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NOTES

RULE 8-04(b)(2) OF THE PROPOSED FEDERAL RULES OF EVIDENCE: A STEP TOO FAR?

INTRODUCTION

The recent promulgation of proposed Federal Rules of Evidence is a result of a continuous movement in the United States toward reform of the law of evidence.\(^1\) A major target of this reform is the hearsay rule. Because of its multifarious exceptions, the hearsay rule has become both confusing and difficult to apply.\(^2\) Attempts to abandon the rule entirely, or in the alternative to liberalize its exceptions,\(^3\) have enveloped the reform movement in controversy.\(^4\) Article VIII, Hearsay, of the proposed Federal Rules of Evidence has been proffered as a reasonable measure of reform of the hearsay rule.\(^5\) The draftsmen of the Federal Rules of Evidence have retained the rule against hearsay, but have systematically revised its exceptions.\(^6\) The purpose of this note is to discuss whether rule 8-04(b)(2), Statement of Recent Perception, is a reasonable exception to the rule against hearsay. Consideration will be given not only to past experience but also to the present judicial application of the Federal Rules of Civil Procedure.\(^7\)

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1. The most notable achievements are the Model Code of Evidence, adopted and promulgated by the American Law Institute in 1942; the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws in 1953, approved by the American Bar Association and the American Law Institute, adopted in California, Kansas and New Jersey; and the latest effort, the Federal Rules of Evidence, proposed in 1969.

2. See McCormick, Evidence §§ 230-99 (1954) for an elaboration of the various exceptions to the hearsay rule.


4. See Model Code of Evidence, ch. VI; Uniform Rules of Evidence, art. VIII.

5. Fed. R. Evid. art. VIII, Introductory Note, 46 F.R.D. 324, 328 (Prelim. Draft 1969): This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Id.

6. Id. at 327.

7. Only the applicability of federal rule 8-04(b)(2) in civil cases will be discussed. The rule, however, is applicable to criminal cases as well.
WHAT CONSTITUTES AN EXCEPTION TO THE HEARSAY RULE?

The hearsay rule protects the litigant from the risks of inaccuracy and untrustworthiness inherent in the untested statement of an out-of-court declarant.\(^8\) Rule 8-02 of the Federal Rules continues this protection.\(^9\) "Hearsay"\(^10\) is inadmissible except as provided by these rules or the Rules of Civil and Criminal Procedure or by Act of Congress."\(^11\) It may be undesirable to exclude hearsay evidence where it is clear that the statement is free from the risks of inaccuracy or untrustworthiness.\(^12\) In such an instance an exception to the rule is needed. Two considerations, a circumstantial probability of trustworthiness and a necessity for the evidence, are the foundation of exceptions to the hearsay rule.\(^13\)

There are two categorical exceptions to rule 8-02: 1) rule 8-03(a),\(^14\) relating to conditions which indicate that unavailability of the declarant has no bearing on the admissibility of the out-of-court statement; and 2) rule 8-04(a), relating to conditions which indicate that the declarant's

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8. McCormick, Evidence § 224 (1954). Hearsay statements are untested in that they are not subject to cross-examination. See 5 Wigmore, Evidence § 1362 (3d ed. 1940); see also NLRB v. Imparto Stevedoring Corp., 250 F.2d 297 (3d Cir. 1957); Colgrove v. Goodyear, 325 Mich. 127, 37 N.W.2d 779 (1949); Dempsey v. Meighen, 251 Minn. 562, 90 N.W.2d 178 (1958).
   "Hearsay" is a statement, offered in evidence to prove the truth of the matter asserted, unless (1) . . . The statement is one made by a witness while testifying at the trial or hearing; or (2) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him, or (iv) a transcript of testimony given under oath at a trial or hearing or before a grand jury; or (3) . . . The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, or (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Compare McCormick, Evidence § 225, at 460 (1954):
Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

Id.
12. 5 Wigmore, Evidence § 1420 (3d ed. 1940).

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unavailability is a condition precedent to the admissibility of his statement.\textsuperscript{15} Traditional hearsay exceptions were used as a basis for formulating the exceptions listed under rules 8-03(a) and 8-04(a). These exceptions illustrate, but do not limit, the applicability of the two rules.\textsuperscript{16}

Rule 8-04(a) provides:

A statement is not excluded by the hearsay rule if its nature and special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness.\textsuperscript{17}

The subject of this note is rule 8-04(b)(2), an illustration of rule 8-04(a), which excepts from the hearsay rule

[a] statement, not in response to the instigation of a person investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.\textsuperscript{18}

This rule is not a codification of a common law exception.\textsuperscript{19} It is a relaxation of the strict requirements of hearsay exceptions. The problem is whether 8-04(b)(2) merits adoption as an illustration of hearsay statements whose admission is desirable.

