing that the witness has no present memory of the facts. Rather than losing the testimony, the prior memorandum or record is received in evidence, assuming that the other requirements of the rule have been satisfied.

The rationale behind the doctrine survived attack on constitutional grounds in *United States v. Kelly*.¹²⁹ In *Kelly*, the defendants contended that their sixth amendment right of confrontation was abridged because they were unable to cross-examine a prior recorded recollection. The argument was rejected, the court noting that the doctrine was one of long standing and was supported by considerable authority.¹³⁰

The rule is to be distinguished from the doctrine of present recollection refreshed. Under this latter doctrine, the prior memorandum or record may be used to jog the memory of the witness but, once his memory is refreshed, he testifies from memory and the written document is normally not received into evidence.¹³¹

Even if the memorandum or record is received into evidence, it may not be received as an exhibit unless offered by an adverse party. Since it is in the nature of a self-serving document and since

127. FED. R. EVID. 803(5).

128. 3 J. WIGMORE ON EVIDENCE § 754a (Chadbourn ed. 1970); MCCORMICK § 299.

129. 349 F.2d 720, 770 (2d Cir. 1965).

130. *Id.*

131. Annot., 82 A.L.R.2d 473, 512 (1962).

exhibits may, in the discretion of the judge,¹³² be sent to the jury room, this latter provision is a sound one. If the recorded recollection could be received as an exhibit, and if it were taken into the jury room, its constant presence during deliberations could make it more persuasive than live testimony.

The exception as now drawn requires a showing that the statement was either made or adopted by the witness. The preliminary¹³³ and revised¹³⁴ drafts did not include this requirement and, therefore, a statement prepared by a third person would have been admissible. Congress recognized the dangers inherent in the original drafts. Statements given to insurance carriers, for example, would have been admissible upon a showing of a lack of memory by the witness. The change made by Congress is consistent with the definition of a statement in 18 U.S.C. § 3500¹³⁵ which deals with statements of witnesses called by the United States in a criminal prosecution. The final version requires that the statement must either be that of the witness, made close to the event, or that of a witness which the declarant has ratified or adopted. Presumably, the recorded statement of an agent, seen and uncorrected by his principal, and thereby adopted by him, would qualify as a past recorded recollection of the principal.

Rules 803(6) and 803(7): Business Records

(6) Records of regularly conducted activity.—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 in-

132. *Ahern v. Webb*, 268 F.2d 45, 47 (10th Cir. 1959).

133. 46 F.R.D. 161, 346 (1969).

134. 51 F.R.D. 315, 420 (1971).

135. 18 U.S.C. § 3500 (1970).

cludes business, profession, occupation, and calling of every kind.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).—Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.¹³⁶

Rule 803(6) defines the business records exception to the hearsay rule and rule 803(7) permits introduction of evidence of the absence of those records. Originally drafted to cover records of all regularly conducted activities, the rules now pertain only to business records, defined as records of a business, profession, occupation and calling of every kind. Evidence of business records in the United States courts have heretofore been covered by 28 U.S.C. § 1732(a),¹³⁷ which is quite similar to 803(6) and which is specifically repealed by rule 1103 of the Federal Rules of Evidence.¹³⁸

The key to the exception is that the preparation of the records was part of a routine, ordinary business practice and should therefore be trustworthy. If records are not so prepared but rather are prepared in anticipation of litigation, they are excluded. Thus, in *Yates v. Blair Transport, Inc.*,¹³⁹ medical reports of doctors who examined the plaintiff for his workmen's compensation carrier were admissible as business records while reports of the plaintiff's own physician who examined him for trial were not.

Under the rule, hospital records, medical reports, police reports and school records become admissible. The fact that these records might contain opinions of lay witnesses does not render them inadmissible since the rule specifically permits opinion evidence. Fur-

136. FED. R. EVID. 803(6) & (7).

137. 28 U.S.C. § 1732(a) (1970).

138. FED. R. EVID. 1103.

139. 249 F.2d 681 (S.D.N.Y. 1965).

thermore, rule 701¹⁴⁰ is authority for the admission in evidence of limited forms of opinion testimony by lay witnesses.

The elimination of the hearsay objection does not make the records automatically admissible in evidence. Thus, for instance, an objection on privilege grounds might still be interposed to an offer in evidence of medical and hospital records.

