

1977

### Symposium on the Federal Rules of Evidence: Their Effect on Wyoming Practice If Adopted

W. Michael Kleppinger

Blair J. Trautwein

Follow this and additional works at: [https://scholarship.law.uwyo.edu/land\\_water](https://scholarship.law.uwyo.edu/land_water)

---

#### Recommended Citation

Kleppinger, W. Michael and Trautwein, Blair J. (1977) "Symposium on the Federal Rules of Evidence: Their Effect on Wyoming Practice If Adopted," *Land & Water Law Review*. Vol. 12 : Iss. 2 , pp. 601 - 736.  
Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol12/iss2/7](https://scholarship.law.uwyo.edu/land_water/vol12/iss2/7)

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

## COMMENTS

The following Comment is a composite of several students' efforts. Covered in detail within the Comment are Articles IV, V, VIII, IX, and X of the Federal Rules of Evidence, dealing with relevancy, privileges, hearsay, authentication, and writings. The Comment focuses on the most important changes from the common law to the Federal Rules. It is anticipated that the remaining Articles of the Federal Rules of Evidence will be analyzed in a subsequent issue of the Land and Water Law Review. It is hoped that this Comment will serve as a useful guide to the Wyoming attorney. The Special editors separated the footnotes so that they begin anew with each article of the Federal Rules of Evidence. The Special Editors wish to thank Professor Christopher B. Mueller and Ms. Patricia Schick for the time and effort they gave in helping us put this Comment together. For the convenience of the reader the relevant Federal Rules of Evidence have been reproduced in an appendix following this Comment.

The Wyoming Supreme Court is studying Rules of Evidence for adoption in Wyoming. The version of the Rules under study by the Court varies somewhat from the Federal Rules of Evidence. The Wyoming State Bar has scheduled seminars dealing with Rules of Evidence which will be held at the State Bar convention in September of 1977. If Rules are adopted by the Wyoming Supreme Court, it is anticipated that the seminars would examine any deviations from the federal version.

W. MICHAEL KLEPPINGER  
BLAIR J. TRAUTWEIN

### SYMPOSIUM ON THE FEDERAL RULES OF EVIDENCE: THEIR EFFECT ON WYOMING PRACTICE IF ADOPTED

#### ARTICLE IV: RELEVANCY AND ITS LIMITS

Article IV of the Federal Rules of Evidence is concerned with relevancy. As the Advisory Committee has noted, relevancy is not an integral element of evidence and can exist "only as a relation between an item of evidence and a matter properly provable in the case."<sup>1</sup> It is "a matter of analysis and reasoning"<sup>2</sup> that is a cornerstone of our evidentiary system since evidence cannot be admitted regardless of any other rules or policies unless it has probative value on an issue in a case.<sup>3</sup> Relevancy problems can appear in a variety of ways, and Rules 401—403 provide the basic standards by which the probative value of all types of evidence can be de-

---

Copyright© 1977 by the University of Wyoming.

1. FED. R. EVID. 401 Adv. Com. Note.

2. *Id.*

3. MCCORMICK, EVIDENCE § 184 at 433 (2d ed. 1972) [hereinafter cited as MCCORMICK].

terminated and weighed against opposing considerations. If Article IV has a theme, it lies in the lenient relevancy test of Rule 401 which makes all probative evidence admissible.<sup>4</sup>

Rules 404—411 deal with more specific problems. Four distinct groupings occur within these eight rules. Rules 404—406 largely deal with evidence used to prove character or behavior. Rules 407-409 deal with evidence of certain behavior offered to prove an implied admission of guilt. Rule 410 wrestles with the controversial problem of statements made by a criminal defendant in connection with pleas and plea bargaining. Rule 411 regulates the use of liability insurance as evidence. All of these Rules appear in the Appendix. Generally, the Federal Rules on relevancy reflect majority practice, although a few major changes have been adopted.

#### *Rule 401: Definition of Relevant Evidence*

Federal Rule 401 provides a standard for determining the relevancy of proffered items of evidence. Relevancy has been defined as the tendency to prove or disprove a matter in issue<sup>5</sup>; therefore, if evidence is to be excluded, reason compels that the primary condition for rejecting it be lack of probative value.<sup>6</sup> Rule 401 defines relevancy as any tendency by an offered item to make the existence of any fact that is of consequence to the outcome of a case either more likely or less likely than if the offered item had not been received. This definition which does not rely on predetermined standards for deciding relevancy questions has been termed “logical” relevancy.<sup>7</sup> Under this test, if an item of evidence “appears to alter the probabilities” of a fact that may affect the outcome of the case, it is relevant.<sup>8</sup>

Wigmore had advocated a relevancy test based on “legal” relevancy. Wigmore’s legal relevancy test would require a

4. Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 *FED. B. J.* 21 (1974).

5. *BLACK’S LAW DICTIONARY* 1454 (rev. 4th ed. 1968).

6. *MCCORMICK* § 184, at 433.

7. Weinstein and Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 *GA. L. REV.* 43, 56 (1969).

8. *Id.* at 55.

"higher degree of probative value for all evidence to be submitted to a jury than would be asked in ordinary reasoning."<sup>9</sup> The Federal Rules rejected this stricter test because it was impractical. Such a test would "require a higher probative value at the beginning of the trial than when offered near the end when other evidence has been presented."<sup>10</sup> Legal relevancy, McCormick notes, "makes too heavy a demand upon a given item of proof at the admissibility stage, when we are gathering our bits of information piece by piece."<sup>11</sup>

The relevancy test of Rule 401 is similar to that used in Wyoming. In *Cornish v. Territory of Wyoming*, the Court stated that, "[A] relevant fact will not be rejected because it is not sufficient in itself to establish the whole or any definite portion of a party's contention."<sup>12</sup> Recent decisions have continued this liberal view favoring the admissibility of evidence. In *Colorado Serum Co. v. Arp*, the Wyoming Supreme Court, upholding the admission of a disputed piece of evidence, noted that "the modern tendency of courts is to admit in evidence any matter which throws light on the question in controversy. . . ."<sup>13</sup> The cases show a tremendous discretion given to trial judges in defining relevant evidence, especially in cases where the remoteness of circumstantial evidence is in issue.<sup>14</sup>

### *Rule 402: Relevant Evidence Generally Admissible*

Federal Rule 402 continues the reasoning begun in Rule 401. Once a determination under the test of Rule 401 has been made, Rule 402 provides that all irrelevant evidence is inadmissible while all relevant evidence is admissible except

9. 1 WIGMORE, EVIDENCE § 28, at 409 (1940 ed.) [hereinafter cited as WIGMORE].

10. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 390 (1951).

11. MCCORMICK § 185, at 437.

12. *Henderson v. Coleman*, 19 Wyo. 183, 115 P. 439, 451 (1911); *See also Cornish v. Territory of Wyoming*, 3 Wyo. 95, 3 P. 793, 794 (1884); *Tishamer v. Union Pacific R. Co.*, 41 Wyo. 382, 286 P. 377, 380 (1930).

13. *Colorado Serum Co. v. Arp*, 504 P.2d 801, 805 (Wyo. 1972). *See also Gilliland v. Rhoades*, 539 P.2d 1221, 1229 (Wyo. 1975), where the Supreme Court noted that:

Justice and common sense should be applied to legal philosophy in order to destroy any obstacle tending to deprive the jury of relevant facts which can assist in arriving at a correct solution to the factual problem confronting them.

14. *Gilliland v. Rhoades*, *supra* note 13.

as otherwise provided by the United States Constitution, Congress, the Federal Rules of Evidence themselves, or by rules prescribed by the United States Supreme Court. Weinstein explains that these restrictions on otherwise relevant and admissible evidence recognize that the goal of finding out the truth of a matter "is not always served by indiscriminate admission of all relevant evidence. Moreover, truth finding is not always the law's overriding aim."<sup>15</sup> The need to finalize disputes, promote judicial efficiency, or economize judicial resources may cause probative evidence to be excluded.<sup>16</sup> Relevant evidence may also be excluded in order to promote social policies, such as strengthening the judicial system or protecting constitutional rights.<sup>17</sup> Despite the recognition of constitutional and policy restrictions, Rule 402 affirms the modern tendency to allow all evidence that will increase the trier of fact's knowledge about an issue in dispute.<sup>18</sup>

Wyoming law is in accord with Rule 402. Irrelevant evidence is inadmissible.<sup>19</sup> Relevant evidence is generally admissible,<sup>20</sup> except when competing state policies would compel its exclusion. Examples of such competing policies would be the protection of certain privileges,<sup>21</sup> constitutional considerations,<sup>22</sup> and the truth finding process.<sup>23</sup>

*Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time*

Federal Rule 403 finishes the sequence begun in Rule 401. Although all relevant evidence is generally admissible, it may be excluded if its admission would entail certain risks.

15. WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 402[01], at 402-5 (1975) [hereinafter cited as WEINSTEIN].

16. *Id.* at 402-6.

17. *Id.* at 402-10.

18. Schmertz, *Relevancy and Its Policy Counterweights: A Brief Excursion through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B. J. 1, 4 (1974).

19. Reeder v. State, 515 P.2d 969, 973 (Wyo. 1973); Wilson v. Wilson, 473 P.2d 595, 597 (Wyo. 1970); State v. Vines, 49 Wyo. 212, 54 P.2d 826, 835 (1936).

20. Colorado Serum Co. v. Arp, *supra* note 13; Gilliland v. Rhoades, *supra* note 13; State v. Goettina, 61 Wyo. 420, 158 P.2d 865, 884 (1945).

21. WYO. STAT. § 1-139 (1957); WYO. STAT. § 1-142 (1957); WYO. STAT. § 33-343.4 (Supp. 1975).

22. WYO. R. CIV. P. 40(e); Dryden v. State, 535 P.2d 483, 491 (Wyo. 1975).

23. WYO. STAT. § 6-13 (1957); WYO. STAT. § 31-241 (1957); WYO. STAT. § 31-295 (1957); WYO. STAT. § 1-140 (1957); WYO. R. CIV. P. 30(b)(2); WYO. R. CIV. P. 32(a)(3).

Exclusion is required when the probative value of and need for proffered evidence is "substantially outweighed" by the possibility of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.<sup>24</sup> Rule 403 recognized that "relevancy is not always enough. There may remain the question, is its value worth what it costs?"<sup>25</sup> The Rule reaffirms a judge's traditional duty to reject evidence when the risks it involves are out of proportion to its probative value.<sup>26</sup>

Surprise is not a ground for exclusion since the granting of a continuance was thought to be a more appropriate response under modern procedure,<sup>27</sup> and in determining whether evidence should be excluded because of unfair prejudice, the Advisory Committee noted that a judge should consider the feasibility of a limiting instruction under Rule 105.<sup>28</sup> Another factor a judge should consider in deciding questions arising under this rule is the possibility of using alternate means of proof.<sup>29</sup>

Wyoming case law is similar to Rule 403. Numerous cases exclude evidence when it is unduly prejudicial.<sup>30</sup> The exclusion of evidence that might mislead the jury or confuse the issues has been upheld by the Wyoming Supreme Court.<sup>31</sup> The Court has also held that a trial judge has discretion to reject cumulative evidence.<sup>32</sup>

---

24. FED. R. EVID. 403; *U.S. v. Cowsen*, 530 F.2d 734, 738 (7th Cir. 1976); *U.S. v. DeMarco*, 407 F.Supp. 107, 117 (D.C. Cal. 1975).

25. MCCORMICK § 185, at 438.

26. Trautman, *supra* note 10, at 392.

27. FED. R. EVID. 403, Adv. Com. Note; WEINSTEIN ¶ 403, at 403-0.

28. FED. R. EVID. 403, Adv. Com. Note.

29. *Id.*

30. *Reeder v. State*, *supra* note 19; *Linn v. State*, 505 P.2d 1270, 1276 (Wyo. 1973); *Dickey v. State*, 444 P.2d 373, 377 (Wyo. 1968); *State v. Callaway*, 72 Wyo. 509, 267 P.2d 970, 972 (1954); *State v. Lantzer*, 55 Wyo. 230, 99 P.2d 73, 77-78 (1940); *Johnson v. State*, 8 Wyo. 494, 58 P. 761, 764 (1899).

31. *Vinich v. Teton Const. Co.*, 518 P.2d 137, 139 (Wyo. 1974); *Booth v. State*, 517 P.2d 1034, 1037 (Wyo. 1974); *Reeder v. State*, *supra* note 19 at 972-73; *Potts v. Brown*, 452 P.2d 975, 978 (Wyo. 1969); *Edwards v. Harris*, 397 P.2d 87, 94-95 (Wyo. 1964); *Friesen v. Schmelzel*, 78 Wyo. 1, 318 P.2d 368, 372-73 (1957).

32. *Buckles v. State*, 500 P.2d 518, 523 (Wyo. 1972); *State v. Alexander*, 78 Wyo. 324, 324 P.2d 831, 839 (1958); *Eagan v. State*, 58 Wyo. 167, 128 P.2d 215, 224 (1942); *State v. Lantzer*, 55 Wyo. 230, 99 P.2d 73, 78 (1942); *State v. Vines*, *supra* note 19.

*Rule 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*

Federal Rule 404(a) deals with the "substantive" or "circumstantial" use of character evidence, and prohibits use of such evidence to show that a person acted in conformity with such character or trait on a particular occasion. Two exceptions to this general rule are recognized. If a criminal defendant wishes to introduce evidence on a pertinent trait of his character he may do so, but this will let the prosecution introduce similar evidence to rebut the defendant's contention. A criminal defendant may introduce evidence of a pertinent trait of the victim of a crime if such evidence can support a defense he wishes to raise.<sup>33</sup> Again, the prosecution may use similar evidence to rebut the defendant's claim. But in a homicide case, the prosecution may show the "peacefulness" of the victim in order to rebut any claim that the victim was the first aggressor, whether or not the defendant introduces evidence regarding violent traits of the victim. These exceptions made no provision for the use of character evidence in civil actions.<sup>34</sup> Special provisions dealing with another use of character evidence, attacking or supporting the credibility of witnesses by showing character for truth and veracity, are found in Rules 608 and 609.