**THE ELEMENT OF NECESSITY**

An essential element for admissibility of hearsay evidence is the need to receive it.\textsuperscript{20} The evidence may be necessary because of the death,\textsuperscript{21} insanity,\textsuperscript{22} absence from the jurisdiction\textsuperscript{23} or other unavailability of the declarant.\textsuperscript{24} Evidence may also be necessary where conditions

\begin{enumerate}
\item Id. 8-04(a) at 377.
\item Id. art. VIII, Introductory Note at 324.
\item Id. 8-04(a) at 377.
\item Id. 8-04(b)(2).
\item Id. Committee Note at 382.
\item See note 22 supra and accompanying text.
\end{enumerate}
indicating that the court cannot be expected at this or any other time to get evidence of the same value from the same or other sources.\textsuperscript{25} The committee note indicates that rule 8-04(a) is based, in part, on necessity.\textsuperscript{26} Under this rule, the declarant\textsuperscript{27} must be unavailable\textsuperscript{28} if his statement\textsuperscript{29} is to be admitted.\textsuperscript{30} It is doubtful whether unavailability alone can be a sufficient basis for an exception to the hearsay rule.\textsuperscript{81} Courts have, however, admitted hearsay statements where there was some urgent need for the evidence other than the declarant's unavailability.\textsuperscript{82}

In Moore v. Atlanta Transit System,\textsuperscript{83} for example, the statement of a deceased declarant describing how she was injured was admitted into evidence because there were no other witnesses to the accident.\textsuperscript{34} The

\textsuperscript{25} Necessity in this context requires a comparison of the probative value of the survey with the evidence, if any, which as a practical matter could be used if the survey were excluded. If the survey is more valuable, then necessity exists for the survey, i.e., it is the inability to get "evidence of the same value" which makes the hearsay statement necessary.


\textsuperscript{27} In a need for hearsay evidence where it is apparent that more satisfactory evidence is not available. See Olesen v. Henningsen, 247 Iowa 883, 77 N.W.2d 40 (1956); Chillstrom v. Trojan Seed Co., 242 Minn. 471, 65 N.W.2d 888 (1954).


\textsuperscript{30} "A declarant is a person who makes a statement." Fed. R. Evid. 8-01(b), 46 F.R.D. 331 (Prelim. Draft 1969).

\textsuperscript{31} "Unavailable as a witness" includes situations in which the declarant is:

(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persistent in refusing to testify despite an order of the judge to do so; or

(3) Unable to present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(4) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance.

\textsuperscript{32} A declarant is not unavailable as a witness if his exemption, refusal, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.


\textsuperscript{34} "A statement is (1) an oral or written assertion or (2) a nonverbal conduct of a person, if it is intended by him as an assertion." Fed. R. Evid. 8-01(a), 46 F.R.D. 331 (Prelim. Draft 1969).


\textsuperscript{36} Rule 503(a) of the Model Code of Evidence provided broadly for admission of any hearsay declaration of an unavailable declarant. No circumstantial guarantees of trustworthiness were required. Lacking in precedent, the rule met with little success.


\textsuperscript{38} Jacobs v. Village of Buhl, 199 Minn. 572, 273 N.W. 245 (1937).

\textsuperscript{39} 105 Ga. App. 70, 123 S.E.2d 693 (1961).

\textsuperscript{40} The court ruled:

[D]eclarations of a decedent, or where there is equivalent unavailability of the

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statement was not made until eighteen months after the accident and six months before the trial. At that time it was made to a doctor who examined her on behalf of the defendant transit system. Reliability was not an issue.\textsuperscript{38} The court admitted the evidence because of the peculiar need for it—the non-existence of any other eye-witnesses to the accident.

In another case that considered the question, Jacobs v. Village of Buhl,\textsuperscript{39} the court admitted a non-spontaneous\textsuperscript{40} statement that a policeman had made forty-five minutes after an accident. The statement described how the policeman had injured his knee in a fall while he was alone on his beat. He died several months later from septecemia. The evidence was accepted out of necessity—not because the policeman was dead, but because he had been working alone and lacked the benefit of a witness to his accident.