Although suggested by the advisory committee and included in both the preliminary¹⁴¹ and revised¹⁴² drafts, records of non-business activity are not within the purview of this rule. Consequently, it seems certain that records of purely personal activity, such as diaries and calendars, would be excluded. Similarly, it is doubtful whether records of political parties would be within the scope of the rule.

Rule 803(7), permitting evidence of the non-existence of business records, makes sense. A well-known trial tactic is to suggest to the jury that certain records do exist but that the opposition has failed to produce them. The rule will permit the introduction of evidence that no such records exist.

Rules 803(8), 803(9) and 803(10): Public Records

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law, as to which there was a duty to report; excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

140. FED. R. EVID. 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

141. 46 F.R.D. 161, 346 (1969).

142. 51 F.R.D. 315, 420 (1971).

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.—To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.¹⁴³

These three rules cover records of public offices, records of vital statistics and the absence of such records. Heretofore, records of federal agencies were made admissible by 28 U.S.C. § 1733,¹⁴⁴ which is now made inapplicable to cases arising under the Federal Rules of Evidence by virtue of rule 1103(c).¹⁴⁵ The rules apply to federal agencies as well as to non-federal public agencies.

Rule 803(8)(B) was the subject of considerable debate and last minute amendment. The rule was changed on the day the House of Representatives finally passed the Federal Rules of Evidence.¹⁴⁶ As originally written, anything reported by a public official could have been introduced into evidence.¹⁴⁷ There had also been some concern that chance observations by, for instance, social workers, would be reported and later used in evidence.¹⁴⁸ Calling this an “extraordinary departure from existing law,”¹⁴⁹ Representative Elizabeth

143. FED. R. EVID. 803(8)-(10).

144. 28 U.S.C. § 1733 (1970).

145. FED. R. EVID. 1103(c).

146. See generally 120 CONG. REC. 563-65 (daily ed. Feb. 6, 1974) (debate concerning amendments to rule 803).

147. H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 94 (1973).

148. Thus, a social worker's report of a random observation of a marital relationship could be introduced in a criminal case against one of the spouses. Similarly, a policeman's report containing an observation of an alleged criminal offense could be used in the criminal trial instead of having the police officer himself testify. . . . [The rule] gives more credibility to the observations of government employees than are given to observations of private citizens.

120 CONG. REC. 311 (daily ed. Jan. 30, 1974) (remarks of Representative Elizabeth Holtzman).

149. *Id.*

Holtzman introduced the amendment which makes only those observations admissible which the official had a duty to report.¹⁵⁰ Representative David W. Dennis then introduced the final proviso which places observations of police officers and other law enforcement personnel in a separate category, their observations being, presumably, more credible than those of other public officials.¹⁵¹

The most controversial of these three rules is rule 803(8)(C) which permits the introduction, in civil cases and against the government in criminal cases, of factual findings resulting from an official investigation. Factual findings are to be distinguished from the opinions and evaluations leading to those findings. Such opinions and evaluations are not admissible, according to the comments of the House Subcommittee,¹⁵² which also expressed the legislative desire that the term "factual findings" be strictly construed.¹⁵³ The advisory committee comments, on the other hand, seem to contemplate that "evaluative reports" would be admissible.¹⁵⁴ Hours of debate should follow the offer into evidence of, for example, a coroner's finding that a driver was operating his vehicle while under the influence of intoxicating liquor. The debate will focus on whether such a finding is a factual finding or merely an evaluation by the coroner.

Public investigations, such as coroner's inquests, will take on a new significance in civil cases under the Federal Rules of Evidence. Since testimony at such proceedings is normally taken under oath, inconsistent statements would be outside the scope of the hearsay rule and would be admissible as proof of the facts contained therein;¹⁵⁵ the factual findings of the coroner would be admissible¹⁵⁶ and an unavailable witness' testimony at the inquest would come in as an exception under rule 804(b)(1).¹⁵⁷

Rule 803(8), it should be noted, gives the court discretion to exclude matters contained in public reports and records upon a

150. 120 CONG. REC. 563 (daily ed. Feb. 6, 1974).

151. *Id.*

152. 1973 *Hearings Supp.*, *supra* note 30, at 174.

153. *Id.*

154. 46 F.R.D. 161, 364 (1969).