Subdivision (b) of the Rule excludes evidence of specific acts, wrongs, or crimes when it is offered to prove the character of a person in order to show that he acted in conformity with his character on a particular occasion. A major ex-

---

33. Schmertz, *supra* note 10, at 10.

34. *Id.* at 10-11 states:

Implicit in the text of Rule 404 and explicit in the Advisory Committee's Note is the total rejection of circumstantial character evidence in civil actions—even those in which the pleadings accuse a party of conduct amounting to a serious or degrading crime. Wigmore recommended admission in this narrow class of cases, despite marginal probative value and the possibility of confusion of issues and time consumption. Total exclusion in such cases seems to run counter to what is said to be a 'growing minority of courts' which admit character evidence on behalf of a party against whom a criminal act has been charged in the civil pleadings. Finally, Rule 404 may change the law entirely as to civil assault actions where the criminal parallel is generally followed. To admit character evidence when the government accuses the defendant of a crime in a proceeding called 'criminal' and to exclude it when the plaintiff makes a similar charge in a proceeding which happens to be called 'civil,' is to deprive a possibly innocent party of an opportunity to prevent community disgrace and to make a fetish out of labels.

ception, however, allows prior acts to be shown for other purposes which do not fall within the prohibition, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of prior acts offered for these other purposes is subject to the test of Rule 403.<sup>35</sup> Rule 404(b) clearly "presents a fertile area for the application of sound Rule 403 analysis and discretion."<sup>36</sup>

Wyoming case law is in accord with Rule 404(a). It is well established that character evidence is not admissible to prove that a person acted in conformity with that character on any given occasion.<sup>37</sup> A defendant may offer evidence of his good character or a particular trait<sup>38</sup> as long as it is pertinent.<sup>39</sup> Once the defendant does so, however, the prosecution may use character evidence to rebut the defendant's claim.<sup>40</sup> The defendant may also show the character or a pertinent trait of the victim in order to support a defense asserted by him.<sup>41</sup>

Wyoming case law is also in accord with Rule 404(b). Numerous cases have held that evidence of prior crimes, wrongs, or acts is not admissible in order to show a propensity towards similar behavior on the event in question.<sup>42</sup> How-

35. FED. R. EVID. 404, Adv. Com. Note.

36. *Schmertz*, *supra* note 18, at 11; *U.S. v. Hearst*, 412 F. Supp. 877, 879 (N.D. Cal. 1976); *U.S. v. Fairchild*, 536 F.2d 185, 188-89 (7th Cir. 1975); *U.S. v. Wixom*, 529 F.2d 217, 220 (9th Cir. 1976).

37. *Gabrielson v. State*, 510 P.2d 534, 536 (Wyo. 1974); *State v. Riggle*, 76 Wyo. 1, 298 P.2d 349, 363 (1956), *reh. denied*, 79 Wyo. 1, 300 P.2d 567, *cert. denied* 352 U.S. 981; *State v. Jones*, 73 Wyo. 122, 276 P.2d 445, 449 (1954); *State v. Velsir*, 61 Wyo. 476, 159 P.2d 371, 374 (1945); *State v. Lowry*, 29 Wyo. 287, 212 P. 768, 770-71 (1932); *State v. Wells*, 29 Wyo. 335, 212 P. 1099, 1103 (1923); *Anderson v. State*, 27 Wyo. 345, 196 P. 1047, 1055 (1921).

38. *Cavaness v. State*, 358 P.2d 355, 358 (Wyo. 1961); *Thompson v. State*, 41 Wyo. 72, 283 P. 151, 157 (1929); *Johnson v. State*, 8 Wyo. 494, 58 P. 761, 764 (1899).

39. *State v. Riggle*, *supra* note 37, at 361; *Meldrum v. State*, 23 Wyo. 12, 146 P. 596, 602 (1915).

40. *State v. Riggle*, *supra* note 37, at 364; *State v. Carroll*, 52 Wyo. 29, 69 P.2d 542, 554 (1937).

41. *State v. Kump*, 76 Wyo. 273, 301 P.2d 808, 812 (1956); *State v. Velsir*, *supra* note 37; *State v. Goettina*, *supra* note 20, at 874; *Mortimore v. State*, 24 Wyo. 452, 161 P. 766, 772 (1916); *Meldrum v. State*, *supra* note 39.

42. *Newell v. State*, 548 P.2d 8, 11-12 (Wyo. 1976); *Jackson v. State*, 533 P.2d 1, 4 (Wyo. 1976); *Gabrielson v. State*, *supra* note 37; *State v. Lindsay*, 77 Wyo. 410, 317 P.2d 506, 510 (1957); *State v. Vines*, *supra* note 19; *Kinney v. State*, 36 Wyo. 466, 256 P. 1040, 1042 (1927); *Rosencrance v. State*, 33 Wyo. 360, 239 P. 952, 953-55 (1925); *State v. Sorrentino*, 31 Wyo. 129, 224 P. 420, 425 (1924); *Fields v. Territory*, 1 Wyo. 78, 81 (1872).

ever, many cases have recognized exceptions to the general prohibition when such evidence is offered for other purposes than proving propensity to act a certain way.<sup>43</sup>

*Rule 405: Methods of Proving Character*

Federal Rule 405 regulates how character may be proved once a determination is made under Rule 404 that character evidence is admissible. Subdivision (a) of Rule 405 provides that if character evidence is admissible it may be presented by either reputation or opinion. Questions concerning specific instances on which such reputation or opinion is based are allowed on cross-examination. However, subdivision (b) provides that if character evidence is in issue, that is, where it is an "element of a claim or defense" capable of determining the outcome of a case, as in libel and slander suits, character may be proved by showing specific instances of conduct in addition to the methods allowed by subdivision (a).<sup>44</sup> The Advisory Committee noted that since evidence of specific acts of conduct is the most dramatic and convincing, it carries the greatest danger of prejudice and various other problems.<sup>45</sup> The Committee decided to limit the use of such evidence to those cases where it was the very matter in issue.<sup>46</sup>

The Rule follows traditional practice in allowing the use of reputation evidence to prove character.<sup>47</sup> Allowing opinion evidence to be admitted, however, is a major departure from established practice.<sup>48</sup> The Advisory Committee recommended the use of opinion because it agreed with text

43. The leading Wyoming case in this area is *Valerio v. State*, 429 P.2d 317, 318 (Wyo. 1967), *aff'd*, 445 P.2d 752 (1968). See also *Dorador v. State*, 520 P.2d 230, 232-33 (Wyo. 1974); *Galbraith v. State*, 503 P.2d 1192, 1195 (Wyo. 1972); *Longest v. State*, 495 P.2d 311, 314 (Wyo. 1971); *Dobbins v. State*, 483 P.2d 255, 261 (Wyo. 1971); *State v. Lindsay*, *supra* note 42; *State v. Grider*, 74 Wyo. 88, 284 P.2d 400, 406 (1955); *State v. Hambrick*, 65 Wyo. 1, 196 P.2d 661, 676-77 (1948); *State v. Koch*, 64 Wyo. 175, 189 P.2d 162, 164 (1948); *State v. Slane*, 48 Wyo. 1, 41 P.2d 269, 274 (1935); *Tobin v. State*, 36 Wyo. 368, 255 P. 788, 790 (1927); *Strand v. State*, 36 Wyo. 78, 252 P. 1030, 1032 (1927); *Rosencrance v. State*, *supra* note 42, at 953; *State v. Lowry*, 29 Wyo. 267, 212 P. 768, 771 (1923); *Horn v. State*, 12 Wyo. 80, 73 P. 705, 720-21 (1903); *Edelhoff v. State*, 5 Wyo. 19, 36 P. 627, 630 (1894).

44. FED. R. EVID. 405, Adv. Com. Note.

45. FED. R. EVID. 405, Adv. Com. Note.

46. FED. R. EVID. 405, Adv. Com. Note.

47. WEINSTEIN at 405-15 to 16; MCCORMICK § 44, at 90; WIGMORE §§ 1608-21.

48. FED. R. EVID. 405, Adv. Com. Note.

writers and other authorities who maintained that opinion evidence was at least as competent on character as reputation evidence.<sup>49</sup> In addition, the Committee observed that:

It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing.<sup>50</sup>

Sanctioning the use of opinion evidence did not meet universal enthusiasm, however. The House Committee on the Judiciary deleted the provision allowing opinion as a way of proving character.<sup>51</sup> The House of Representatives, believing the advantages of opinion outweighed any possible problems, restored the provision.<sup>52</sup> A few had objected to the admissibility of opinion testimony on the grounds that civil cases would become popularity contests,<sup>53</sup> or that "individual opinion testimony . . . is theoretically never cumulative."<sup>54</sup> It was thought that the proponent of opinion evidence could introduce one witness after another in endless succession, whereas the traditional approach of proving character by reputation was an inherently compact, self-limiting process. Such criticism of Rule 405 overlooks the controlling effect of Rule 403 on this kind of evidence.

49. 7 WIGMORE § 1986; MCCORMICK §§ 44 and 187; A.L.I. MODEL CODE OF EVIDENCE, Rule 306 (1942); UNIFORM RULES OF EVIDENCE, Rule 47 (1953); CAL. EVID. CODE § 1102 (West 1967); Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166 (1940).

50. FED. R. EVID. 405, Adv. Com. Note.

51. REPORT ON THE FEDERAL RULES OF EVIDENCE, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 93rd Cong. 1st Sess., No. 93-6550 (1973) [hereinafter cited as HOUSE COMMITTEE REPORT].

52. WEINSTEIN at 405-1.

53. HEARINGS ON PROPOSED RULES OF EVIDENCE BEFORE THE SPECIAL SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93rd Cong., 1st Sess., ser. 2, at 209 (1973).

54. WEINSTEIN at 405-10.

Judges may limit the reception of evidence which might cause undue delay, waste time, or be needlessly cumulative.<sup>55</sup> These provisions can keep opinion evidence within bounds, and trial courts will not have to tolerate lengthy swearing contests of minimal value, nor a parade of witnesses presenting "theoretically never cumulative" opinion testimony.

Under Wyoming case law reputation evidence is competent to prove character.<sup>56</sup> After a character witness testifies about a person's reputation, he may, depending on the judge's discretion, be cross-examined concerning specific instances which form the basis of that reputation.<sup>57</sup> As a general rule, though, lay witnesses cannot express their opinions.<sup>58</sup> However, Wyoming does allow a lay witness to express his opinion that a person is sane.<sup>59</sup> The Advisory Committee argued that no real dividing line exists between character and mental condition and if opinion is competent for establishing mental condition it should be equally competent on character as well.<sup>60</sup>

Were a party's character in issue, that is, an "element of a claim or defense", evidence of specific acts would probably be allowed in Wyoming. In *Spriggs v. Cheyenne Newspapers*, an action for libel, the defendant pleaded truth and the plaintiff then attempted to show his good reputation. He was not allowed to do this since the Wyoming Supreme Court held that his character had no bearing on the truth of the defendant's articles.<sup>61</sup> If, in an action for libel, the libel charged was immoral character and the defendant pleaded truth, character would be directly in issue and most courts would allow specific acts to prove it.<sup>62</sup>

In some instances, Wyoming case law would allow evidence of specific acts to be admitted in order to prove

---

55. FED. R. EVID. 403.

56. *Thompson v. State*, 41 Wyo. 72, 283 P. 151, 157 (1929).

57. *Porter v. State*, 440 P.2d 249, 250 (Wyo. 1968); *Loy v. State*, 26 Wyo. 381, 185 P. 796, 800 (1919).

58. *State v. Moore*, 356 P.2d 141, 144 (Wyo. 1960); *Long v. Big Horn Const Co.*, 75 Wyo. 276, 295 P.2d 750, 753 (1956).

59. *State v. Riggle*, *supra* note 37, at 365; *In re Johnson's Estate*, 63 Wyo. 332, 181 P.2d 611, 618 (1947).

60. FED. R. EVID. 405, Adv. Com. Note.

61. *Spriggs v. Cheyenne Newspapers*, 63 Wyo. 416, 182 P.2d 801, 809 (1947).

62. MCCORMICK § 187.

character circumstantially. When a homicide defendant pleads self-defense and there is some corroborating evidence, particular violent acts of the victim which the defendant knows about may be shown in order to determine the reasonableness of the defendant's apprehension at the time of the homicide.<sup>63</sup> Although this evidence is circumstantial, and, therefore, inadmissible under Rule 405(b), it would be allowed under Rule 404(b) since it bears on intent. Federal Rule 405(b) would not allow any other uses of this kind of evidence. The Wyoming rule reflects a wise policy judgment and, if changed, should be expanded rather than limited to its present scope.<sup>64</sup> Rather than Federal Rule 405, a bet-

63. *Mortimore v. State*, *supra* note 41, at 772-74.

64. Evidence of prior violent acts of the victim may be useful for either or both of two purposes. They can show that (1) the defendant's fear of danger was reasonable, as the Court in *Mortimore*, *supra* note 41, recognized or (2) the probability that the victim was the aggressor. Comment, *Evidence: Prosecution for Homicide or Assault: Self-Defense: Admissibility of Character and Threats of Victim*, 25 CALIF. L. REV. 459, 460 (1937). If the defendant knew of the victim's prior acts this is obviously relevant since knowledge of those acts would undoubtedly affect his state of mind. But, of course, if those acts were unknown to the defendant, they could have no such effect on his state of mind. The function of prior acts used for this purpose is therefore limited to communicated character.

However, a crucial point which has been overlooked by many courts and commentators is that such evidence used for the second purpose, proving probable aggression by the victim, may be offered for that purpose whether or not the defendant knew of it at the time of the killing. Slough has pointed out that:

In ruling upon the admissibility of deceased's character evidence, special care should be taken to distinguish the purposes for which the particular proof is being used. Unfortunately, many decisions have failed to draw the necessary distinctions. . . .

A sizeable majority of jurisdictions have restricted proof in this area to evidence of the deceased's reputation, thus ruling out evidence of specific instances of conduct and opinion. *Reasons* supplied by the courts often indicate confusion between the functions of communicated and uncommunicated character. . . . Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 404, 426 (1957) (Emphasis added).

Unlike evidence used to show the defendant's apprehension, the relevancy of such evidence on the issue of aggression remains the same whether or not it has been communicated to the defendant.

The defendant's knowledge about these past acts is immaterial because this evidence used for the purpose of showing aggression only affects the probability of the victim's behavior. 1 JONES, EVIDENCE § 4:40 (6th Ed. 1972). Wigmore has explained that:

The additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief. WIGMORE § 63.

Proving a proneness towards violence certainly does not prove a particular act of violence or aggression, but it does increase the probability of the defendant's story where there is other evidence suggesting that the victim was the aggressor. Of course, when particular instances of conduct are described, a more vivid and compelling picture is drawn.

The majority of courts refuse to use this kind of evidence precisely

ter model for Wyoming to follow would be section 1103(1) of California's Evidence Code which allows evidence of a victim's prior acts as circumstantial evidence of his conduct at the time of the crime.<sup>65</sup> California's Law Revision Committee noted that in some cases this kind of evidence might raise a reasonable doubt about the defendant's guilt. And while such evidence frequently has low probative value, a defendant should have the opportunity to introduce it since his fate may depend on it.<sup>66</sup>

Whether prior acts of sexual intercourse by a prosecutrix may be used as circumstantial evidence on the issue of consent in a rape prosecution is an open question in Wyoming.<sup>67</sup> The policy of the Federal Rules concerning the use of such evidence seems uncertain. While Rule 405(b) would clearly not allow this evidence, it might be argued that the prior acts by the prosecutrix show her "intent" on the occasion in question and are therefore admissible under Rule 404(b). Since the Federal Rules are not entirely clear on this point, it is advisable to consider adding provisions in

---

because it can create such forceful images. "Evidence of other crimes and misdeeds is not excluded because of an inherent lack of probative value, but is withheld as a precaution against inciting prejudice." Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956). But this equates the evidential uses of the victim's character with the character of the defendant and ignores the fact that a different policy underlies the use of both. Slough, 5 KAN. L. REV. *supra*. There is good reason to be concerned with preventing prejudice against a criminal defendant, but similar prejudice against a victim cannot be as serious and any possible harm is outweighed by other factors. Fear of prejudice against the victim is misplaced because his fate cannot be affected by such prejudice while the defendant's can. The victim is not (or more aptly, could not be) charged with any crime. There is no need to worry about presuming him innocent or exposing him to double jeopardy. His life or liberty is not at stake as is the defendant's, whose case may hinge on presenting such evidence. Therefore, the same policy considerations applied to proof of a defendant's character should not be applied to proof of a victim's character.