A Connecticut statute\textsuperscript{41} provides for admission of statements of a deceased declarant in actions by or against his personal representative. This provision is necessary to offset the presumed inequality resulting when a surviving opponent is allowed to testify about matters concerning the decedent's estate.\textsuperscript{42} Accordingly, the court in Plisko v. Morgan\textsuperscript{43} admitted the statement of a deceased declarant that attributed his accident

declarant, to whomsoever made are admissible in evidence if there are no other witnesses to alleged occurrence. "Other witnesses" within the meaning of this rule would include eyewitnesses, whether favorable or unfavorable to the party offering the evidence, but would exclude those who merely testify that they did not see the alleged occurrence.


35. The court quoted Atlanta St. Ry. Co. v. Walker, 93 Ga. 462, 465, 21 S.E. 48, 49 (1893), in which Chief Judge Bleckley stated "[S]carcely anything * * * [is] less reliable than a sick plaintiff's opinion of his own case, when he is in pursuit of damages." Moore v. Atlanta Transit Sys., Inc., 105 Ga. App. 70, 84, 123 S.E.2d 693 (1961).

36. 199 Minn. 572, 273 N.W. 245 (1937).


38. CONN. GEN. STAT. ANN. § 52-172 (1958) provides:

In actions by or against representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. In actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of such trustee or receiver, shall be received in evidence.

Id.


to the worn and slippery edges of a stairway. The plaintiff, executrix of the decedent's estate, sued the owners of a two-family house, claiming that the injury was caused by the defective condition of a common stairway. Unavailability of the declarant, however, was not the determining factor of admissibility. The decedent's statement was necessary to rebut the testimony given in court by the defendants.\footnote{41}{Id.}

The mere unavailability of the declarant should not, therefore, remove the declarant's hearsay statement from the operation of the hearsay rule.\footnote{42}{See notes 20-40 supra and accompanying text. Contra, In re Keenan, 287 Mass. 577, 192 N.E. 65 (1934). In a disbarment proceeding, the court admitted the statement of a deceased juryman that he had taken a bribe from the lawyer in question. This exception to the hearsay rule was made pursuant to MASS. ANN. LAWS ch. 233, § 65 (1956). In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant. Id. For further applications see Young v. Slaney, 255 F.2d 785 (1st Cir. 1958); Kelly v. Jordan Marsh Co., 278 Mass. 101, 179 N.E. 299 (1939). See also R.I. GEN. LAWS ANN. § 9-19-11 (1956), and supporting cases, Rhode Island Hosp. Trust Co. v. United States, 241 F. Supp. 586 (D.R.I. 1965); Waldman v. Shipyard Marina, Inc., 230 A.2d 841 (R.I. 1967).}

Rule 8-04(a), as a general exception to the proposed federal hearsay rule,\footnote{43}{Fed. R. Evid. 8-02, 46 F.R.D. 343 (Prelim. Draft 1969).} specifies no further requirement of necessity than the declarant's unavailability.\footnote{44}{Compare Uniform Rules of Evidence 63(4)(c), Commissioners' Note: The fact remains that there is a vital need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best available. Id. (emphasis added).}

It follows, then, that rule 8-04(a) would not be sufficient as a hearsay exception without the added requirement that the out-of-court statements have "strong assurances of accuracy."\footnote{45}{Fed. R. Evid. 8-04(a), 46 F.R.D. 377 (Prelim. Draft 1969).} Rule 8-04(b)(2), as an illustration of 8-04(a), must sanction only those statements of an unavailable declarant, absent some further compelling need, made under circumstances known to give strong assurances of accuracy to the statements.\footnote{46}{Cases cited note 13 supra.}

**The Element of Trustworthiness**

Courts will admit untested hearsay evidence where it is probable that the statements are accurate and trustworthy.\footnote{47}{5 Wigmore, Evidence § 1422 (3d ed. 1940), quoted in Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961). See also Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963); Olesen v. Henning, 247 Iowa 883, 77 N.W.2d 40 (1956); Fauciella v. Harry, 409 Pa. 155, 185 A.2d 598 (1962).} Rule 8-04(a) calls for "strong assurances of accuracy."\footnote{48}{See note 45 supra and accompanying text.} The question then becomes whether
rule 8-04(b)(2) is a proper illustration of rule 8-04(a) with regard to admitting as evidence hearsay statements offering strong assurances of accuracy. The naked thrust of the rule is to allow into evidence a "statement . . . which narrates, describes, or explains an event or condition recently perceived by the [now unavailable] declarant . . . ."49

Wigmore states that there are three classes of reasons underlying the exceptions to the hearsay rule.50 It is situations under these classifications that the courts have sanctioned as sufficient guarantees of trustworthiness:51

(1) Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed; (2) where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force; (3) where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.52

The Natural Utterance of an Accurate Statement

Prime examples of statements which involve circumstances under which a sincere and accurate statement would naturally be uttered are those that are a part of the res gestae.53 In Chesapeake & Ohio Ry. Co. v. Mears,54 a severely injured railroad conductor was found lying beside a track in a railroad yard. His statement that he had been knocked from the train by a car on the adjacent track was admitted into evidence. The court found a sufficient guarantee of trustworthiness in his statement because it had been made under the immediate influence of the accident.