155. FED. R. EVID. 801(d)(1)(A).

156. FED. R. EVID. 803(8)(c).

157. FED. R. EVID. 804(b)(1) (former testimony). See notes 181-85 *infra* and accompanying text.

showing of a lack of trustworthiness, but the exact meaning of this term will not be known until appropriate cases have been presented for decision. Records of vital statistics, in any form, and by whom-ever kept, are made admissible by rule 803(9) providing that a report thereof was made to a public office pursuant to law. The official records themselves are not required by the rule and the records may have been maintained privately so long as a report thereof was made to a public office.

Rule 803(10) is similar to rule 803(7) with regard to the proof of absence of public records. A rule 902 certification may be introduced into evidence to prove the absence of a public record, report, statement or data compilation. Proof may be had of not just the absence of the record, but also the nonoccurrence of an event normally recorded.

Rules 803(11), 803(12), 803(13), 803(14), 803(15), 803(16) and 803(17): Miscellaneous Reports

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

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

(13) Family records.—Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been

executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.¹⁵⁸

These seven rules are relatively non-controversial, introduce little new to the law of evidence and require little comment. Rule 803(11) fills a possible void created by rule 803(6) which would require a showing that a religious organization was a business in order for its records to be admissible. Rule 803(11) dispenses with the necessity for such a showing but limits the matters which may be shown through the items designated in the rule. Rule 803(12) fills in a possible void created by rule 803(9) since a clergyman would probably not be considered a public officer under rule 803(9). All of the matters covered by rule 803(12) were probably heretofore admissible as "official written statements"¹⁵⁹ but their admissibility is now clearly and precisely guaranteed. Rule 803(14) provides for the admissibility of recorded documents affecting an interest in property and rule 803(15) pertains to unrecorded documents affecting an interest in property. Rule 803(15) would also apply to wills, unrecorded contracts for the sale of real estate and unrecorded deeds and trusts so long as the documents purport to establish an interest in property. Rule 803(16) changes the common law definition of the time when documents become ancient. Traditionally, documents

158. FED. R. EVID. 803(11)-(17).

159. See McCORMICK § 315.

become ancient when they are 30 years of age or older.¹⁶⁰ The rule reduces the time to 20 years. Finally, rule 803(17) permits the use of published compilations, including telephone directories, without proof of their accuracy or reliability.

Rule 803(18): Learned Treatises

(18) Learned treatises [*sic*].—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert [*sic*] testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.¹⁶¹

One of the most significant categories of hearsay, previously inadmissible, but allowed by the new Federal Rules is found in rule 803(18). This rule permits the reception into evidence of learned treatises, periodicals and pamphlets, if relied on by an expert witness and if established as a reliable authority. If received in evidence, the material may be read to the jury but may not be received as an exhibit. This represents a departure from the traditional method of using such material only on cross-examination for the purpose of impeachment.¹⁶² The problem with using it on cross-examination was that the opposing expert had to first admit that he recognized the impeaching material as authoritative. If he did not, it could not be used. Under this new rule, the material in question may be used on direct as well as on cross-examination of an expert.

The rule consequently permits an expert on direct examination to become a spokesman for a whole body of scientific authority. If properly used, the rule puts the leading experts in any field at the disposal of counsel and his local expert, without cost. The opposing party may also use this procedure on cross-examination, as before, but the real significance lies in its use on direct examination. After the expert testifies to the efforts made by him to form his opinion,

160. BLACK'S LAW DICTIONARY 111 (Rev. 4th ed. 1968).

161. FED. R. EVID. 803(18).

162. 31 AM. JUR. 2d *Evidence* § 67 (1967).

he may then be asked if he relied on other authorities to form that opinion. If he has, these authorities may then be admitted as direct evidence. The possibilities are endless. The professor of mechanical engineering at the local university, for example, can buttress his opinion with published works from the leading scientific institutions in the country and such works are then received as direct evidence on the matter in controversy.

The rule puts no limitation on the type of expert. So long as the court finds him to be an expert, he can give his opinion and support it with learned material. It is significant that rule 702¹⁶³ permits experts by experience to testify. Accordingly, a carpenter, garage mechanic or welder, if found by the court to be an expert, may become the vehicle for counsel to read into evidence published material upon which the expert has relied.