65. CAL. EVID. CODE § 1103(1) (West, Supp. 1976) provides:

(1) In a criminal action, evidence of the character or trait of character (in the form of an opinion, evidence of reputation or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

See also NEV. REV. STAT. § 48.064 (Supp. 1975):

Transactions, Conversations with, or Actions of Deceased Person.  
Transactions or conversations with or actions of a deceased person are admissible if supported by corroborative evidence.

66. CAL. EVID. CODE § 1103 (West 1975).

67. *Martinez v. State*, 511 P.2d 105, 110 (Wyo. 1973).

order to clarify Rule 405 should Wyoming consider adopting an evidence code patterned after the Federal Rules. Nevada added such a clarifying provision to its evidence code which was modeled on the Federal Rules.<sup>68</sup> Another possible model for consideration is section 1103(2) of the California Evidence Code.<sup>69</sup>

### *Rule 406: Habit; Routine Practice*

Federal Rule 406 allows the use of uncorroborated evidence of a person's habit or an organization's routine practice to prove conduct on a particular occasion, whether or not eyewitnesses were at the event in issue. A subdivision of the Rule prescribing the manner by which routine practice

---

68. NEV. REV. STAT. § 48.069 (Supp. 1975) provides:

Previous Sexual Conduct of Rape Victim: Procedure for Admission of Evidence to Prove Victim's Consent. In any prosecution for forcible rape or for assault with intent to commit, attempt to commit or conspiracy to commit forcible rape, if the accused desires to present evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent:

1. The accused shall first submit to the court a written offer of proof, accompanied by a sworn statement of the specific facts that he expects to prove and pointing out the relevance of the facts to the issue of the victim's consent.

2. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the victim regarding the offer of proof.

3. At the conclusion of the hearing, if the court determines that the offered evidence:

(a) Is relevant to the issue of consent; and

(b) Is not required to be excluded under NRS 48.035 [identical to FED. R. EVID. 403], the court shall make an order stating what evidence may be introduced by the accused and the nature of the questions which he is permitted to ask. The accused may then present evidence or question the victim pursuant to the order.

69. CAL. EVID. CODE § 1103(2) (West Supp. 1976) provides:

(a) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, or 264.1 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any such section, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(b) Paragraph (a) of this subdivision shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

(c) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and such evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence introduced by the prosecutor or given by the complaining witness.

could be proved was deleted by Congress, thus allowing courts to deal with the method of proof for this type of evidence on a case by case basis.<sup>70</sup> The Advisory Committee recommended admitting this kind of evidence because of its high probative value.<sup>71</sup> Yet, despite the generally conceded probativeness of habit evidence,<sup>72</sup> some courts have rejected it, particularly in negligence cases.<sup>73</sup> McCormick attributes this to a modern tendency to describe character loosely in terms of "habits," such as "a habit of drinking" or "lazy habits," which has created confusion between character and true habit.<sup>74</sup>

The structure of the Rules, however, is designed to help avoid confusion between these two terms. The differences between habit and character are underlined by dealing with them in separate rules. Although Rule 406 does not attempt to define habit, the Advisory Committee emphasized McCormick's classic definition of the term:

A habit . . . is a person's regular practice of meeting a particular kind of situation with a specific kind of conduct . . . . The doing of the habitual act may become semi-automatic.

Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition.<sup>75</sup>

The Rule is not aimed at allowing proof of such indefinite characteristics as "intemperate habits" or "a habit of honesty" which would affect *all* aspects of a person's life. Rather, the Rule is geared to more discrete and specific responses to regularly occurring situations, such as always using a particular bus to return from work or crossing a street at a particular place every day.<sup>76</sup>

---

70. WEINSTEIN ¶ 406(04), at 406-18.

71. FED. R. EVID. 406, Adv. Com. Note.

72. 1 WIGMORE §§ 92 and 97; MCCORMICK § 195, at 463; WEINSTEIN ¶ 406[01] at 406-6 to 9; RICHARDSON, EVIDENCE § 185, at 154 (10th ed. 1973) [hereinafter cited as RICHARDSON].

73. 1 WIGMORE §§ 65 and 97; 1 JONES, EVIDENCE §§ 191, 192 (5th ed. 1958) [hereinafter cited as JONES].

74. MCCORMICK § 195, at 463-64.

75. *Id.* at 462-63.

76. *See* cases cited in MCCORMICK § 195, at 643 n. 11.

Wyoming has no case law dealing with the admissibility of habit evidence to show conduct on a particular occasion. *Jenkins v. State* raised this question, but the Wyoming Supreme Court disposed of the issue on procedural grounds.<sup>77</sup>

A major change made by Rule 406 is the abolition of the "no eyewitness rule." Under this rule, numerous courts have admitted habit evidence only where there are no eyewitnesses to the event in controversy.<sup>78</sup> This view is unsound.<sup>79</sup> If evidence is relevant, the modern trend is to admit it and let the trier of fact consider it with all other evidence that might shed light on the controversy.<sup>80</sup> The no eyewitness rule is unsound on other grounds as well. Even if there are eyewitnesses to an event, they may disagree or merely be uncertain. They may be prejudiced or mistaken and thereby make habit evidence as useful and necessary as it is when there are no eyewitnesses.<sup>81</sup> Finally, abolition of the no eyewitness rule may help to clarify the law in this area since evidence of habit will not be summarily excluded without a determination of whether the offered evidence constitutes habit or character. Even if evidence is found to constitute habit, it may still be held inadmissible under the provisions of Rule 403.

Rule 406 allows a routine practice of an organization as evidence of its conduct on a particular occasion. Such evidence has generally been admitted, perhaps, because it cannot be readily confused with evidence of character as habit can be.<sup>82</sup> Rule 406 is consistent with Wyoming's Uniform Commercial Code which allows a "course of dealing" between the parties to a business transaction to be shown to prove conduct on a particular occasion.<sup>83</sup> Wyoming's Uniform Commercial Code also allows the admission of

77. *Jenkins v. State*, 22 Wyo. 34, 134 P. 260, 264 (1913), *reh. denied* 135 P. 749 (1913).

78. Annot., 29 A.L.R. 3d 791, 797 (1970); Annot., 28 A.L.R. 3d 1293, 1294-95 (1969); McCORMICK § 195, at 463.

79. McCORMICK § 195, at 463 n.14.

80. Gilliland v. Rhoades, *supra* note 13.

81. Note, *Evidence-Relevancy-Admission of Habit Evidence to Show Due Care*, 10 VAND. L. REV. 447, 448 (1957).

82. McCORMICK § 195, at 464.

83. WYO. STAT. § 34-1-205(1) (Supp. 1975).

a usage of trade . . . having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.<sup>84</sup>

Rule 406 is more specific, not limiting proof of commercial custom to only trade-wide practices, and instead, allowing proof of the routine practices of a particular business as well.

While several Wyoming cases have admitted proof of business custom as evidence bearing on a party's due care or lack of it,<sup>85</sup> Rule 406 is designed to admit habit and custom evidence only to prove *conduct* and not due care.<sup>86</sup> The admissibility of this kind of evidence on the issue of due care would be governed by the general relevancy provisions of Rules 401-403.

#### *Rule 407: Subsequent Remedial Measures*

Federal Rule 407 provides that remedial measures taken after an accident cannot be used to prove negligence before the accident. This is the rule adopted by the preponderance of American jurisdictions.<sup>87</sup> The logic behind the Rule is persuasive. While the inference that a defendant who takes subsequent precautions is tacitly admitting earlier negligence is plausible under Rule 401, it is equally possible that the defendant believes the injured party was negligent and is only acting to forestall future injuries.<sup>88</sup> More importantly, if improvements made to prevent future accidents could be used as an implied admission of liability against a defendant, the defendant would be placed in a dilemma. Should he take precautions which might be used to hold him liable in a pending suit, or should he do nothing and risk facing later suits by others injured from the same unremedied condition? Clearly, this choice does not advance society's paramount interest in having dangerous conditions

84. Wyo. STAT. § 34-1-204(2) (Supp. 1975).

85. *Prine v. Thelen*, 496 P.2d 905, 907 (Wyo. 1972); *Pan American Petroleum Corp. v. Like*, 381 P.2d 70, 76 (Wyo. 1963); *McVicker v. Kuronen*, 71 Wyo. 222, 256 P.2d 111, 114-16 (1953).

86. FED. R. EVID. 406.

87. *Annot.*, 64 A.L.R.2d 1296, 1300 (1959); *McCORMICK* § 275, at 666-67.

88. FED. R. EVID. 407, Adv. Com. Note; *Schmertz*, *supra* note 18, at 15-16.

corrected and thereby preventing future injuries. The exclusion of evidence of later precautions, if not encouraging such precautions, at least does not penalize one for doing so.<sup>89</sup>

Rule 407 also provides, however, that such evidence may be admissible for purposes other than proving negligence on the theory that the advantages of clarifying collateral issues may at times outweigh the considerations supporting the general rule.<sup>90</sup> These purposes include proof of ownership or control and the feasibility of safety measures, if these issues are controverted, or impeachment of witnesses. The Advisory Committee's Note to Rule 407 stressed that unless a genuine issue is present, evidence offered for these other purposes must be automatically excluded.<sup>91</sup> If evidence of later precautions is introduced for any of these purposes an opponent may request a limiting instruction under Rule 105.<sup>92</sup>

The Federal Rule is consistent with recent Wyoming case law. In *Vinich v. Teton Const. Co.* the Wyoming Supreme Court adopted the almost universal majority rule excluding evidence of subsequent precautions.<sup>93</sup> Although the appellant attempted to rely upon the impeachment exception in order to introduce evidence of later precautions, the Court ruled that the trial court had acted properly in excluding this evidence since it would have introduced collateral issues and, perhaps, confused the jury.<sup>94</sup> The same result would have been possible under the exclusionary principles of Federal Rule 403.<sup>95</sup>

### *Rule 408: Compromise and Offers to Compromise*

Federal Rule 408 excludes evidence of compromise offers or completed compromises if offered to prove the validity

89. *Id.*

90. Note, *Exceptions to the Subsequent Remedial Conduct Rule*, 18 HAST. L. J. 677, 678 (1967).

91. FED. R. EVID. 407, Adv. Com. Note.

92. FED. R. EVID. 105.

93. *Vinich v. Teton Const. Co.*, *supra* note 31, at 139.

94. *Id.*

95. FED. R. EVID. 403.

or invalidity of a claim or damages.<sup>96</sup> Under the majority view only compromise offers, and not completed compromises, would be excluded when offered for these purposes.<sup>97</sup> The Rule is designed to encourage negotiations and out-of-court settlements of disputes and thereby help lighten crowded court calendars.<sup>98</sup> However, to insure that otherwise admissible evidence would not be made inadmissible merely because it was presented during settlement negotiations, Congress amended Rule 408.<sup>99</sup> One significant change from majority practice made by the Rule is that independent statements of fact made during compromise negotiations are not admissible against the party who made them. Under traditional practice admissions of fact had to be phrased as hypotheticals or stated to be without prejudice, otherwise they could be considered statements against interest and admissible by an opponent.<sup>100</sup> Such restrictions served only to trap the unwary and stifle the free communication necessary for effective settlement negotiations.<sup>101</sup>

Not all attempts to show compromise offers or settlements are excluded by Rule 408. Attempts to settle an admittedly valid claim for a smaller amount are not within the scope of the Rule.<sup>102</sup> Other legitimate uses for such evidence include showing bias or prejudice by a witness or negating the idea that a claim was not pressed diligently enough.<sup>103</sup> Nor are attempts to hinder a criminal investigation or a prosecution subject to the protection of the Rule.<sup>104</sup>

Wyoming law in this area conforms to majority practice. Compromise offers are excluded if an actual dis-

96. A recent federal case, *Burns v. City of Des Peres*, 534 F.2d 103, 112 n.9 (8th Cir. 1976), indicated that although settlement negotiations are not explicitly mentioned in Rule 408, they would be treated the same as compromise negotiations are under that Rule.

97. Annot., 15 A.L.R.3d 13, 22 (1967).

98. FED. R. EVID. 408, Adv. Com. Note; MCCORMICK § 274, at 663

99. REPORT ON FEDERAL RULES OF EVIDENCE, COMMITTEE ON THE JUDICIARY, SENATE, 93rd Cong., 2d Sess., No. 93-1277 (1973) [hereinafter cited as SENATE COMMITTEE REPORT].

100. FED. R. EVID. 408, Adv. Com. Note; Annot., 15 A.L.R.3d 20, 33 (1967); MCCORMICK § 274, at 663-64.

101. FED. R. EVID. Adv. Com. Note; Schmertz, *supra* note 18, at 17; Annot., 15 A.L.R.3d 13, 20 (1967); MCCORMICK § 274, at 664.

102. FED. R. EVID. 408, Adv. Com. Note; MCCORMICK § 273, at 660.

103. Annot., 161 A.L.R. 395, 397 (1946); 41 WIGMORE § 1061; MCCORMICK § 273, at 660.

104. FED. R. EVID. 408, Adv. Com. Note; MCCORMICK § 274, at 665.

pute exists.<sup>105</sup> Offers of judgment that meet the requirements of Rule 68 of the Wyoming Rules of Civil Procedure are given special statutory protection under that rule and are inadmissible if unaccepted except in a proceeding to determine costs.<sup>106</sup> Any statements of fact made during compromise negotiations are admissible against the party making them unless they are expressly stated to be without prejudice.<sup>107</sup> This is a major difference between the Federal Rules and Wyoming practice since under Federal Rule 408 any such statements would be inadmissible.

A completed compromise between a party to an action and a third person was held inadmissible except under unusual circumstances in *Carpenter & Carpenter v. Kingham*.<sup>108</sup> That case also implied that a completed compromise between the parties to an action would be admissible.<sup>109</sup> This is in accord with the majority rule.<sup>110</sup> An action to enforce a contract of compromise is permissible and the compromise agreement is admissible in such a suit.<sup>111</sup> The same result would be reached under Rule 408.<sup>112</sup> Finally, attempts to obstruct a criminal prosecution may be shown.<sup>113</sup>

#### *Rule 409: Payment of Medical and Similar Expenses*

Federal Rule 409 excludes offers to pay or payments of an injured party's medical expenses when offered to prove negligence by the alleged tortfeasor. The Rule is based on the relevancy notion that such assistance usually springs from humane impulses and not from feelings of fault, and on the policy consideration that any rule allowing this evidence would tend to discourage offers of aid.<sup>114</sup> Rule 409 does not exclude statements which are incidental to the offer or actual assistance.<sup>115</sup> Any express admissions of liability

105. *Kahn v. Trader's Ins. Co.*, 4 Wyo. 419, 34 P. 1059, 1076 (1893).

106. Wyo. R. Civ. P. 68.

107. *Kahn v. Trader's Ins. Co.*, *supra* note 105.

108. 56 Wyo. 314, 109 P.2d 463, 472 (1941).

109. *Id.*

110. 31A C.J.S. *Evidence* § 290, at 738 (1964).