50. 5 Wigmore, Evidence § 1422 (3d ed. 1940).
51. See note 47 supra and accompanying text.
52. 5 Wigmore, Evidence § 1422 at 205 (3d ed. 1940), quoted in Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 397 (5th Cir. 1961).
53. The court in General Schuyler Ins. Co. v. Shustick, 35 Ohio L. Abs. 205, 213, 40 N.E.2d 485, 489 (Ct. App. 1941) stated:
[Res gestae] may be broadly defined as meaning matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might properly be understood. * * * They are incidents of the act, and not the act itself.
Four major exceptions have evolved from the concept of res gestae: 1) Declarations of present bodily condition; 2) declarations of present mental state and emotion; 3) excited utterances; and 4) declarations of the present sense impression. Wabiskey v. D.C. Transit Sys., 309 F.2d 317 (D.C. Cir. 1962).
See Fed. R. Evd. 8-03(b)(1), (2) & (3), 46 F.R.D. 345 (Prelim. Draft 1969) for these exceptions.
54. 64 F.2d 291 (4th Cir. 1933).
The court ruled:

[D]eclarations which are the natural emanation or outgrowths of the act or occurrence of the litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction . . . and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself.\textsuperscript{55}

It is doubtful whether narrations of past events are made "under such circumstances as necessarily to exclude the idea of design or deliberation." The mind of the declarant is no longer under the control of the event. The courts, therefore, have adopted the presumption that his later statements are deliberate.\textsuperscript{56}

The statement considered in \textit{Bennette v. Hader}\textsuperscript{57} was made approximately one minute after the declarant, an accident victim, had regained consciousness. He was still at the scene of the accident and was suffering intense pain. The statement was admitted into evidence because it apparently was the spontaneous result of the accident and resulting death [of another passenger] upon the senses of the speaker rather than the result of premeditation, design or reasoning from the facts.\textsuperscript{58}

The preclusion of the possibility of deliberation and fabrication results


(1) The statement or declaration must relate to the main event and must explain, elucidate, or in some way characterize that event, (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair, (3) it must be a statement of a fact, and not a mere expression of an opinion, (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design, (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such a time and under such circumstances as will exclude the presumption that it is the result of deliberation, and, (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

\textit{Id.} at 651.

\textsuperscript{56} Chesapeake & Ohio Ry. Co. v. Mears, 64 F.2d 291 (4th Cir. 1933). \textit{See also} Jack v. Mutual Reserve Fund Life Ass'n, 113 F. 49 (5th Cir. 1902); Showalter v. Western Pac. Ry. Co., 16 Cal. App. 2d 460, 106 P.2d 895 (1940); Bennette v. Hader, 337 Mo. 977, 87 S.W.2d 413 (1935).

\textsuperscript{57} 337 Mo. 977, 87 S.W.2d 413 (1935).

\textsuperscript{58} \textit{Id.} at 416.
in a high degree of reliability and trustworthiness. A narrative of a past event is not a circumstance under which a sincere and accurate statement would naturally be uttered. A case which clearly states this proposition is Portsmouth Transit Co. v. Brickhouse. In that decision, a driver's statement to a police officer, made twenty minutes after an accident, was determined inadmissible hearsay because it was merely a narrative of a past event. In discussing the lack of natural reliability surrounding the circumstances of the narrative account, the court stated:

[T]he spontaneity of the utterance is the guarantee of its trustworthiness . . . it must be made at such a time and under such circumstances as will preclude the presumption that it is the result of deliberation. It must not be a narrative of a past, completed affair.

A second example showing that a narrative is not a natural utterance is United States v. Mountain State Fabricating Co. In that case, the witness saw a fire and asked an unidentified workman what had happened. The workman stated that he and another workman had noticed the fire and had extinguished it. After returning from a lunch break, however, the workmen again found the structure afire. In an ensuing negligence action, the court held that even though the fire was still burning when the account was purportedly given, the retrospective character of the statement offered little assurance of reliability. Lack of spontaneity was held to be the determining factor in the court's rejection of the statement. The workman had time to make a considered response, and his account of the fire was not a natural emanation of the event itself.