Consider the effect in a products liability case. Aside from the obvious financial savings, the plaintiff's expert can testify that he relied on scientific papers published by the defendant's manufacturer, or its employees, or by trade associations of which the defendant is a member, or by the very experts upon whom the defendant will also rely.

While it is generally true that testimony read into evidence may not be as effective as live testimony, it can have its advantages. First, there is no fear of losing the effect on cross-examination. Second, the rule does not specify who is to read the material into evidence. Therefore, counsel can select a reader whose appearance and voice will be pleasing to the jury. The jury will tend to unconsciously associate the reader with the author of the article.

There were some efforts to eliminate even the requirement that a live expert first testify that he relied on the learned material. It was suggested that, particularly in medical malpractice cases, this rule will not be very helpful because the plaintiff will still have to find a doctor who will testify against the defendant doctor. The rule, however, does retain the requirement that a live witness first testify

163. FED. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

that he relied upon the learned material before the material may be placed in evidence.

The whole field of expert testimony will be changed by the Federal Rules of Evidence. Consider rule 803(18) in conjunction with rule 704.¹⁶⁴ Under 704, the traditional argument that a question is objectionable because it calls for an answer which would "invade the province of the jury" will not work since rule 704 permits a witness to testify on an ultimate issue. Certainly an expert witness also would be permitted to so testify. Rule 703¹⁶⁵ permits an expert to rely on facts or data which were not received in evidence. Therefore, a physician, for instance, who may be a general practitioner and who has ordered x-rays to be interpreted by a radiologist, would not find his opinion at trial successfully objected to merely because he relied on the hearsay report of the absent radiologist in forming his opinion. It seems clear that rule 803(18), together with the other rules on expert testimony, should make it mandatory that counsel discover, prior to trial, not only the names of the experts who will be testifying against him but also the learned material upon which that expert may rely.

Rules 803(19), 803(20) and 803(21): Reputation Evidence

(19) Reputation concerning personal or family history.—Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history.—Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in

164. FED. R. EVID. 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

165. FED. R. EVID. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.—Reputation of a person's character among his associates or in the community.¹⁶⁶

These three rules apply to evidence of reputation and eliminate the hearsay objection to such evidence. Rules 803(19) and 803(20) are largely the same as existing case law and require no further comment.

Rule 803(21) deals with reputation evidence of character and permits reputation to be proven by a witness who is familiar with the reputation if not with the person whose character is in question. It is important to stress that the exception goes only to the question of how character can be proven, *i.e.*, by reputation among associates, and not to the question of whether the evidence is admissible and, if so, to what extent and for what purpose. These matters are governed by other rules, principally rules 404, 405 and 608.¹⁶⁷ The

166. FED. R. EVID. 803(19)-(21).

167. FED. R. EVID. 404, 405 and 608 provide:

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purposes of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused.—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim.—Evidence of a pertinent trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of Proving Character

(a) Reputation.—In all cases in which evidence or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.—In cases in which character or a trait of

methods of proving character are listed in rule 405 and the admissibility of character is governed by rule 608. When the effort is to prove a person's character in order to show that he acted in conformity therewith at the time in question, rule 803(21) will not come into play until the requirements of both rules 404 and 405, or rule 608, have been satisfied. For example, character may be proven in one of the three instances set forth in rule 404; rule 405(a) then authorizes 803(21) testimony. Rule 608(a) permits 803(21) testimony to show reputation for truthfulness or untruthfulness.

The rules go so far as to allow opinion evidence of character. This was permitted under both the preliminary¹⁶⁸ and revised¹⁶⁹ drafts, was eliminated by the House Judiciary Committee¹⁷⁰ and reinstated by the full House of Representatives.¹⁷¹

Rules 803(22) and 803(23): Prior Judgments

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by

character of a person is an essential element of charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 608. Evidence of Character and Conduct of Witness

(a) Reputation evidence of character.—The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

168. 46 F.R.D. 161, 231 (1969).

169. 51 F.R.D. 315, 348 (1971).