111. *Kahn v. Trader's Ins. Co.*, *supra* note 105.

112. WEINSTEIN at 408-23.

113. *State v. Slane*, 48 Wyo. 1, 41 P.2d 269, 273 (1935).

114. FED. R. EVID. 409, Adv. Com. Note; Annot., 65 A.L.R. 3d 932, 936-41 (1975).

115. FED. R. EVID. 409, Adv. Com. Note; Schertz, *supra* note 18.

made in connection with an offer or actual assistance may still be used against the party who made them. The Rule does not prohibit this kind of evidence from being used, subject to Rule 403 considerations, for purposes other than proving negligence.<sup>116</sup>

The Rule is in accord with prevailing practice.<sup>117</sup> Wyoming has no case law regarding the admissibility of this type of evidence. Section 1-7.1 of the Wyoming Statutes could be interpreted as excluding such offers and assistance. That statute provides that “[N]o voluntary partial payment of a claim . . . shall be construed as an admission of fault or liability.”<sup>118</sup> The key to the applicability of this section lies in the term “claim.” Section 1-1 of the same statute notes that a strict construction of general words in that statute is not required.<sup>119</sup> Since the Wyoming Supreme Court noted in an early case that the term can mean not only an actual demand, but the right to make a claim or demand as well,<sup>120</sup> it is reasonable to expect this section to apply to offers of or assistance for medical expenses whether made before or after an injured party has filed suit and thereby achieve the same result as Rule 409 would.

*Rule 410: Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty*

Federal Rule 410 has been the subject of much controversy. As originally promulgated by the Supreme Court, Rule 410 consisted only of the first sentence of the present Rule without the introductory phrase, “[E]xcept as otherwise provided in this rule.”<sup>121</sup> That version of Rule 410 made withdrawn guilty pleas and nolo contendere pleas, offers to plead guilty or nolo contendere to any crime, and any statements made in connection with such withdrawn pleas or unaccepted offers inadmissible against the person who made them in any criminal or civil action.<sup>122</sup> The Senate,

116. WEINSTEIN ¶ 409(02).

117. Annot. 65 A.L.R.3d 932, 936 (1975); Annot., 20 A.L.R.2d 291, 293 (1951).

118. Wyo. STAT. § 1-7.1 (Supp. 1975).

119. Wyo. STAT. § 1-1 (Supp. 1975).

120. Great Western Ins Co. v. Pierce, 1 Wyo. 45, 50 (1872).

121. FED. R. EVID. 410.

122. FED. R. EVID. 410.

however, balked at such a broad exclusion and amended the Rule to limit its scope where a defendant's statements were concerned.<sup>123</sup> The House objected to this move and a compromise agreement was reached. The Senate amendment which allowed impeachment use of any "voluntary and reliable" statements made in court on record in connection with such pleas and offers was approved subject to any inconsistent Federal Rules of Criminal Procedure or Act of Congress subsequently enacted.<sup>124</sup>

On August 1, 1975, P.L. 94-64, adding Section (e) (6) to Rule 11 of the Federal Rules of Criminal Procedure, was signed into law. This new section was inconsistent with Rule 410 and superseded the Rule.<sup>125</sup> Rule 11(e) (6) was much narrower than the Senate version of Rule 410 and made statements of a defendant during plea bargaining inadmissible for impeachment purposes.<sup>126</sup> The enactment of P.L. 94-149 on December 12, 1975, amended Rule 410 to conform with Federal Rule of Criminal Procedure 11(e) (6).<sup>127</sup>

Under the present Rule neither a plea nor the offer of a plea is admissible against the declarant for any purpose in any proceeding. Statements made by a defendant during plea bargaining may not be used to impeach his subsequent testimony at trial. Such statements, if contradicted by the defendant during his trial, may be used against him in a later perjury or false statement prosecution if made under oath, on the record, and in the presence of the defendant's attorney.<sup>128</sup> The Rule makes no comment on the admissibility of pleas not withdrawn as evidence in a subsequent civil action.<sup>129</sup>

123. SENATE COMMITTEE REPORT, at 11.

124. 120 CONG. REC. H12253 (Daily ed., December 18, 1974).

125. WEINSTEIN at 410-12.

126. FED. R. CRIM. P. 11(e) (6).

127. Pub. L. No. 94-149 (December 12, 1975).

128. Pub. L. No. 94-149 (December 12, 1975).

129. WEINSTEIN at 410-30. Wyoming law is clear on this point. Section 6-13 of the Wyoming Statutes provides that no record of conviction can be used in a subsequent civil action unless the defendant confesses in court. WYO. STAT. § 6-13 (1957). Evidence of a guilty plea is admissible in a later civil action because the term "conviction" in section 6-13 has been determined not to include pleas of guilty. *Haley v. Dreesen*, 532 P.2d 399, 404 (Wyo. 1975).

The Rule seeks a balance between two opposing interests: the need to protect the judicial process from wilful deceit and the need for free communication necessary to effectuate disposition of criminal cases by compromise.<sup>130</sup> The Rule encourages plea bargaining while also providing the judicial process with some protection against open lying. It is important to note that Rule 410 and Rule 11(e)(6) are designed to regulate plea bargaining when it occurs and do not force courts to engage in plea bargaining.<sup>131</sup>

Scant Wyoming case law exists on the points of law covered in Rule 410. Rule 33(d) of the Wyoming Rules of Criminal Procedure allows a defendant to withdraw a plea of guilty or *nolo contendere*, but is silent as to whether such pleas may later be used as evidence against him.<sup>132</sup> Rule 22(c) of the Wyoming Rules of Criminal Procedure provides, however, that if a case is transferred under subdivisions (a) or (b) of that rule and the defendant then changes his plea to not guilty, his earlier guilty or *nolo contendere* plea is not admissible against him.<sup>133</sup> While Wyoming law in this area is unclear, the trend of modern authority has been to prohibit the use of withdrawn pleas against a defendant.<sup>134</sup>

130. These opposing interests are illustrated by these comments:

"As with compromise offers generally . . . free communication is needed and security against having an offer of compromise or related statement admitted in evidence effectively encourages it." FED. R. EVID. 410, Adv. Com. Note.

". . . the immunity from direct use of such statements to promote candor by defendants who make statements in open court in connection with their pleas should not be extended to grant a license to lie." 121 CONG. REC. S12875 (daily ed. July 17, 1975) (remarks of Senator McClelland).

"The House provided for limited use of plea negotiation statements in order to protect the integrity of the judicial process from wilful deceit and untruthfulness." 121 CONG. REC. H7859-20 (daily ed. July 30, 1975).

131. MOORE'S FEDERAL PRACTICE, Rules Pamphlet, pt. 3, 91 (1976).

132. WYO. R. CRIM. P. 33(d).

133. WYO. R. CRIM. P. 22(a), (b) and (c).

134. *Kercheval v. U.S.*, 274 U.S. 220, 223-224 (1927). See also, A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 2.2 (Approved Draft, 1968) [hereinafter cited as A.B.A. STANDARDS].

If the withdrawn plea may be used in evidence against the accused, he may, in fact if not in legal theory, be practically doomed ab initio, since jurors are apt to give extreme weight to such evidence. Accordingly, the privilege extended of withdrawing the plea may be an empty one, if the withdrawn plea may be used against him on his trial.

A number of jurisdictions have resolved this dilemma by holding that the judicial action permitting withdrawal of the plea ad-

Whether a defendant's offer to plead guilty or nolo contendere upon a condition may be shown as evidence of an admission of guilt has not been decided by the Wyoming Supreme Court.<sup>135</sup> It has been held that where an offer to plead guilty to a reduced charge was improperly induced by a person in authority, the "confession" implied in the offer is involuntary and therefore inadmissible as evidence.<sup>136</sup> McCormick noted that most courts treat offers arising from plea bargaining as privileged.<sup>137</sup> The modern trend has been to exclude plea bargaining offers in order to encourage such negotiations.<sup>138</sup>

A statement made by a defendant or his attorney during a pretrial conference under Rule 19 of the Wyoming Rules of Criminal Procedure may not be used against that defendant unless the statement has been transcribed and signed by the defendant and his attorney.<sup>139</sup> Whether statements made in connection with withdrawn pleas or offers to plead may be admissible for impeachment purposes if made under oath in court and in the presence of counsel is uncertain. Statements made in connection with an improperly induced plea or offer to plead would be inadmissible under the rationale of *State v. Mau*.<sup>140</sup> Whether such statements may be used in a subsequent prosecution for perjury in Wyoming is uncertain. The rationale of *State v. Mau* could be used to exclude statements made in connection with improperly induced pleas and offers. While Section 6-153.1 of the Wyoming Statutes would seem to allow prosecution for perjury in cases where such statements were connected to pleas and offers not improperly induced,<sup>141</sup> it is not clear whether the defendant's prior statements would be considered privileged and therefore inadmissible. It could be argued that the withdrawal of a plea or offer also operates

---

judicates the impropriety or improvidence of its prior reception and forbids any subsequent evidentiary use thereof, lest the privilege of withdrawal be illusory or even a boobytrap. Annot., 86 A.L.R. 2d 326, at 328 (1962).

135. *State v. Mau*, 41 Wyo. 365, 285 P. 992, 998 (1930).

136. *Id.*, at 992.

137. MCCORMICK § 274, at 665.

138. Annot., 59 A.L.R.3d 441 (1974). See also A.B.A. STANDARDS § 3.4.

139. WYO. R. CRIM. P. 19.

140. *State v. Mau*, *supra* note 135.

141. WYO. STAT. § 6-153.1 (Supp. 1975).

to withdraw any statements connected therewith and vitiates any possible waiver of a defendant's privilege against self-incrimination.

Given the uncertain state of Wyoming law on many of the topics discussed under Rule 410, the adoption of Rules of Evidence is desirable. The present Rule 410 is not the only choice available. Throughout its controversial history, Rule 410 has reflected three different approaches to the difficult problems of dealing with statements regarding withdrawn pleas and unaccepted offers. Which approach is best for Wyoming can only be decided by analyzing the competing policies behind each of the different versions of Rule 410 in light of the needs and values of Wyoming's judicial system.

#### *Rule 411: Liability Insurance*

Federal Rule 411 is in accord with the majority rule disallowing evidence of insurance carried by a party to prove negligence.<sup>142</sup> One reason for the rule is obvious: evidence of insurance has little or no probative value on the issue of negligence.<sup>143</sup> A second reason is the fear that juries will be improperly influenced by such evidence and render judgments based on ability to pay rather than legal fault.<sup>144</sup> Such evidence can have probative value on issues other than negligence, and if the need for this evidence is great enough to outweigh the danger of prejudice, then it may be admissible.<sup>145</sup> Rule 411 expressly allows evidence of insurance when not offered for the purpose of inferring negligence. Examples of such other uses include proving agency or ownership and bias or prejudice of a witness.

Wyoming law is in accord with Rule 411. Two cases have held that evidence of insurance is ordinarily irrelevant.<sup>146</sup> Certain exceptions to this principle have been rec-

142. Annot., 4 A.L.R.2d 761, at 767 (1949).

143. McCORMICK § 201, at 479.

144. FED. R. EVID. 411, Adv. Com. Note; Schmertz, *supra* note 18, at 18.

145. McCORMICK § 201, at 479-80; Annot., 4 A.L.R.2d 761, at 765 (1949).

146. Miller v. City of Lander, 453 P.2d 889, 892 (Wyo. 1969); Eagan v. O'Malley, 45 Wyo. 505, 21 P.2d 821, 822 (1933).

ognized under the majority rule.<sup>147</sup> In Wyoming it has been held that evidence disclosing the fact of insurance may be admitted to discredit a written statement used for impeachment purposes.<sup>148</sup>

#### CONCLUSION

Many of the relevancy provisions in the Federal Rules reflect current Wyoming practice and would cause no significant changes if adopted. Two of the Rules would, however, have a substantial impact on Wyoming practice. Rule 405 (a) would allow opinion evidence to prove character. Rule 408 would make independent statements of fact made during comprise negotiations inadmissible. In some areas, such as the topics covered in Rules 406 and 410, adoption of the Federal Rules would provide standards where none exist now. The provisions of Rule 410 concerning statements made by a defendant in connection with pleas or plea negotiations have had a disputed history and the present Rule represents a compromise between competing interests. The Rule is but one of several possible models to consider in view of the needs and values of Wyoming's judicial system.

In a few areas, however, the Federal Rules are inadequate. One of these areas is the Rule 405(b) prohibition against allowing prior violent acts of a homicide victim to be shown by a defendant attempting to prove self-defense. While the adoption of Rule 405(b) would not abolish a long standing Wyoming rule allowing such evidence when the defendant has knowledge of such acts, it would prevent other uses of such evidence. Wyoming's approach to this situation is sound and should be expanded rather than restricted. In Rule 405(b) is adopted, it should be modified to allow prior violent acts of the victim which are unknown to the defendant to be shown when they may be relevant on the issue of self-defense. The Federal Rules also are inadequate on the question of whether a prosecutrix's prior unchastity has a bearing on the issue of consent. The Rules are indefinite and clarification is needed in this area.

W. J. F.

147. Annot., 4 A.L.R.2d 761 (1949); Egan v. O'Malley, *supra* note 146, at 821.

148. Hawkins v. B. F. Walerk, Inc., 426 P.2d 427, 429 (Wyo. 1967).

## ARTICLE V: PRIVILEGES

The law of privileges has been the subject of considerable debate. The issues inherent in the debate are nowhere more clearly illustrated than in the history of Article V of the Federal Rules of Evidence.

The Advisory Committee's paramount goal in drafting the Proposed Rules of Evidence was to facilitate the admission of all relevant evidence to enhance accurate judicial determinations. Because privileges do not further that goal, they were viewed as obstacles which should be overcome.<sup>1</sup> Accordingly, the Advisory Committee's proposed Article (and the one promulgated by the Supreme Court) contained thirteen rules—one limiting recognized privileges to those specified in Article V, the Constitution, or Act of Congress, nine delineating specific privileges, and three addressing related issues such as waiver and compelled disclosure.<sup>2</sup>

Congressional reception of the Proposed Article was less than favorable. The Article was attacked on several fronts. Some questioned the Committee's assumption that the goal of truthfinding in the judicial process was superior to the extrinsic social goals served by the privileges; some questioned the Supreme Court's power to promulgate rules of "substance" pursuant to its powers under the Enabling Act; and others questioned the constitutionality of rules which tended to invade individual privacy.<sup>3</sup> Additionally, several of the Proposed Rules were attacked individually, particularly Proposed Rule 505 which eliminated the spousal privilege for confidential communications and Proposed Rule 504 which did not contain a general physician-patient privilege.<sup>4</sup> Congress rejected the proposed Article and opted for an article containing only one rule on privileges, fulfilling

---

Copyright© 1977 by the University of Wyoming.

1. 2 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 501[01], at 501-12 (1975) [hereinafter cited as WEINSTEIN].
2. RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183 (1972) [hereinafter cited as PROPOSED RULES.].
3. 2 WEINSTEIN ¶ 501[01], at 501-14 (1975).
4. Black, *The Marital and Physician Privileges—A Reprint of A Letter to a Congressman*, 1975 DUKE L. J. 45 (1975).