A narration, explanation or description of a past event, not spon-
taneous to it, affords the declarant an opportunity to weigh the consequences of his thoughts and ultimately add design to the statement he makes. As a result, he may recount the event as he remembers it, rather than as it happened, or he may even mold it to his own liking.\(^{68}\) Since a narration of a past event is not what has been termed the statement or gesture drawn out by the circumstances of the event, there should be no presumption, based upon the aspect of spontaneity, that such a statement is sincere and accurate.\(^{69}\)

**Fear of Punishment**

The second circumstance determinative of an accepted degree of trustworthiness permits a non-spontaneous statement where the danger of easy detection or the fear of punishment would probably deter falsification.\(^{70}\) Dying declarations, official statements and prior testimony under oath are commonly made under such circumstances.\(^{71}\)

The fear of divine punishment is believed to instill in a person who knows he is dying a tendency to tell the truth.\(^{72}\) Shortly before he died, a victim of a shotgun blast told the investigating sheriff that his brother-in-law had shot him. In the ensuing murder trial,\(^{73}\) the court acknowledged the reliability of dying declarations made “in view of impending death and judgment, when the last hope of life is extinct, and when the retributions of eternity are at hand.”\(^{74}\) Since the state, however, did not offer evidence from which an inference could be drawn that the victim knew he was dying when he made the statement, the court rejected the statement as being no more reliable than ordinary hearsay. The court explained:

If the statements made by the deceased were not made with knowledge of impending death and judgment, that his last hope of life was gone, that his soul was soon to take its flight into the unexplored realms of eternity “from whose bourne no

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68. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); Standard Accident Ins. Co. v. Heathfield, 141 F.2d 648 (9th Cir. 1944); Bennette v. Hader, 337 Mo. 977, 87 S.W.2d 413 (1935); General Schuyler Ins. Co. v. Shustick, 35 Ohio L. Abs. 205, 40 N.E.2d 485 (Ct. App. 1941).


70. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).


73. Id.

74. Id. at 457.
traveler returns," the law would not impart that equal solemnity to his statements equivalent to testimony under oath.  

A narration of a past event, not in response to the instigation of a person engaged in investigating, litigating or settling a claim, is a voluntary statement that is not made under fear of detection or punishment. Though the motive to falsify may be lessened by barring statements which are the fruits of investigatory procedures, fear of detection or punishment is still not present in the making of statements which would be admissible under rule 8-04(b)(2). Therefore, the rule does not promise or even render probable the particular assurances of accuracy offered by these special circumstances.

Conditions of Publicity

The third circumstance lending reliability to a hearsay statement is the condition of publicity under which it was made. Publicity is expected to assure a probability of detection and correction when a statement is in error. In *Dallas County v. Commercial Union Assurance Co.*, the court admitted an article from a newspaper published fifty-eight years before the trial. The court explained that although newspaper articles are not usually admissible since they are hearsay, in this instance a small town was involved, and the resulting conditions of publicity were such that a false report of a fire in the town's courthouse tower would have subjected the newspaper and the reporter to embarrassment in the community. The court concluded:

To our minds the article published in the *Selma Morning-Times* on the day of the fire is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later.

In most cases, a general statement narrating a past event would not be made under conditions of publicity. Therefore, with regard to conditions of publicity, statements excepted from the operation of the hearsay rule by rule 8-04(b)(2) would not offer corresponding assurances of accuracy.

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75. Id.
76. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).
77. Id.
78. Id. at 397.
80. As to these three circumstances, Wigmore stated: First, it is not always that an exception is founded merely on a single one of
LIMITATIONS OF UNRELIABILITY

With little guarantee of reliability in narrations of past events, what assurances of accuracy are gained by limiting the application of rule 8-04(b)(2) to statements made: 1) not in response to investigatory functions; 2) ante litem motam; 3) recent to the event; 4) with clear recollection; and 5) in good faith? First, the rule limits admissibility to statements "not in response to the instigation of a person engaged in investigating, litigating, or settling a claim."81 This provision was incorporated to exclude inherently unreliable statements "carefully prepared under the tutelage of lawyers, claim adjusters, or investigators with a view to pending or prospective litigation."82 With the exclusion of such statements, the circumstantial probability of unreliability resulting from investigatory procedures is avoided. This, however, does not result in the conclusion that statements otherwise admissible under rule 8-04(b)(2) would then be reliable.

Secondly, the rule prohibits statements made "in contemplation of pending or anticipated litigation in which he [the declarant] was interested."83 The ante litem motam clause is usually present in exceptions whose reliability would otherwise be unquestioned except for the possibility of some interest in litigation, present or future, to which the declarant might pattern his statement.84 Although some specifically unreliable statements are prohibited by this clause, there is still little assurance that the permitted statements will be reliable.