170. H.R. REP. No. 93-650, 93d Cong., 1st Sess. 48-49 (1973).

171. H.R. Res. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 569-70 (daily ed. Feb. 6, 1974).

the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries.—Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.¹⁷²

The hearsay aspects of prior judgments are covered by these rules. If within the confines of these rules, the prior judgment may be used to prove, in the case of prior judgments of conviction, any facts essential to sustain the judgment, and in the case of rule 803(23), personal, family or general history, or boundaries, if these matters were essential to the judgment, but not to prove reputation. The rules deal only with the hearsay aspects of such judgments and not with the questions of *res judicata* and collateral estoppel.¹⁷³ Prior judgments of conviction, if specified in rule 803(22), thus would be admissible in a subsequent civil suit to prove the facts determined in a criminal case. The use of prior judgments of conviction for the purpose of impeachment, and not to prove facts, is covered by rule 609.¹⁷⁴

RULE 804: HEARSAY EXCEPTIONS—DECLARANT UNAVAILABLE

This rule adds exceptions to the hearsay rule but includes the requirement that the declarant be unavailable to testify in person. Not only the usual notions of unavailability, *i.e.*, death, illness or absence from the subpoena power of the court are used; 804(a) also specifies that a refusal to testify on a subject or a claim of privilege or a lack of memory¹⁷⁵ on a subject is equivalent to unavailability. In order to qualify under 804(b)(2), (3) or (4) a showing is required that neither the attendance of the witness nor his testimony (presumably by deposition) could be obtained.

172. FED. R. EVID. 803(22) and (23).

173. The questions of *res judicata* and collateral estoppel are discussed in the advisory committee notes, 51 F.R.D. 315, 436 (1971).

174. FED. R. EVID. 609.

175. For impeachment purposes, some states take the position that when a witness is cross-examined on a prior inconsistent fact or statement and, when asked if he did not do the act or make the statement, he says he does not recollect, it is the same as if he had answered in the negative. *See, e.g.*, IND. CODE § 34-1-15-1 (1973).

The preliminary draft of the Federal Rules did not define unavailability and continued the practice found in rule 803 of listing illustrations of exceptions, leaving further development to the courts.¹⁷⁶ The revised draft changed the approach by referring to exceptions rather than illustrations but also added rule 804(b)(6) which left some discretion in the courts.¹⁷⁷ The final draft of the House Judiciary Committee, however, removed this discretion from the courts by deleting 804(b)(6), thereby making the list of exceptions complete.¹⁷⁸

It is noteworthy that of the three types of out-of-court declarations covered by Article Eight, the type covered by rule 804 is the most restrictive. Rule 801¹⁷⁹ freed certain types of evidence from all hearsay restrictions and rule 803¹⁸⁰ broadly expanded the traditional exceptions and made them applicable irrespective of whether the declarant was available. Rule 804, however, requires a showing of unavailability as defined in 804(a) and then permits only four types of statements to be used.

Rule 804(b): Hearsay Exceptions

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

(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.¹⁸¹

This rule permits the prior testimony of a witness to be used as evidence of the facts contained therein if the witness is unavailable. The prior testimony may have been at an earlier hearing of the matter under consideration or at an entirely different proceeding and prior depositions in either the same or another proceeding are

176. 46 F.R.D. at 377.

177. 51 F.R.D. at 438.

178. H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 52 (1973).

179. FED. R. EVID. 801.

180. FED. R. EVID. 803.

181. FED. R. EVID. 804(b)(1).

included. In order for any such testimony to be used, the party against whom it is offered, or his predecessor in interest, must have had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

Both the preliminary¹⁸² and revised¹⁸³ drafts of the Federal Rules made the former testimony usable if it was given at the instance of or against a party whose motive and interest was similar to those of the party against whom the testimony was being offered. Feeling that this bound a party to another party's handling of the witness, Congress restricted the use of former testimony unless the opposing party's predecessor in interest had the opportunity to develop the testimony. Although no definition is given of "predecessor in interest," it is certainly more confining than the term "similar motive and interest."

The use of an unavailable witness' prior testimony or deposition taken in the same cause is clearly proper and consistent with existing federal practice. However, problems arise when the testimony or deposition was in an entirely unrelated proceeding with different parties and different issues. As mentioned earlier in this article, a deposition may be taken only for discovery and may not include any real cross-examination. Nonetheless, a party may find such testimony used against him if his "predecessor in interest" was present at the deposition and had the opportunity to develop such testimony, even though he may not have done so.