Congressional intent of "leaving the law of privileges where we found it."<sup>5</sup> This analysis of Article V will explore the law of privileges as it existed at common law, as it exists in Wyoming, and as it would exist under the rules proposed by the Advisory Committee.

### *Husband-Wife*

Two privileges are recognized in the husband-wife relationship. The testimonial privilege prevents one spouse from testifying against the other.<sup>6</sup> The confidential communication privilege relates to intra-spousal confidential communications.<sup>7</sup>

### Testimonial Privilege

The husband-wife testimonial privilege is a relic of an old common law rule of incompetency which prevented one spouse from testifying for or against the other. Today one spouse is generally permitted to testify for the other.<sup>8</sup> The privilege is founded upon policy considerations of preservation of the marital relationship and a societal antipathy toward forcing one spouse to take an adverse position against the other spouse.<sup>9</sup>

In Wyoming the husband-wife testimonial privilege is statutory.<sup>10</sup> Case law reveals its common law origin by often erroneously referring to the privilege as a rule of competency<sup>11</sup> and it is only recently that the courts have explicitly recognized that the statute embodies a rule of privilege rather than a rule of competency.<sup>12</sup> The general rule

5. FED. R. EVID. 501. Congress further indicated its displeasure with the Supreme Court's Proposed article on privilege by requiring that any court amendment modifying a privilege be approved by an act of Congress. All other proposed amendments become effective 180 days after promulgation unless disapproved by a resolution of either house of Congress. 28 U.S.C. § 2076 (1976).

6. 8 WIGMORE, EVIDENCE, § 2227 (McNaughton ed.) [hereinafter cited as WIGMORE].

7. *Id.* § 2332.

8. *Sinon, Spouse's Testimony in Criminal Cases*, 19 WYO. L. J. 35 (1964).

9. 8 WIGMORE § 2241.

10. WYO. STAT. § 1-142 (Supp. 1975).

11. *Fox v. Fox*, 75 Wyo. 390, 296 P.2d 252 (1956).

12. *Chamberlain v. State*, 348 P.2d 280 (Wyo. 1960); *Simms v. State*, 492 P.2d 516 (Wyo. 1972).

in Wyoming is that one spouse may not testify against the other spouse. Certain exceptions to the general rule have been explicitly recognized by statute. A spouse may testify in "criminal proceedings for a crime committed by one against the other."<sup>13</sup> "Crime" has been broadened to embrace all "wrongs" done to the spouse, and the wrong need not be physical.<sup>14</sup> Thus, injuries to the spouse's child or sexual offenses by the spouse with a third party would be deemed sufficient to abrogate the privilege. The privilege is also inapplicable in civil actions by one spouse against the other,<sup>15</sup> in divorce proceedings,<sup>16</sup> in criminal actions for desertion and non-support,<sup>17</sup> in proceedings under the Uniform Enforcement of Support Act,<sup>18</sup> and in child abuse cases.<sup>19</sup> The courts have also refused to recognize the privilege where the marital relationship is beyond saving,<sup>20</sup> and have allowed the transcript of testimony given at a preliminary hearing before marriage to be admitted at the trial against the new spouse.<sup>21</sup> In Wyoming one spouse may testify for the other spouse,<sup>22</sup> subject to cross-examination and impeachment.<sup>23</sup> Prosecuting attorneys may comment on the failure of a spouse to testify for the other spouse.<sup>24</sup>

Problems arise in determining who may claim the privilege. The majority of jurisdictions, recognizing the pressures that can be brought to bear upon a prospective witness and that a spouse's willingness to testify against the accused may be due to temporary emotions and may not truly indicate that the marriage is past saving,<sup>25</sup> grant the privilege only to the party-spouse.<sup>26</sup> Some jurisdictions grant the witness-spouse the privilege not to testify<sup>27</sup> and some

- 
13. WYO. STAT. § 1-142 (Supp. 1975).
  14. Chamberlain v. State, *supra* note 12.
  15. WYO. STAT. § 1-142 (Supp. 1975).
  16. WYO. STAT. § 20-51 (1957).
  17. WYO. STAT. § 29-76 (1957).
  18. WYO. STAT. § 20-126 (Supp. 1975).
  19. WYO. STAT. § 14-28.12 (Supp. 1975).
  20. Chamberlain v. State, *supra* note 12.
  21. Simms v. State, *supra* note 12.
  22. WYO. STAT. § 1-142 (Supp. 1975).
  23. Strand v. State, 36 Wyo. 78, 252 P. 1030 (1927).
  24. State v. Spears, 76 Wyo. 82, 300 P.2d 551 (1956).
  25. 2 WEINSTEIN ¶ 505[04], at 505-15.
  26. *E.g.*, MINN. STAT. ANN. § 595.02 (Supp. 1976).
  27. *E.g.*, R.I. GEN. LAWS ANN. § 12-17.10 (1956).

grant the privilege to both.<sup>28</sup> The issue is unresolved in Wyoming. The judicial analysis that does exist suggests that the privilege may belong only to the party-spouse.<sup>29</sup>

Proposed Rule 505 restricts the privilege to criminal proceedings, gives the privilege only to the party-spouse but allows the witness-spouse to claim the privilege on behalf of the party-spouse, and like Wyoming, recognizes certain exceptions to the privilege such as crimes by spouse against spouse or against a child of the spouse.<sup>30</sup>

### Confidential Communications

The confidential communications privilege enables one spouse to prevent the other from testifying with regard to intra-spousal confidential communications.<sup>31</sup> Unlike the testimonial privilege which is destroyed upon dissolution of the marriage, the confidential communications privilege survives both death and divorce.<sup>32</sup> The basis of the privilege is the belief that the privilege fosters marital communications, thus strengthening the marriage and ultimately benefiting society as a whole by strengthening the institution of marriage.<sup>33</sup>

The privilege has been attacked on grounds that the purpose behind the privilege is not enhanced by existence of the privilege.<sup>34</sup> Opponents of the privilege argue that people are unaware of the privilege and even when they are aware of the privilege there is no evidence that the marital relationship is benefited. Nevertheless the privilege is widely accepted today.<sup>35</sup>

---

28. *E.g.*, ORE. REV. STAT. § 136.655 (1975).

29. *Simms v. State*, *supra* note 12.

30. Proposed Rule 505. Uniform Rule 504 creates a hybrid of the testimonial privilege and the interspousal confidential communications privilege. A spouse cannot testify against the other spouse who is the accused in a criminal proceeding. However, the testifying spouse is only precluded from testifying as to matters arising from a confidential communication with the accused spouse. Regarding all other matters, no privilege exists under the Uniform Rule. Rule 504(a) and (b), HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 926 (1974).

31. 8 WIGMORE § 2336.

32. *Id.*

33. MCCORMICK, EVIDENCE § 78 (2d ed. 1972) [hereinafter cited is MCCORMICK].

34. Comment, *Privileges*, 27 ARK. L. REV. 200 (1973).

35. MCCORMICK § 78.

Wyoming at one time had a statute codifying the confidential communication privilege, but the statute has for the most part been repealed, the remnant being the husband-wife privilege found in Section 1-139 of the Wyoming Statutes. Since repeal of the statute, the privilege is recognized in Wyoming as it existed at common law.<sup>36</sup> Since confidentiality was a requirement at common law, it is also required in Wyoming.<sup>37</sup> Generally any communication between husband and wife is presumed to be confidential.<sup>38</sup> However the presumption may be rebutted and confidentiality is destroyed by the presence of a third party.<sup>39</sup> Jurisdictions are divided on the issue of who holds the privilege. Some jurisdictions grant the privilege only to the communicating spouse,<sup>40</sup> while others grant the privilege to both.<sup>41</sup> The issue is unsettled in Wyoming, but since the purpose of the privilege is to facilitate marital communication it would seem that the privilege should be limited to the communicating spouse. The confidential communications privilege has been statutorily abrogated in specific instances.<sup>42</sup> The privilege is not recognized in the Proposed Rules.

### *Attorney-Client*

The attorney-client privilege is one of the oldest of the testimonial privileges. At its inception the privilege belonged to the attorney, but today it is generally recognized that the privilege belongs solely to the client.<sup>43</sup> The purpose of the privilege is to facilitate attorney-client communication, thus enabling a well-informed attorney better to represent his client, ultimately benefitting society by a more "just" result.<sup>44</sup> Unfortunately, the degree to which existence of the privilege has aided in achieving the desired goal is highly speculative and in view of the roadblocks to

---

36. *Sinon*, *supra* note 8 (1964).

37. *Chamberlain v. State*, *supra* note 12.

38. MCCORMICK § 80.

39. *Chamberlain v. State*, *supra* note 12.

40. 8 WIGMORE § 2340; MCCORMICK § 83.

41. *E.g.*, CAL. EVID. CODE § 980.

42. *See*, WYO. STAT. § 1-142 (Supp. 1975); WYO. STAT. § 20-76 (1957); WYO. STAT. § 14-28.12 (Supp. 1975).

43. MCCORMICK § 92.

44. *Id.*, § 87.

fact-finding presented by the privilege, the need for existence of the privilege has been questioned.<sup>45</sup> Nevertheless, the privilege is recognized throughout the country.<sup>46</sup> The elements of the privilege are perhaps best summarized by Wigmore: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.<sup>47</sup>

Wyoming has codified the privilege, and as worded the statute does not require confidentiality.<sup>48</sup> Nevertheless, the courts have imposed the common law requirement of confidentiality.<sup>49</sup> The privilege is not destroyed by the presence of individuals such as secretaries and legal clerks to whom disclosure is made in furtherance of providing legal services to the client, but the privilege is destroyed if the communication is overheard by some other party, even if disclosure is inadvertent.<sup>50</sup>

In Wyoming the privilege belongs solely to the client and encompasses not only communications from client to attorney, but also advice given by the attorney to the client. The privilege may be waived. If the client voluntarily testifies, the attorney may be compelled to testify on the same subject.<sup>51</sup> Furthering a policy of strictly construing the privilege, the privilege has been held inapplicable where the litigation involves parties all of whom claim through the same deceased client.<sup>52</sup> Where an attorney has acted as a subscribing witness to a document, the privilege does not bar disclosure of any communication relevant to an issue concerning the document.<sup>53</sup>

---

45. 8 WIGMORE, § 2291.

46. *Id.* § 2293.

47. *Id.* § 2291.

48. WYO. STAT. § 1-139 (1957).

49. *Dobbins v. State*, 483 P.2d 255 (Wyo. 1971).

50. *Id.* at 255.

51. WYO. STAT. § 1-139 (1957).

52. *Forbes v. Volk*, 358 P.2d 942 (Wyo. 1961).

53. *Collins v. Collins*, 110 Ohio St. 105, 143 N.E. 561 (1924).

The Proposed Rules recognize the attorney-client privilege. As drafted, the Rules does not differ drastically from the common law. The Proposed Rules do differ from Wyoming law in that under the Proposed Rules inadvertent disclosure would not destroy the confidentiality of the communication.<sup>54</sup>

One problem left unresolved by the Proposed Rules, and a problem yet to be dealt with in Wyoming, is that of the corporate client. The problem of applying the attorney-client privilege to the corporation stems from the fact that a corporation as a legal entity can act only through its agents or employees. Since the attorney-client privilege applies only to communications of a client, a question arises as to the circumstances under which communications of an employee or agent of the corporation may be considered to be communications of the corporate client, thus enabling the corporation to claim the attorney-client privilege.<sup>55</sup>

The courts have adopted several proposed solutions to the problem. Some courts have opted for a "broad approach" which extends the privilege to anyone affiliated with the corporation as an employee, officer or director.<sup>56</sup> This approach has been criticized on grounds that it runs counter to the broad discovery provisions of the Rules of Civil Procedure and allows the corporation to hide all information merely by funneling it through an attorney.<sup>57</sup> Other courts have opted for a "control group" test which would limit the privilege to those members of the corporation who could participate in, or control, a corporate decision based upon legal advice.<sup>58</sup> This test has been criticized be-

---

54. Proposed Rule 503.

55. Annot., 9 A.L.R. Fed. 685 (1971).

56. *E.g.*, *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954).

57. 2 WEINSTEIN ¶ 503(b)[04], at 503-41 (1975).

58. *Virginia Electric and Power Co. v. Sun Shipbuilding and Dry Dock Co.*, 68 F.R.D. 396 (E.D. Va. 1975); *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962). Uniform Rule 502 added to the rule proposed by the Advisory Committee a definition for a representative of a client. The Uniform Rule would limit the privilege to those representatives of the client "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Rule 502(a)(2), HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 923 (1974).

cause of its lack of predictability.<sup>59</sup> Recently some courts have opted for an approach which would allow the privilege only if the employee makes the communication at the direction of his superiors in the corporation and the subject matter of the communication is the employee's performance of his duties.<sup>60</sup> This approach has also been criticized because it enables the corporation to hide "discoverable" information.<sup>61</sup> None of the approaches has achieved wide-spread acceptance. Weinstein suggests an approach which places the burden of proof on the corporation to demonstrate that the communication was (1) not disseminated beyond those with a need to know, (2) was intended primarily for the ears of the attorney, and (3) was made for the purpose of obtaining legal services for the corporation.<sup>62</sup> The Weinstein approach is preferable in that it most closely approximates the eight Wigmore elements, it tempers the confidentiality requirement with a practical view of the corporate image, and is most in line with the policy of the privilege.

### *Physician-Patient*

Unlike the marital privileges and the attorney-client privilege, which existed at common law, the physician-patient privilege is entirely statutory in origin.<sup>63</sup> First enacted in New York in 1828, the privilege has been codified in almost three-fourths of the states.<sup>64</sup> The privilege protects only communications from a patient to a professional physician acting in his capacity as such. The communication must be confidential, but confidentiality is not destroyed by the presence of agents of the physician.<sup>65</sup> The communication must be related to the diagnosis and/or treatment of the patient.<sup>66</sup> The privilege belongs solely to the patient and

59. 2 WEINSTEIN ¶ 503(b) [04], at 503-43.

60. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.C. S.C. 1974); *Harper and Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970).

61. 2 WEINSTEIN ¶ 503(b) [04], at 503-44 (1975).

62. *Id.* at 503-88.

63. 8 WIGMORE § 2380.

64. 2 WEINSTEIN ¶ 504[01], at 504-8.

65. Some courts have taken the position that confidentiality is presumed from the mere existence of the physician-patient relationship. 8 WIGMORE § 2381, at 832, n.1.

66. *Id.* § 2383.

thus may be claimed or waived only by the patient or his representative.<sup>67</sup>

The basis of the privilege is the policy of encouraging patients to secure medical aid by removing the threat of betrayed confidence.<sup>68</sup> Opponents of the privilege argue that the goal is sufficiently well protected by the code of conduct existing within the medical profession itself, and when litigation arises the need for confidentiality is outweighed by the need for full disclosure and protection of the integrity of the judicial process.<sup>69</sup> It is further argued that to the extent that the patient's symptoms are visible they are in no sense secret. Even if communication were not protected by the privilege, few patients would refrain from seeking medical help because of fear of disclosure.<sup>70</sup> Since the court will in many cases be denied information which is known to the general public, the injury to the cause of justice generally exceeds the injury to the physician-patient relationship.<sup>71</sup>

The privilege exists by statute in Wyoming.<sup>72</sup> The statute would appear to prevent disclosure of all communications between physician and patient regardless of confidentiality. There is no Wyoming case which speaks to the issue of confidentiality. However, in view of the fact that confidentiality is required in the attorney-client relationship, and that there would appear to be no policy served by application of the privilege to non-confidential communication,

67. *Id.* § 2386.