Thirdly, rule 8-04(b)(2) limits admissibility to statements of events

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82. Id. Committee Note at 383. The lack of such a clause was one of the main reasons for the deletion of rule 63(4)(c) of the Uniform Rules of Evidence from the California Evidence Code. See 4 CALIFORNIA LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 318 (1962).

5 Wigmore, Evidence § 1422 at 205 (3d ed. 1940). It is to be presumed that if a statement is not made under any one of the three sets of circumstances indicative of sufficient trustworthiness, then the statement cannot fit the circumstances of any combination of the three. Therefore, it cannot of itself point to the degree of reliability the circumstances contemplate.
“recently perceived.” In general, a hearsay statement must be made contemporaneous to the event about which it speaks. The lapse of time, however, between the event and the statement elucidating the event is not indicative of reliability—it only helps to determine whether the statement could have been spontaneous. If there is a lack of spontaneity, the lapse of time involved permits the moment of deliberation and the opportunity to fabricate that courts have not permitted. Where the declarant has the opportunity to falsify his account of the event perceived, he must make his statement under circumstances that guarantee that he will not falsify. It is submitted, however, that an 8-04(b) statement does not offer this guarantee. It would therefore seem that the exclusion of statements narrating events not recently perceived by the declarant would not assure that statements ultimately admitted would be accurate.

Fourthly, the rule bans statements made by the declarant when his

85. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1675 (unabridged 1961), defines perception as:

[physical sensation as interpreted in the light of experience; the integration of sensory impressions of events in the external world by a conscious organism esp. as a function of non-conscious expectations derived from past experience and serving as a basis for or as verified by further meaningful motivated action.]

Id. Rule 62(3) of the Uniform Rules of Evidence more simply provides: “Perceive means acquire knowledge through one's own senses.” Id.

66. Courts have found statements contemporaneous when they were uttered immediately after the event perceived. See Chesapeake & Ohio Ry. Co. v. Mears, 64 F.2d 291 (4th Cir. 1933) (several minutes after an injury); Rice v. Jackson, 1 Mich. App. 105, 134 N.W.2d 366 (1965) (during a fire); Bennette v. Hader, 337 Mo. 977, 87 S.W.2d 413 (1935) (one minute after regaining consciousness). Contra State v. Simmons, 52 N.J. 538, 247 A.2d 313 (1968) (several hours after an assault); Ogden Iron Works v. Industrial Comm’n, 102 Utah 492, 132 F.2d 376 (1942) (nine days after an accident).


88. The risk of untrustworthiness is found in the period of time between the event and the statement describing the event that allows the declarant to deliberate. Showalter v. Western Pac. Ry. Co., 16 Cal. App. 2d 460, 106 P.2d 895 (1940) (“before time to reflect upon the consequences of his statement; . . . to negative any probability of fabricating”); Hutchesi v. Cedar Rapids & M.C. Ry. Co., 128 Iowa 279, 103 N.W. 779 (1905) (“without opportunity for premeditation”); Campbell v. Brown, 81 Kan. 480, 106 P. 37 (1910) (“where it appears that claimed exception to the hearsay rule was in fact a deliberate and considered answer”); Ammundson v. Tinholt, 228 Minn. 115, 36 N.W.2d 521 (1949) (“unless the party making it had the capacity of recollecting and narrating the facts to which his utterance relates”); Bennette v. Hader, 337 Mo. 977, 87 S.W.2d 413 (1935) (“to preclude the idea of deliberation and fabrication”); Portsmouth Transit Co. v. Brickhouse, 200 Va. 844, 108 S.E.2d 385 (1959) (“to exclude the presumption that it is the result of deliberation”).

89. No consideration has been given to the dilemma of what is or is not recent since recency cannot be shown to assure reliability, but only to obviate certain unreliability. For a consideration of the problem of recency, see Gard, Evidence, 12 KAN. L. REV. 239 (1963).
recollection of the event or condition was unclear. What is or is not clear recollection can only be determined in a courtroom by objective standards. Either a witness must testify to what he believes was the probable clearness of the declarant's recollection, or the court must look to the circumstances under which the statement was made—recency of perception, complexity of the event and the then-existing mental state of the declarant. The problem, however, is who can testify to the declarant's capacity for remembering. It is suggested that despite the most cautious judicial discretion, the probability that only accurate statements will be admitted regarding the clearness of recollection of a recently perceived event will necessarily be low.

Not only does our idea of the past become inexact by the mere decay and disappearance of essential features; it becomes positively incorrect through the gradual incorporation of elements that do not properly belong to it . . . extraneous ideas become imported into our mental representation of a past event.