Another problem may arise with the new definition of unavailability. As pointed out earlier, rule 801¹⁸⁴ permits the use of prior inconsistent testimony at the trial. Rule 804 permits the use of any prior testimony if the witness is now unavailable. Unavailability, it should be noted, includes a lack of memory. If a witness testifies at the trial, his prior inconsistent testimony may come in under rule 801. As to any parts of his testimony to which he professes a lack of memory, rule 804 prior testimony can be used.

The use of the term "predecessor in interest" is unfortunate. It is a loosely drawn compromise between two views and will be a fruitful ground for debate in the years to come. The proposal of the

182. 46 F.R.D. at 377.

183. 51 F.R.D. at 438.

184. FED. R. EVID. 801.

House of Delegates of the American Bar Association would have permitted prior testimony against a party whose "incentive, interest and position" was substantially identical.¹⁸⁵ This would have been a better result. Consider the following scenario: A and B are involved in an accident allegedly caused by C. A sues C. A calls witness X to testify at the trial and C calls witness Y. Both X and Y saw the accident. The jury believes witness Y, apparently disbelieving witness X, and C wins. Now, B sues C. Both X and Y are unavailable. The former testimony of X can be used by B against C but C cannot use the testimony of Y against B because neither B nor his predecessor in interest had an opportunity to develop the testimony. Therefore, B wins and C loses. This result would not have been possible under either the preliminary or revised drafts or under the American Bar Association's proposal. Hopefully, one of these proposals will be adopted in the future.

(2) Statement under belief of impending death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.¹⁸⁶

This is one of the oldest exceptions to the hearsay rule and, as pointed out earlier, was the first to be codified by statute.¹⁸⁷ The guarantee of trustworthiness is obvious. In order to use the statement, the witness need not have died, it being sufficient if he is unavailable, and if he thought he was dying when he made the statement. The statement can be used only if it concerned the cause or circumstances of what the witness believed to be his impending death.

Neither the preliminary¹⁸⁸ nor revised¹⁸⁹ drafts included the preamble language "in a prosecution for homicide or in a civil action or proceeding," this having been added by Congress. This addition restored the common law treatment of dying declarations in crimi-

185. See the recommendation by the Committee on Federal Practice and Procedure which was approved by the House of Delegates, 1973 *Hearings Supp.*, *supra* note 30, at 337.

186. FED. R. EVID. 804(b)(2).

187. See, e.g., *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F.2d 871, 887 (6th Cir. 1943), *cert. denied*, 320 U.S. 800 (1944).

188. 46 F.R.D. at 378.

189. 51 F.R.D. at 438.

nal cases but expanded their use into civil cases as well, the Subcommittee noting, however, that their use in civil cases could lead to the possibility of forum shopping.¹⁹⁰

(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to criminal liability, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.¹⁹¹

Statements against a declarant's pecuniary or proprietary interest, if the declarant was unavailable, have traditionally been treated as exceptions to the hearsay rule.¹⁹² Both the preliminary¹⁹³ and the revised¹⁹⁴ drafts would have made an absent declarant's statements admissible if they tended to subject him to civil or criminal liability, render invalid a claim by him against another or make him an object of hatred, ridicule or disgrace. The final version, as shown, includes statements against penal interest, but none of the other changes. The present rule also excepts confessions of codefendants and co-conspirators if offered against a defendant in a criminal case. The inclusion of statements against penal interest is the major change in this rule.

It is important to distinguish between statements against interest, covered by this rule, and admissions of a party, covered by rule 801;¹⁹⁵ the two are sometimes confused. Admissions apply only to a party; statements against interest apply to *any* witness. Admissions may or may not be against interest, but usually are. Admissions

190. 1973 *Hearings Supp.*, *supra* note 30, at 176.

191. FED. R. EVID. 804(c)(3).

192. *See, e.g.*, *Gichner v. Antonio*, 410 F.2d 238 (D.C. Cir. 1969).

193. 46 F.R.D. at 378.

194. 51 F.R.D. at 438.