68. Vidakovich, *Are the Records of Mental Hospitals Privileged in Mental Incompetency Adjudications?*, 19 WYO. L. J. 59 (1968).

69. 2 WEINSTEIN ¶ 504[01], at 504-09.

70. *Id.* at 504-9. As Weinstein points out, doctors in jurisdictions without the privilege have as many patients as doctors in jurisdictions that have the privilege.

71. Wigmore lists four elements necessary to the existence of any privilege:

1) The communications originate in confidence that they will not be disclosed,

2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties,

3) The relation must be one which in the opinion of the community ought to be sedulously fostered,

4) The injury that would inure to the relation must be greater than the benefit thereby gained for the correct disposal of the litigation. 8 WIGMORE § 2285, at 527.

Opponents of the physician-patient privilege argue that element four is not met by existence of the privilege.

72. WYO. STAT. § 1-139 (1957).

Wyoming courts would probably follow the general rule and not apply the privilege where the confidentiality requirement is not met.

Wyoming does extend the privilege to include communications from the physician to the patient. The privilege belongs only to the patient and he may exercise the privilege whether or not he is a party to the litigation. The physician-patient privilege may be waived, and if the patient voluntarily testifies, the physician may be compelled to testify on the same subject.<sup>73</sup> The privilege has been specifically abrogated in cases involving child abuse<sup>74</sup> and workman's compensation.<sup>75</sup>

The Proposed Rules do not recognize a general physician-patient privilege. However, the Rules do recognize a psychotherapist-patient privilege.<sup>76</sup> Arguing that the psychotherapist-patient privilege is more closely akin to the priest-penitent relationship than the physician-patient privilege, commentators who denounce the physician-patient privilege are virtually unanimous in their acceptance of the psychotherapist-patient privilege. The commentators argue that psychotherapy is worthless unless the patient feels assured that whatever he may disclose will remain confidential. Without a promise of confidentiality, buttressed by a legal privilege, a patient would not reveal personal data which might evoke social disapproval. Not only is such data important in its own right, but also the catharsis achieved by its verbalization may itself be a significant factor in treatment. For the privilege to be applicable it is generally held that the subject matter of the consultation must be an infirmity generally recognized as susceptible to psychotherapeutic treatment.<sup>77</sup>

---

73. WYO. STAT. § 1-139 (1957). *Peters v. Campbell*, 80 Wyo. 492, 345 P.2d 234 (1959).

74. WYO. STAT. § 14-28.12 (Supp. 1975).

75. WYO. STAT. § 27-370 (Supp. 1975).

76. Proposed Rule 504. Uniform Rule 503 would reinstate the physician-patient privilege. Rule 503, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 925-26 (1974).

77. Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U. L. REV. 384 (1952).

Wyoming has recognized a psychologist-patient privilege<sup>78</sup> and to the extent that physicians engage in psychotherapy, Wyoming would undoubtedly apply the psychotherapist-patient privilege in much the same manner as the Proposed Rules.

### *Miscellaneous*

In addition to the privileges previously noted, several other privileges such as the priest-penitent privilege<sup>79</sup> and the required-report privilege,<sup>80</sup> also exist in Wyoming. No attempt will be made to enumerate all of these privileges. The Proposed Rules provide an exclusive enumeration of these privileges. Obviously, Wyoming recognizes all of the "constitutional" privileges such as the privilege against self-incrimination.<sup>81</sup>

### CONCLUSION

The Wyoming Court can approach the law of privileges in a fashion similar to that of the Federal Rules. Alternatively, the Supreme Court may choose to "take the bull by the horns" and opt for a Proposed Rules approach. The Proposed Rules approach has been adopted in at least three jurisdictions.<sup>82</sup> The Proposed Rules approach would certainly be preferable in view of several unresolved questions that exist in Wyoming today, most notably, who may claim the spousal privileges, what effect should unintentional disclosure have on confidentiality and how should the corporate client be treated.

E. J. B.

---

78. WYO. STAT. § 33-343.4 (Supp. 1975).

79. WYO. STAT. § 1-139 (1957).

80. WYO. STAT. § 31-220 (1957).

81. WYO. CONST. ART. 1 § 11.

82. ME. REV. STAT. ANNO., *Rules of Evidence* 501-13 (Supp. 1975); WIS. STAT. ANN. §§ 901.01-.09 (1975); N.M. STAT. ANN. §§ 29.4-501, -509 (Interim Supp. 1976).

## ARTICLE VIII: HEARSAY

*Rule 801: Definitions*

*Rule 801(a): Statement.* The definition of hearsay under Rule 801(c) of the Federal Rules of Evidence is in accord with traditional definitions,<sup>1</sup> except that it is modified by the definition of "statement" in Rule 801(a), the effect of which is to exclude from the definition of hearsay (1) conduct not intended as an assertion, (2) oral or written conduct which is not an assertion, and probably (3) oral or written assertions of one thing which are offered to show, inferentially, something else.<sup>2</sup>

Under Rule 801(a) conduct is not a statement unless there is an intent, on the part of the actor, to make an assertion. Intent to make an assertion may be regarded as intent to communicate an idea.<sup>3</sup> It would appear from the structure of the rule that the word "assertion" in Rule 801(a)(1) incorporates the idea of intent to assert; therefore non-assertive verbal conduct would be excluded from the definition of "statement."<sup>4</sup>

Rule 801(a), judging from the advisory committee's note,<sup>5</sup> would also exclude from the definition of "statement" oral or written assertions by a declarant from which the fact finder is asked to infer declarant's belief in the disputed

---

Copyright© 1977 by the University of Wyoming.

1. 5 WIGMORE § 1362 (Chadbourn ed. 1974) [hereinafter cited as WIGMORE]. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1139 (1935).
2. FED. R. EVID. 801, Adv. Comm. Note. After a discussion of the rationale for excluding evidence of conduct from the definition of hearsay, the committee's note continued: "Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c)."
3. *E.g.*, Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 148 (1912); Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133, 136 (1961); Wheaton, *What is Hearsay?* 46 IOWA L. REV. 210, 211 (1961).
4. It is difficult to think of a convincing example of verbal conduct which could not be construed as asserting something. Perhaps an involuntary cry of pain, or nonsense verse, or words of greeting ("hello, John") might be examples. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 189-90 (1948) for the view that a letter written but never mailed, or a soliloquy in the wilderness would be non-assertive conduct but still hearsay if offered testimonially.
5. *Supra*, note 2.

fact, and then to make a further inference from declarant's belief in the fact to the truth of the fact. The disputed evidence in the famous case of *Wright v. Tatham*<sup>6</sup> was of this sort. The evidence consisted of letters to the testator, offered to show his competency to make a will. The letters elicited his aid in community affairs, expressed gratitude and affection, and were such as would be written to a person of ordinary understanding.<sup>7</sup> The letters were offered to show that their authors believed the testator sane and, by inference from that belief, that he was sane. After eight years of litigation the letters were rejected, and the explanatory opinions of Judge Vaughan and Baron Parke greatly influenced subsequent treatment of this kind of evidence by commentators and the courts.<sup>8</sup>

Baron Parke labelled such evidence, both of "pure" conduct from which an inference may be drawn<sup>9</sup> and verbal

6. 7 Adolph & E. 313, 112 Eng. Rep. 488 (Ex. 1837) and 5 Cl. & F. 670, 47 Rev. Rep. 136 (H.L. 1838).

7. *Id.*, 112 Eng. Rep. 488, 490-94 (1837). See Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 749-60 (1961) for a detailed account of the litigation.

8. Although Wigmore's treatment of the topic is analytical rather than prescriptive, he gives considerable credit to the point of view set out in *Wright v. Tatham*. See WIGMORE § 267. The few earlier American cases generally followed the reasoning of the court in *Wright*. See *Thompson v. Manhattan Ry.*, 42 N.Y. Supp. 896 (1896) (evidence plaintiff was treated by a doctor hearsay when offered to show she suffered injury); *In re Louck's Estate*, 160 Cal. 551, 117 P. 673 (1911) (evidence that doctor had placed accident victim in mortuary van hearsay when offered to show the person was dead); *People v. Bush*, 300 Ill. 532, 133 N.E. 201 (1921) (placement of patient in venereal free ward hearsay when offered to show she did not have venereal disease). However, the pattern in the case law is not entirely consistent. See *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926 (1890) (evidence plaintiff was not allowed to vote in a particular locality not hearsay when offered to show lack of residency); *United States v. Sessin*, 84 F.2d 667 (1936) (evidence a person was placed in a tuberculosis ward not hearsay when offered to show he had tuberculosis). None of the cited cases contain any helpful discussion of the rationale of the holding.

Until recently the practice, if one may be discerned from so few cases, has been to follow *Wright* in equating evidence of conduct, both verbal and non-verbal, with evidence of assertions and thus excluding it as hearsay. In the few recent federal cases, however, the courts have shown a disposition to look to the presence or absence of assertive intent in the actor, as the rules now require. Perhaps this trend is due to an underlying sense that, in Judge Vaughan's phrase, "moral evidence which might be respected by common sense and experience" ought not to be automatically excluded in a court of law, but that in place of rigid inflexibility the courts ought to substitute a consideration of the reliability and value of the evidence.

9. Baron Pake's most notable example was that of the deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family. *Wright v. Tatham*, *supra* note 6, at 386.

assertions used similarly, as "implied statements" and the subject has come to be known as the "implied assertions" problem. This is an unfortunate label, because it does not make clear the distinction between statements as to which there is a clear probability that the declarant *intends to imply* something other than the matter directly asserted, and statements as to which it is clearly probable that the thing asserted directly is sufficiently remote from the thing sought to be proved that an intent to imply that very thing is unlikely. For instance, consider the difference, on the question of X's sanity, between the statements "X really knows what life is all about" and "X is the babysitter I prefer." The first statement is hardly more than a slightly oblique way of saying "X is sane" and the declarant's intent to imply that conclusion is clear, while the second statement asserts something quite different—but something from which X's sanity may nevertheless be inferred by the trier of fact. We all know from experience that, in the normal course of things, people do not entrust their children, by preference, to insane babysitters.

Because of the ease with which a declarant may deliberately utter verbal statements designed to convey something other than the matter directly asserted—in other words, to imply some other conclusion—the courts will probably be much more cautious in making a preliminary determination of intent under Rule 801(a) in the case of verbal conduct than where evidence of "pure" conduct is in question.<sup>10</sup> Several authorities have suggested tests of reliability which might be applied by the court, such as the importance of the conduct to the actor, the possibility of a motive for creating a false impression, and the nearness of the conduct in time to the event or condition sought to be proved.<sup>11</sup> Although

---

10. See text accompanying footnotes 27 through 30 *infra*.

11. Falknor, *supra* note 3, at 137; Finman, *Implied Assertions As Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 701-03 (1962); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 504 (1930); Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 216-17 (1940); Morgan, *supra* note 1, at 1159. McCormick characterized the position taken by himself, Falknor, and Morgan in the three articles immediately above as "essentially a transitional one, with the element of reliance being advanced as a justification for breaking away from the

such tests are not expressly stated in the rule, it seems safe to say that they represent the kinds of considerations the courts will apply.

The main justification for the exclusion of hearsay today is the fear that the finder of fact will be unable to assess the reliability of the evidence because the declarant is not present in court and thus his memory, narrative accuracy, perception, and candor are not subject to the test of cross-examination.<sup>12</sup> It has been noted, however, that when the evidence offered is evidence of non-assertive conduct of a person not present in court, some of the hearsay dangers are greatly diminished in importance.<sup>13</sup> The narrative ability of the actor or declarant is not in question and in the absence of any intent to assert, his candor is not an issue. "A person who did not intend to make *any* statement about f could not have intended to make a misleading statement about f."<sup>14</sup> But evidence of conduct, including verbal conduct used inferentially, presents some peculiar dangers of its own. The inference from conduct evidencing belief to the fact believed may depend for its validity upon an assumption that (1) the conduct arose from the belief and not from some other cause, and (2) the actor's motivational pattern was normal. Another danger is that conduct, verbal or otherwise, which appears non-assertive may have been intended to assert.<sup>15</sup> Under Rule 801 (a), according to the advisory committee's note,

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. . . . The

---

existing pattern of exclusion, rather than as a requirement of admissibility." MCCORMICK, EVIDENCE; § 250 at 599 (2nd ed. 1972) [hereinafter cited as MCCORMICK].

12. MCCORMICK § 245.

13. WIGMORE § 459; Rucker, *The Twilight Zone of Hearsay*, 9 VAND. L. REV. 453, 457-58 (1956); Maguire, *supra* note 7, at 769; Seligman, *supra* note 3 at 148-49; Falknor, *supra* note 11, at 195. *But see* Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 37-38; Blakey, *You Can Say That if You Want—The Redefinition of Hearsay in Rule 801 of the Proposed Federal Rules of Evidence*, 35 OHIO S. L. J. 601, 612-16 (1974).

14. Finman, *supra* note 11, at 685.

15. *Id.* at 686-90.

determination involves no greater difficulty than many other preliminary questions of fact.<sup>16</sup>

Finman<sup>17</sup> has pointed out that although the intent of the actor looks like a question of fact, the intent may not actually be ascertainable by factual analysis. The real problem for the judge is not whether or not the evidence is hearsay, but whether or not it should be admitted. Where the actor is not available in court, the judge must determine his intent from the conduct offered, and this decision, particularly where the material offered is verbal conduct used inferentially, turns on a "complex exercise of judgment" by the court.<sup>18</sup>

*Assertive Intent: Examples of "Statements" and of Conduct not Amounting to "Statements".* Where the conduct offered in evidence is clearly assertive, determining whether it ought to be admitted poses few problems. Some conduct, such as the sign language of the deaf, or a nod of the head in answer to a question, is obviously intended as a substitute for assertive speech; evidence of such conduct is hearsay. In *U.S. v. Ross*<sup>19</sup> the prosecution sought to prove that the defendant had solicited buyers for worthless stock by evidence that when an investigator went to defendant's company's offices and inquired about code numbers assigned to salesmen, a clerk pointed to a printed list which showed that the number in question was assigned to the defendant. Defendant objected that this evidence was hearsay, and the appellate court agreed.

At the other extreme is conduct so involuntary that it cannot be described as assertive. In *Cole v. United States*<sup>20</sup> testimony that a bank teller was pale and shaking shortly after handing over money to defendant was not hearsay.

---

16. FED. R. EVID. 801, Adv. Com. Note.

17. Finman, *supra* note 11, at 695-97.

18. *Id.*

19. 321 F.2d 61, 69 (2d Cir. 1963), *cert. denied*, 375 U.S. 894 (1963) finding that "the pointing was as much a communication as a statement that 'This is a list of the names and numbers of the salesmen' would have been." *Id.* at 69.

20. 327 F.2d 360, 61 (9th Cir. 1964) finding that "[O]bviously it was not hearsay. The teller was not pale and shaking for the purpose of communicating a message. . . ." *Id.* at 361.