The declarant's subjective attentiveness is critical in determining the quality of his perception and recollection. A clear recollection may still be a "tainted" recollection. It is submitted that a requirement for clarity of recollection fails in its objectivity to consider a subjective question.

When the requirement of good faith is added to the foregoing limitations, the basic exception is restored to its original context. It is submitted that good faith, by itself, is impossible to discern, and that it is actually the presence of bad faith that permits detection. A good faith requirement can only assure detection of statements obviously untrustworthy because of their apparent bad faith origin.

91. Though some of the "fact" variations in the testimony of those involved in legal controversies are due to perjury, most of them are honest variations caused by the inherent nature of man himself. "His thought processes do not always permit him to record and relate accurately the true character of those images or stimuli which affect his senses." W. Rokes, Memory Taints Witness Credibility, 5 Trial 46 (1969).
94. Through his reasoning processes, he [man] interprets a stimulus . . . .
Thus, he sometimes modifies, or completely changes, what was originally perceived. As a consequence, imperfections in human sensitivity, man's peculiar mental processes, and dishonesty, result in wide distortions and differences in perception, recollection, and narration. . . . His recollection of an earlier event may be so intermingled with the memory of subsequent events that a narration of the earlier event will be distorted.

Id. at 46.
PROPOSED FEDERAL RULE 8-04(b)(2)

THE EFFECT OF THE FEDERAL RULES OF CIVIL PROCEDURE

It was the hope of the draftsmen of the proposed Federal Rules of Evidence that the addition of the clause prohibiting admission of statements obtained through the instigation of persons engaged in investigating, litigating or settling claims would cure one of the apparent defects of rule 63(4)(c) of the Uniform Rules of Evidence. There is, however, an added danger overlooked by the draftsmen with regard to differences between the Uniform Rule and the Federal Rule. Rule 63(4)(c) was drafted to indicate an attitude of reluctance that requires the most careful scrutiny before admitting hearsay evidence under its provisions. Rule 8-04(b)(2) of the Federal Rules would be subject to the provisions of the Federal Rules of Civil Procedure.

Rule 43(a) of the Federal Rules of Civil Procedure governs the admissibility of evidence in federal courts and requires that rules of evidence be construed to favor admissibility. There is hesitation to accept the hearsay statements of the type contemplated in the Uniform Rules, whereas there is a tendency to favor the same statements under the Federal Rules approach. There is, therefore, a significant difference in discretion between the two rules regarding the admissibility of hearsay, and it is the Federal Rule that permits the less discrete approach. It is submitted that this can only decrease the probable accuracy of 8-04(b)(2) statements.

A LIBERALIZATION BEYOND REASON

Rule 8-04(b)(2) is not a good illustration of the admonition of rule 8-04(a) because the safeguards written into 8-04(b)(2) are not adequate when applied to "offer strong assurances of accuracy." The safeguards eliminate only those hearsay declarations which are assuredly inaccurate. This internal inconsistency of the Federal Rules of Evidence is obvious if it is assumed that the draftsmen equated "strong assurances of accuracy" to the common law standard of strong probability of trustworthiness.

The draftsmen, however, may have intended the federal standard to be a relaxation of the common law standard. If this is the case, the rule is not

95. See note 82 supra and accompanying text.
96. UNIFORM RULE OF EVIDENCE 63(4)(c), Commissioners' Note.
99. Fidelity & Cas. Co. of N.Y. v. Funel, 383 F.2d 42 (5th Cir. 1967).
100. FED. R. EVID. 8-04(b)(2), Committee Note, 46 F.R.D. 377, 383 (Prelim. Draft 1969). The draftsmen of the Federal Rules have elected against admitting all hearsay or discarding all hearsay, but instead favor a qualified rule against hearsay, the exceptions to which offer reliability above the normal to be expected. FED. R. EVID. art. VIII, Introductory Note, 46 F.R.D. 324, 328 (Prelim. Draft 1969).
clear. The Committee Note states that rule 8-04(a), which offers "strong assurances of accuracy," is consistent with the pattern of hearsay exceptions as common law with respect to the declarations of unavailable declarants. A lower standard of reliability is applied to these declarations. It is submitted, however, that the reliability inherent to narrations of past events cannot be compared with the reliability of statements peculiar, for example, to common law exceptions for ancient deed recitals, family history, declarations against interest or dying declarations. The latter statements are felt reliable because of the obvious lack of motive to misrepresent or deceive, whereas narrations of past events are replete with incentive to falsify. Where there is both motive and opportunity to deceive, the standards of reliability of acceptable hearsay must be raised, not lowered.