195. FED. R. EVID. 801.

may be shown even though the declarant is available; *statements against interest can be used only if the declarant is unavailable.*

An example of how the changed rule will work may be illustrated by *Chambers v. Mississippi*,¹⁹⁶ if the facts were to be slightly altered. In *Chambers*, Gable MacDonald, both orally and in writing, confessed to the crime with which the defendant was charged. The defendant's efforts to call the witnesses who had heard the statements of MacDonald were blocked by the trial court, and by the Mississippi Supreme Court, on hearsay grounds. The United States Supreme Court reversed the lower courts, however, citing rule 804 (although not applicable because MacDonald was available), and suggested the admissibility of statements against penal interest. In order to bring the case squarely within rule 804, it should be assumed that MacDonald was in fact unavailable or was unavailable because of a refusal to testify. Under rule 804, MacDonald's statement would be admissible but, since it would be offered to exculpate the defendant, it would not come in unless "corroborating circumstances" clearly indicated its trustworthiness.

Since statements against penal interest can be used, under the proper circumstances, to exculpate a criminal defendant, the House Committee recognized that results such as those found in *Donnelly v. United States*¹⁹⁷ would be changed. In *Donnelly*, the confession of a decedent, clearly showing his involvement and tending to exculpate the defendant, was excluded because the statement was not against his pecuniary interest but only against his criminal interest. As Justice Holmes once said, in a dissenting opinion: "[N]o other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man."¹⁹⁸

(4) Statement of personal or family history.—(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B)

196. 410 U.S. 284 (1973).

197. 228 U.S. 243 (1913).

198. *Id.* (dissenting opinion).

a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.¹⁹⁹

There are no remarkable changes in this rule except, as stated in the comments of the advisory committee, the following: (1) The declaration need not have been made before the controversy arose; (2) The declarant may testify if he is not related to but has an intimate association with the family; (3) If the statement concerns a relationship between two other persons, the declarant need not qualify as to both.²⁰⁰

RULE 805: HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.²⁰¹

The rule is self-explanatory. In order for several items of hearsay to come in, each must independently meet evidentiary standards; if so, the fact that it is included within other hearsay does not make it inadmissible.

RULE 806: ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.²⁰²

199. FED. R. EVID. 804(b)(4).

200. 46 F.R.D. at 387.

201. FED. R. EVID. 805.

202. FED. R. EVID. 806.

A hearsay statement, once admitted, may be attacked and supported as if the declarant had testified in court. It is proper to show any inconsistent statement or conduct of the declarant, at any time, whether or not he was given a chance to deny or explain it. If a declarant is later called as a witness by a party against whom the statement was given, that party may then cross-examine the witness.

This rule gives to the trial lawyer, against whom hearsay evidence has been used, three weapons of attack: (1) He may attack the credibility of the declarant as if he were present;²⁰³ (2) He may show inconsistent conduct or statements of the declarant; and/or (3) He may call the declarant as his own witness and cross-examine him on the statement. This rule provides a check on the possible abusive use of hearsay evidence as permitted by the Federal Rules. It should compel the careful advocate to be certain that the witness himself cannot testify before he relies on the hearsay evidence, even though such may otherwise be permitted.

In order to aid the party disadvantaged by the lack of the opportunity to cross-examine, counsel is further permitted to introduce the prior inconsistencies whether they occurred before or after the statement in question and whether or not the declarant was ever given a chance to explain or deny, as required by rule 613(b).²⁰⁴ In other words, impeachment is proper even without laying a foundation.

CONCLUSION

The Federal Rules of Evidence will change the trial practice in the United States District Courts and Magistrates Courts. The hearsay changes in particular will be of great significance. Many state courts will adopt some or all of the Federal Rules as appropriate cases are presented and many state legislatures will consider codes of evidence patterned after the Federal Rules of Evidence.

Having now enacted the Federal Rules of Evidence, Congress has also created the machinery to amend them. The tendency will be to liberalize the Rules over the years and to adopt some of the recommendations of the Judicial Conference which have been re-

203. FED. R. EVID. 608. See note 167 *supra* for the text of rule 608.

204. FED. R. EVID. 613(b). See note 77 *supra* for the text of rule 613(b).

jected by Congress. The hearsay rule, weakened considerably by Article Eight, will continue to be eroded by judicial interpretations and congressional amendments. Innovations, such as statements of recent perception, will become recognized exceptions to the rule. The trend is clear: allow the hearsay evidence to be admitted and then permit the finder of fact to weigh its reliability.

It would not be surprising, in the years to come, to see American courts follow the English lead in the abolition of the hearsay rule entirely. If so, Article Eight will have been the first step in that process.