The difficult questions of intent arise when the conduct falls within these extremes, when it is in some way ambiguous. When, for instance, evidence is offered that a person whose sanity is in question broke up furniture, refused to speak, seemed distraught, and so on, the trial judge must try to determine whether or not the person was likely to have been feigning insanity; he must assess the probability that the actor intended to assert, by his conduct, that he was insane. Evidence of third party flight presents the same problem. Though it has usually been excluded when offered to cast doubt on defendant's guilt,<sup>21</sup> relevant evidence of third party flight, under the rule, ought to be subject to the same kind of determination of intent as any other evidence of conduct. Did the person, in running away, intend to assert his guilt (perhaps in order to draw attention away from defendant)? If not, the evidence ought to be admissible.

Similar questions are presented by evidence of silence. For example, if the issue is the merchantability of goods, the defendant may wish to show that other customers who bought goods from the same lot made no complaints. The evidence would be offered to show by inference from the silence of the buyers their belief that the goods were acceptable and from their belief that the goods were in fact acceptable. State courts have split on the hearsay issue.<sup>22</sup> The matter is additionally complicated by the fact that evidence of silence will often be vulnerable to attack on relevancy grounds under Rule 401.<sup>23</sup>

Where the evidence is a verbal assertion, offered to prove belief in some other fact than the one asserted, and thus to prove the fact, more difficult problems are presented. In one kind of case this evidence has generally been admit-

21. *E.g.*, *Owensby v. State*, 82 Ala. 63, 2 So. 764 (1887); *People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924); *State v. Menilla*, 177 Iowa 283, 158 N.W. 645 (1916); See Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 195, n.13, for collected older state court decisions holding evidence of third party flight inadmissible.

22. For a thorough analysis of the treatment of this evidence by state courts prior to 1940 see Faulkner, *supra* note 21 at 209-17.

23. For discussions of the relevancy of silence evidence, see Weinberg, *Implied Assertions and the Scope of the Hearsay Rule*, 9 M. U. L. REV. 268, 283 (1973); McCORMICK § 250, at 600-01.

ted. During a police raid on premises suspected of being used for illegal gambling, the phone rings, an officer answers without identifying himself, and a voice on the other end says something like: "This is Irving. I want ten dollars to win on Longshot in the eighth at Monmouth." At trial, defendant will usually object to the evidence of the words spoken by the caller as hearsay, and generally the objection will fail. This was the case in *United States v. Pasha*<sup>24</sup> where the court ruled that the conversations were not hearsay because they were "offered only as circumstantial evidence of the type of operation that was being conducted on the premises." This not very helpful language is typical of the approach of some state courts as well.<sup>25</sup>

McCormick classifies the betting evidence with non-hearsay uses of out-of-court statements as verbal parts of acts; the process of proving the character of an establishment by evidence of statements made in connection with activities therein is like the process of showing, by accompanying utterances, the character of relevant but ambiguous acts.<sup>26</sup> But such evidence actually seems to be offered to prove the belief of the declarant, and from his belief, the truth of the fact believed. The speaker asserts that he wants to place a certain bet; the fact finder is asked to infer from his assertion that he believes he is calling a betting establishment, and from his belief that the place is in fact used for those purposes. In these cases the courts have admitted evidence of assertions used inferentially to prove a fact believed. Under Rule 801 (a) the evidence would be subject to the same test of intent to assert as any other out-of-court assertion offered on grounds that it is not a statement, and hence not hearsay. Probably there would be little difficulty, in most cases, in determining that the caller had no intent to

24. 332 F.2d 193 (7th Cir. 1964), *cert. denied*, 379 U.S. 839 (1964). In some federal cases of this type the hearsay question is apparently ignored, e.g., *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950).

25. *People v. Radley*, 68 Cal. App.2d 607, 157 P.2d 426, 427 (1945) (evidence received "for the purpose of establishing that the room was being occupied for placing bets on horse races."); *State v. Tolisano*, 136 Conn. 210, 70 A.2d 118, 119 (1949) (calls were "verbal acts to show that the defendant was engaged in the activities . . ."); See Weinberg, *supra* note 23, at 274-77.

26. McCORMICK § 249, at 589.

assert directly, or to imply "this is a betting establishment" and thus the evidence would be admissible as outside the scope of the hearsay rule. Nevertheless, the trier could reasonably infer (and therefore find) the declarant's belief, and hence the fact believed, from proof of his statement. It would clarify matters if the admissibility of such evidence were discussed in terms of Rule 801(a) rather than under Rule 801(c) or one of the exceptions.

In criminal cases, where the challenged evidence is critical to the outcome, the federal courts in a few cases decided before passage of the rules, showed great caution in admitting evidence of the "implied assertions" variety. In *United States v. Pacelli*,<sup>27</sup> a prosecution for causing the death of a witness, the trial court admitted testimony as to out-of-court remarks and conduct by defendant's family and friends which tended to show that they believed him guilty. The evidence was offered to show, by inference, that he was guilty. It was crucial since it was the only corroboration of the testimony of an eyewitness-accomplice. The Second Circuit held the evidence inadmissible:

We consider it irrelevant . . . that the extra-judicial statements and conduct admitted in this case may not have been intended by those involved to communicate their belief that Pacelli murdered Parks . . . . While the danger of insincerity may be reduced where implied rather than express assertions . . . are involved, there is the added danger of misinterpretation of the declarant's belief. Moreover, the declarant's opportunity and capacity for accurate perception or his sources of information remain of crucial importance.<sup>28</sup>

The Fifth Circuit took a similar view in *Park v. Huff*.<sup>29</sup>

Implied assertions may in certain circumstances carry less danger of insincerity or untrustworthiness than direct assertions, but not always. The danger of insincerity or untrustworthiness is de-

27. 491 F.2d 1108 (2d Cir. 1974), cert. denied, 419 U.S. 826 (1974).

28. *Id.* at 1116-17.

29. 493 F.2d 923 (5th Cir. 1974), revd. on rehearing on other grounds 506 F.2d 849 (5th Cir. 1975), cert. denied, 423 U.S. 824 (1975).

creased only where there is no possibility that the declarant intended to leave a particular impression. . . . When the possibility is real that an out-of-court statement was made with assertive intent, it is essential that the statement be treated as hearsay if a direct declaration of that fact would be so treated.<sup>30</sup>

The Fifth Circuit thus applied, in this pre-rules case, a strict standard for determining whether a statement was made with assertive intent: There must be "no possibility" that the declarant intended to leave a particular impression.

*Rule 801(c): Hearsay.* Rule 801(c) defines "hearsay" as an out-of-court statement offered in evidence to prove the truth of the matter asserted; Rule 802 excludes hearsay "except as provided by these rules or by other rules prescribed by the Supreme Court . . . or by Act of Congress." Rule 801(c) follows traditional practice except insofar as it is modified by the definition of "statement" in 801(a).

If a party offers W's testimony in court that on some earlier occasion A told him that X picked Y's pocket, and A is not available at trial, why should W's testimony not be admitted on the question of whether X picked Y's pocket? The thoroughly established rule against the admission of hearsay rests on two distinguishable bases: First, common sense and experience indicate that where A has observed an event and made a statement about it to W, and W's account of A's statement is offered to prove the event, the evidence provided by W's testimony is likely to be much less reliable than a direct in-court statement by A would be. The possibilities of mistake, misunderstanding, and insincerity are doubled when the information must pass from declarant to witness, and only then to the finder of fact. Fears on the reliability point will not support the rule alone, however. Evidence other than out-of-court statements, which is regularly offered in court and regularly admitted, may range from highly reliable to very dubious indeed. There is no

---

30. *Id.* at 927-28.

all-encompassing rule that only "reliable" evidence may be received.

The second basis of the hearsay rationale is that the trier of fact has no means of assessing the degree of reliability of A's statement. That is, the out-of-court declarant is not under oath and present in court where the trier of fact may observe his demeanor and weigh his responses to cross-examination designed to expose any flaws in his perception, memory, or narrative ability, and reveal any motive he may have to misstate or falsify his account of the event in question. In the hypothetical situation above, the most searching cross-examination of W can, at best, only test W's perception, memory, narrative skill, and candor; it cannot reach A effectively, and W cannot be cross-examined about the actual event at all.

If, however, the out-of-court statement is offered to prove not the truth of the matter stated therein, but something else, the hearsay rule alone will not exclude it, because the fact that the statement was made is relevant without regard to the truth of the matter asserted. Certain situations in which such use may be made of an extra-judicial statement tend to arise repeatedly and serve to illustrate some of the limits of the hearsay rule.<sup>31</sup>

Verbal acts are out-of-court statements which are "not evidence of assertions offered testimonially, but rather of utterances—verbal conduct—to which the law attaches duties and liabilities."<sup>32</sup> Thus words constituting an oral contract, or testimony that an insurance policy was orally cancelled,<sup>33</sup> or that labor negotiations had or had not taken place, or that an impasse had been reached<sup>34</sup> are admissible to establish that

31. MCCORMICK § 249.

32. *Id.* at 588.

33. *Creaghe v. Iowa Home Mutual Casualty Company*, 323 F.2d 981, 984 (10th Cir. 1963). "The hearsay rule does not exclude *relevant* testimony as to what the contracting parties said with respect to the making or the terms of an oral agreement. The presence or absence of such words and statements of themselves are part of the issues in the case. This use of such testimony does not require a reliance by the jury or the judge upon the competency of the person who originally made the statements for the truth of their content." (Emphasis in original).

34. *N.L.R.B. v. Tex-Tan, Inc.* 318 F.2d 472, 483-84 (5th Cir. 1963).

the words were spoken. The same is true of extra-judicial assertions offered to show that a defamation was communicated<sup>35</sup> and testimony of threats made in the course of an extortionate gambling scheme.<sup>36</sup>

Extrajudicial statements may be introduced as verbal parts of acts. The meaning of acts taken in isolation may be unclear, and "explanatory words which accompany and give character to the transactions are not hearsay."<sup>37</sup> Thus, where the fact to be proved was whether or not defendant took a car with the owner's consent, the owner's statements as he gave defendant permission to "sleep in the car" were admissible; the owner handed over temporary possession of the car but his words limited and defined the possession.<sup>38</sup>

Out-of-court statements may be introduced to show the effect of the statement on the hearer or reader.<sup>39</sup> The statement is received as evidence of the probable state of mind it induced in the hearer, such as being put on notice, or of having knowledge or motive, or to show information upon which the hearer acted as bearing on the reasonableness of his subsequent acts. Thus, in an action on a bond issued to a railroad by defendant, where defendant sought to prove a railway employee negligent in releasing cars to a shipper whose delivery bond was inadequate, evidence that a manager who purported to speak for the company president ordered the employee to release the cars was admissible, to show the employee acted with reasonable care.<sup>40</sup> Also, testimony bearing on defendant's knowledge that cars transported were stolen,<sup>41</sup> and letters of complaint which were called to defendant merchandizer's attention and were relevant to his in-

---

35. *M.F. Patterson Dental Supply Company, Inc. v. Wadley*, 401 F.2d 167, 172 (10th Cir. 1968).

36. *United States v. Burke*, 495 F.2d 1226 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974).

37. *McCORMICK* § 249, at 589.

38. *United States v. Hatcher*, 496 F.2d 529 (9th Cir. 1974).

39. *McCORMICK* § 249, at 589-90.

40. *Boston & Maine Railroad v. Aetna Casualty and Surety Co.*, 329 F.2d 602 (1st Cir. 1964). *See also*, *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969) (articles in medical journals properly admitted to show that defendant should have known of possible ill effects of drug).

41. *United States v. Carter*, 491 F.2d 625 (5th Cir. 1974).

tent and good faith in a fraud prosecution<sup>42</sup> have been admitted as non-hearsay.

Extrajudicial statements may also be offered to show circumstantially the feelings or state of mind of the declarant.<sup>43</sup> In an action for breach of an agreement giving plaintiff an option to purchase stock, where the issue was plaintiff's ability to perform, evidence that two persons had offered to loan him money was admissible either under the state of mind exception to the hearsay rule, or circumstantially to show the speakers' state of mind, i.e. that they were willing to come to plaintiff's aid.<sup>44</sup> A letter from an extortion victim to the FBI, written the day before his death, was admitted as evidence of his state of mind, fear.<sup>45</sup> Evidence of false statements made to an officer has been admitted as showing declarant's guilty mind.<sup>46</sup> A similar use of out-of-court statements is seen where the state of mind to be proved is insanity. In an action on a war risk policy, where plaintiff claimed total disability due to dementia praecox, his irrational statements to doctors were admissible as proof of mental disease.<sup>47</sup>

In summary, under Rule 801(a) conduct is not a statement and hence not hearsay unless there is an intent on the part of the actor to make an assertion. Verbal assertions used to show the declarant's belief and by inference from his belief the fact believed are treated similarly, so long as the matter actually stated is sufficiently remote from the matter to be proved that an intent on the part of the declarant to assert that very thing is unlikely. Courts will probably be cautious in making that determination, especially in criminal cases where the evidence is important to the outcome of

42. *United States v. Press*, 336 F.2d 1003 (2d Cir. 1964), *cert. denied*, 379 U.S. 965, *reh. denied*, 380 U.S. 927 (1965).

43. *McCORMICK* § 249, at 590.

44. *Scholle v. Cuban-Venezuelan Oil Voting Trust*, 285 F.2d 318, 321 (2nd Cir. 1960): "[T]he hearsay rule does not bar admission of the statements used circumstantially, since when so used the primary focus of inquiry is whatever inferences can be drawn from the fact that the words were spoken and not the truth of what was said."

45. *United States v. DeCarlo*, 458 F.2d 358 (3rd Cir. 1972). The trial court took the unusual step of having each juror sign a pledge that he would only consider the letter as evidence of state of mind.

46. *United States v. Sharpe*, 452 F.2d 1117 (1st Cir. 1971).

47. *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932).

the case. Rule 801(c) states the traditional definition of hearsay. Under the rule, out-of-court statements which are offered to prove something other than the matter asserted therein, so that the perception, memory, narrative skill, and candor of the out-of-court declarant are not in question, continue to be admissible.

*Rule 801(d): Statements Which Are Not Hearsay—Prior Statements By A Testifying Witness—In General.* Rule 801(a), (b), and (c) define hearsay. Rule 801(d) defines as “not hearsay” certain kinds of out-of-court statements, which have been treated traditionally either as hearsay or as exceptions to the hearsay doctrine. These out-of-court statements fall into two broad groups: Prior statements by a testifying witness (Rule 801(d)(1)) and admissions by a party opponent (Rule 801(d)(2)).

The underlying rationale for the exclusion of hearsay is that the out-of-court statement sought to be introduced as proof of the matter stated therein was not made under oath, under circumstances such that the trier could observe the declarant's demeanor, and—most important—the statement was not subject to cross-examination.<sup>48</sup> The trier of fact has no adequate means by which to assess the reliability of the evidence.<sup>49</sup> What if, however, the hearsay declarant is present and testifying at the trial? May his prior, out-of-court statements come in as proof of the matter asserted therein? Will the oath, cross-examination and demeanor evidence available at trial substitute for the oath, cross-examination, and demeanor evidence which were not available when the statement was made? The traditional answer is no.<sup>50</sup> However, modern commentators have argued that prior statements of a witness present and testifying at trial

48. MCCORMICK § 251, at 601.

49. *Id.*; WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, ¶ 801(d)(1)[01], at 801-63, 64 (1975) [hereinafter cited as WEINSTEIN].