The final consideration is whether rule 8-04(b)(2), though a weak attempt at liberalization, may still be beneficial to the adversary, judicial determination of factual issues. It is submitted that the rule would permit gross falsification of the most undetectable variety. Employable safeguards regarding the witness’ reproduction of the declarant’s unreliable statements are virtually non-existent. The rule does not differentiate between declarations offered by interested proponents and declarations offered by disinterested proponents. This problem is particularly critical since both written and oral declarations would be admissible. Oral hearsay would certainly be more subject to false reproduction by the proponent than written hearsay. It is submitted that cross-examination of an interested proponent would not expose his falsification; nor could cross-examination serve as a sufficient deterrent to falsification. The witness need only state what he remembers or "thinks" the declarant said. The exposure of perjured testimony would be so remote in such an instance that the probability of accuracy of an uncorroborated 8-04(b)(2) statement would be indeterminable. This situation, if accepted, would relegate the hearsay rule to one of preference. Without discussing the value of a hearsay rule as a rule of preference rather than as a rule of exclusion, it should be noted that the draftsmen of the Federal Rules intended the federal hearsay rule to be a rule of exclusion.

An 8-04(b)(2) declaration is not subject to cross-examination. Therefore, information affecting the declarant’s grounds of knowledge, interest, bias, character and other supplementary and qualifying facts

cannot be uncovered except through extraneous corroboration. The rule, however, does not require corroboration as a condition of admissibility. An 8-04(b)(2) statement would then be similar to most non-hearsay statements given under direct examination—it could either be an incomplete statement or a misstatement. Evidence of this kind is not useful for determining factual issues until it is subjected to cross-examination.\(^{104}\) Since the out-of-court declarant cannot be cross-examined, and since cross-examination of the proponent of the declarant's statement is not a satisfactory substitute, his statement, to be suitable, must be made under circumstances assuring reliability.\(^{105}\) Without this assurance, hearsay is not useful in determining factual issues and is detrimental to the adversary judicial process of litigation. It is submitted that rule 8-04(b)(2) would admit evidence that is not only useless, but also detrimental to evidentiary determinations of fact.

**Conclusion**

Assurances of accuracy are not gained by merely avoiding the potentially unreliable circumstances under which hearsay statements are made. Rule 8-04(b)(2) offers the probability that only certain obviously inaccurate statements of recently perceived events will be detected. This is not an assurance of accuracy. Rule 8-04(a) calls for strong assurances of accuracy that rule 8-04(b)(2) cannot meet. It is submitted, therefore, that rule 8-04(b)(2) is not a proper illustration of rule 8-04(a) and should be deleted.

The risk of a blanket exception such as rule 8-04(b)(2) is not necessary. Rule 8-04(a) provides a guideline for determining the admission of desirable hearsay statements in the future. In *Dallas County v. Commercial Union Assurance Co.*,\(^{106}\) the court did not admit the fifty-eight-year-old newspaper article because of any existing exception to the hearsay rule, but because of the unavailability of its author and the strong assurances of accuracy relating to the specific circumstances surrounding its publication.\(^{107}\) The court in *United States v. 60.14 Acres of Land*\(^{108}\) referred to evidence "admitted because it was necessary and trustworthy, under a court-created exception to the hearsay rule . . . ."\(^{109}\)

It would be untenable to say that a declarant's unavailability should itself determine the admissibility of a hearsay statement.\(^{110}\) A hearsay

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105. Id. at § 225.
106. 286 F.2d 388 (5th Cir. 1961).
107. Id.
108. 362 F.2d 660 (3d Cir. 1966).
109. Id. at 666.
110. 5 Wigmore, Evidence § 1420 (3d ed. 1940).
statement must first offer some extra assurance of accuracy, and then "there is reason for admitting it as not merely the best that can be got from that witness, but better than can ordinarily be expected without the test of cross-examination." 111

It is the "proper office of the expounder of law" to distinguish its applications from rulings which are merely arbitrary. 112 While rule 8-04(a) may permit some welcome liberalization of the hearsay rule when necessity dictates without sacrificing the requirement of reliability, it is submitted that rule 8-04(b)(2) goes too far. With regard to the hearsay problem, the court in United States v. Castellana, 113 stated:

We are loath to reduce the corpus of hearsay rules to a straight-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered statement. 114

It is submitted that rule 8-04(b)(2) is to be the antithesis of the exceptions contemplated in the Castellana decision. It is a loose body of semantical slogans to be haphazardly invoked regardless of the unreliability of the proffered statement, and as such, should be rejected. 115

111. Id.
112. Id. at § 1423.
114. Id. at 276.