50. The most striking expression of the traditional view is found in *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939): “The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principle virtue is the immediate application of the testing process. Its strokes fall while the iron is hot.”

ought to be received as substantive evidence.<sup>51</sup> The reasons offered in support of this view are: (1) that the oath is not now emphasized in evidence law;<sup>52</sup> (2) that the demeanor of the witness may be assessed at trial;<sup>53</sup> (c) that the prior statement, being closer in time to the underlying events, is likely to be more accurate;<sup>54</sup> (4) that since in most cases the prior statement will be inconsistent with the witness' trial testimony, cross-examination at trial will be even more effective than is usually the case;<sup>55</sup> and (5) that juries are unlikely to either understand or to heed an instruction limiting the use of prior inconsistent statements to impeachment only.<sup>56</sup>

Rule 801(d) (1) takes a middle path between the orthodox position that almost no prior statements should come in as substantive evidence, and the arguments of some scholars that almost all prior statements should be considered substantively. The rule authorizes the substantive use of three kinds of prior out-of-court statements by removing them from the hearsay category altogether. The three kinds of statements which are "not hearsay" under the rule are (1) prior inconsistent statements which were given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, (2) prior consistent statements

51. 3A WIGMORE § 1018, at 996; McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573 (1947); Morgan, *Hearsay Dangers and the Applications of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948); WEINSTEIN ¶ 801(d) (1)[01], at 801-65, 66.

52. 6 WIGMORE §§ 1827 and 1831.

53. MCCORMICK § 251, at 602; Judge Learned Hand in *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925): "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court."

54. "The prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is." McCormick, *supra* note 51, at 577; Gardner, *The Perception and Memory of Witnesses*, 18 CORN. L. Q. 391, 392-4 (1933); Asaro v. Parisi, 297 F.2d 859, 863-64 (1st Cir. 1962), *cert. denied*, 307 U.S. 904 (1962).

55. "[T]he witness who has told one story aforesaid and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. It will go hard, but the two questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror or greed, and thus reveal which is the true story and which the false," McCormick, *supra* note 51, at 577; *But see* text accompanying notes 71 through 73 *infra*.

56. *See* text accompanying note 69 *infra*.

offered to rebut a charge (express or implied) of recent fabrication or improper influence or motive, and (c) prior statements of identification of a person made after perceiving him. A limitation operating on these three kinds of statement is the requirement that the out-of-court declarant must be present at trial, testifying, and subject to cross-examination concerning the statement.

It should be borne in mind that Rule 801(d) does not operate in a vacuum. On the one hand, there are numerous occasions, other than those enumerated in subdivision (d), for the proper receipt in evidence of a prior statement of a witness. If the statement is offered for some purpose other than to prove the matter asserted it is not hearsay under Rule 801(c).<sup>57</sup> The commonest such use, of course, is impeachment.<sup>58</sup> A prior statement may also qualify under one of the exceptions to the hearsay rule.<sup>59</sup>

On the other hand a prior statement may be admissible as substantive evidence under Rule 801(d) and yet be barred by some other rule of evidence.<sup>60</sup> In addition, in criminal cases constitutional prohibitions may provide grounds to keep the evidence out. Much of the subject matter of Rule 801 is intimately related to issues presented by the Confrontation Clause of the Sixth Amendment. No attempt is made here to trace the route the United States Supreme Court seems to be taking toward a definition of the relationship between the Confrontation Clause and the hearsay rule,<sup>61</sup> but it is safe to say that the precise relationship remains unclear.<sup>62</sup>

57. See text accompanying notes 37 through 47 *supra*.

58. FED. R. EVID. 613.

59. FED. R. EVID. 803, 804.

60. For example, a prior statement might be irrelevant under FED. R. EVID. 401, or though relevant, excludable under FED. R. EVID. 403, or fall within a privilege under FED. R. EVID. 501.

61. See, *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *Bruton v. United States*, 391 U.S. 123 (1968); *California v. Green*, 399 U.S. 149 (1970); *Dutton v. Evans*, 400 U.S. 74 (1970); *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

62. MCCORMICK § 252; 4 WEINSTEIN 800 [04], at 800-18 to 800-26; *Baker, The Right to Confrontation, The Hearsay Rules, and Due Process—A proposal for Determining When Hearsay may be used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); *Graham, The Right of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again*, 9 ALAS. L. J. No. 1, p. 3 and *The Right of Confrontation and Rules of Evidence: The Return of the*

*Rule 801(d)(1)(A): Prior Inconsistent Statements.* Rule 801(d)(1)(A) as prescribed by the Supreme Court authorized the substantive use of any prior inconsistent statement by a witness present and testifying at trial.<sup>63</sup> This was the version approved by the Senate.<sup>64</sup> As passed by the House of Representatives, the rule limited the prior inconsistent statements which could be used substantively to those under oath *and* subject to cross-examination when made.<sup>65</sup> The rule, as adopted, represents a compromise: the prior statement must have been made under oath at a trial, hearing, or other proceeding, or in a deposition, but need not have been subject to cross-examination when made. The most obvious result is that, under the rule as enacted, prior inconsistent statements made in the course of testimony before a grand jury or another proceeding where the statement was under oath but not cross-examined are admissible as substantive evidence, whereas under the House version such testimony would generally have been admissible for impeachment only.<sup>66</sup>

*Comparison of the "Wide-open," House, and Final Versions*

The rule as originally proposed, or "wide-open" version, would have made inconsistency the sole test for admissibility of the prior statement of a witness testifying at trial. The "wide-open" rule obviously favors the prosecution in criminal trials, since the circumstance in which the rule is most likely to be applied involves the witness who gives a statement inculcating the defendant to investigators and then gives a different account, favoring the defendant, at trial. The "wide-open" rule allows the prosecution to introduce the prior statement as substantive evidence of defendant's

---

*Portuguese Gentleman*, 9 ALAS. L. J. No. 5, p. 3 (1971); Younger, *Confrontation and Hearsay: A Look Backward, a Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

63. FED. R. EVID. 801(d), Adv. Comm. Note.

64. FED. R. EVID. 801(d), Adv. Comm. Note.

65. FED. R. EVID. 801(d), Adv. Com. Note.

66. Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L. J. 3, 9 (1975): "The difference between the House version. . . and the version finally adopted, . . . is that statements made during testimony before a grand jury, where only the prosecution may present evidence, can now be used to support a verdict at a subsequent trial despite a change of heart and story by the declarant."

guilt, even though the witness disavows the statement in court. Since the rule requires neither oath nor cross-examination when the statement was made, the evidence may rest entirely on the unsupported word of the person who claims to have heard the statement—often a police or insurance investigator.<sup>67</sup> The rule thus offers a substantial incentive to investigators to obtain such statements and provides a motive for abuse.

Against these misgivings one may set a number of opposing arguments. First, since prior inconsistent statements are universally admitted as impeaching evidence, without special limitations on the circumstances under which they were made, investigators already have a significant motive to obtain such statements.

Second, there may be a legitimate interest in preventing loss of convictions through false trial testimony by “turn-coat” witnesses which outweighs the interest in insuring the maximum possible degree of reliability of the out-of-court statement.<sup>68</sup>

---

67. This was the aspect of the rule as originally proposed which called forth the most vigorous opposition from defense attorneys and some judges. Judge Friendly's testimony before the House Committee on the Judiciary expressed the primary objection and probably carried great weight: "I don't think anybody really appreciated just what that means. What it means is—and this is the setting in which we see it rising, and particularly in criminal trials—a defendant calls a witness who says the defendant was not at the place, did not do the things of which he is being accused. The Government then puts on an agent who testifies to a statement, even an oral statement, by this witness to the contrary. And under this rule the agent's statement, which is controverted by the witness—there is no proof except the agent's own testimony that it had ever been made—is used as affirmative evidence against the defendant. That really revolts me. I was responsible for some modification of the old rule that a prior inconsistent statement could be used only for impeachment of a witness on the stand, but we limited it very carefully to testimony in a previous trial or before a grand jury. I find this rule absolutely indefensible." *Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives*, 93rd Cong., 1st Sess., on Proposed Rules of Evidence, Ser. 2 at 252 (1973). The rule as finally enacted is similar to that developed by the Second Circuit. For discussions of the competing considerations, and limitations applied by the Second Circuit, see the following opinions by Judge Friendly: *United States v. De Sisto*, 329 F.2d 929 (2d Cir. 1964), cert. denied, 377 U.S. 979 (1964); *Taylor v. Baltimore & Ohio Railroad Co.*, 344 F.2d 281 (2d Cir. 1965), cert. denied, 382 U.S. 831 (1965); *United States v. Nuccio*, 373 F.2d 168 (2d Cir. 1967), cert. denied, 387 U.S. 906 (1967).

68. Cf. McCormick, *supra* note 51.

Third, it may be argued that by observing the witness' demeanor on the stand and hearing and considering his testimony in the light of the other evidence in the case, the jury ought to be able to arrive at a fairly accurate decision as to whether the prior statement was actually made and if so, whether it, or the in-court statement, or neither, is worthy of belief.

Fourth, it has often been asserted that the customary instruction that a prior inconsistent statement is to be considered only as it may reflect on the witness' credibility is difficult for a jury to understand and unlikely to be followed even if understood.<sup>69</sup> The jury has before it both the prior statement and the statement at trial, and it is asked to determine whether the defendant, as he testified, was worthy of belief. The jury will naturally consider the witness' demeanor, both the statements, and the other evidence presented at trial. If it decides, weighing all the information, not to believe the trial statement because the prior statement seems more likely to be true, how can it then dismiss from its consideration the substance of the prior statement? Yet this is what the limiting instruction asks the jury to do. Proponents of the "wide-open" rule argue that it merely brings the law into line with what juries do in deciding cases anyway.

The House rule and the final version differ in that the House rule requires the prior statement to have been made subject to cross-examination as well as under oath, while the final version requires only the oath. The requirement of the oath makes it extremely likely that the prior statement was actually made, since a transcript will ordinarily be

---

69. McCormick, *supra* note 51, at 580-81: "If the prior statement and the present testimony are to be considered and compared, what is the purpose [of the limiting instruction]? The intuitive good sense of layman and of lawyers seems to agree that the only rational purpose is not merely to weigh the credibility of the testimony, but to decide *which of the two stories is true*. To do this is ordinarily to decide the substantive issue," [emphasis in original]; See Mr. Justice Jackson, concurring in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

available.<sup>70</sup> Whether the House rule or the version adopted seems more satisfactory depends on whether cross-examination at trial, where the inconsistency is exposed, serves to ascertain the truth as well as cross-examination at the time the prior statement was made. Eminent scholars of evidence law have run strongly to the view that cross-examination at trial is even more effective than it would have been initially. This position has its critics, who have pointed out that cross-examination at the time the prior statement is made can, in some instances, be so effective that the witness repudiates or withdraws his statement so that the judge will instruct that it is not to be considered by the jury for any purpose. Where a statement is admissible under Rule 801(d), however, this opportunity is lost, and the statement stands in court as a prior statement of the witness on an equal footing with his trial testimony and the other evidence in the case, to be considered by the jury as substantive proof of a fact in issue. No amount of in-trial cross-examination may remove it altogether from the jury's consideration.<sup>71</sup> It has been argued that for cross-examination to be truly effective it must be adversarial, and that since under the rule the witness will often be testifying in favor of the party with the greatest interest in discrediting the prior statement, no adversarial cross-examination is possible.<sup>72</sup> Finally, it has been argued that requiring cross-examination when the prior statement was made would also make it more likely that the statement was properly understood and was indeed the statement the witness intended to make.

---

70. Even McCormick, in an article representing the most vigorous advocacy of the "wide-open" rule conceded that some special safeguard might be necessary against the "hazard of error or falsity in the reporting of oral words." McCormick, *supra* note 51, at 588.

71. Blakey, *supra* note 66, at 44-45.

72. Beaver and Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEG. F. 309, 318 (1970): "The theory that cross-examination at trial is sufficient 'denigrates the real office of cross-examination. Cross-examination postulates a witness who avows a thing under interrogation by a lawyer who would have him deny it, or a witness who denies a thing under inquisition by a lawyer who would have him affirm it. Cross-examination is thus essentially adversary. . . . The measure of the cross-interrogator's success is the extent to which he is able to destroy the witness's testimony in chief, shake the witness, elicit retractions, destroy his credibility. If the witness declines to adopt his former statement as true, no adversary cross-examination about it is possible."

*Some Questions of Interpretation of Rule 801(d) (1) (A).*

The rule requires that the prior statement be inconsistent with the witness' trial testimony, but provides no definition of inconsistency. Probably the framers of the rule intended, by limiting substantive use of prior statements to those which are inconsistent, to bring under the rule only those statements which were already admissible to impeach.<sup>73</sup> The rule does not indicate whether the case law as to inconsistency for impeachment purposes should be read into the rule. Some jurisdictions have held that the inconsistency must be "apparent on the face of the two statements and the only possible inference."<sup>74</sup> According to Weinstein and McCormick, the better rule is that the prior statement is admissible to impeach when a reasonable man would infer, comparing the whole effect of the two statements, that they had been produced by inconsistent beliefs.<sup>75</sup>

In other words, the keystone for impeachment use is relevancy—would the prior statement of the witness help the trier of fact evaluate the credibility of the witness, taking into account the dangers specified in Rule 403 which may mandate exclusion if they substantially outweigh the probative effect of the evidence? The approach under Rule 801 should be the same.<sup>76</sup>

The phrase "at a trial, hearing, or other proceeding" is subject to interpretation. What kind of "other proceeding" ought to be included? Should the rule be construed broadly so as to admit prior statements made at a variety of proceedings or narrowly to include only grand jury or preliminary hearing testimony and the like? Judge Weinstein takes the position that the phrase

should be broadly interpreted to include situations where there is some kind of judicial or quasi-judicial proceeding. For example, testimony before a grand jury or before an administrative board

---

73. Blakey, *supra* note 66, at 17.

74. 4 WEINSTEIN ¶ 801(d) (1) (A) [01], at 801-75; MCCORMICK § 34, at 68.

75. *Id.*

76. 4 WEINSTEIN ¶ 801(d) (1) (A) [01], at 801-75.

would be treated as a 'hearing' because the solemnity of the official occasion and oath, plus a stenographic record reduces possibilities of overreaching by the questioner and carelessness by the witness. Whether a parole violation or prison administrative hearing should be included depends upon the formality of the proceeding.<sup>77</sup>

*The Rule in Operation: Possible Responses of Witness.*

When confronted with a prior inconsistent statement a testifying witness may respond in a variety of ways.<sup>78</sup> He may, for example, affirm both his prior statement and the underlying fact—"Yes, I said the light was green and that's the color it was"—in which case he has adopted his prior statement and no hearsay problem is present. The witness may affirm the statement but deny the underlying fact—"Yes, I said the light was green but it's not true because the light was red." In this instance present cross-examination is thought to be unusually effective.<sup>79</sup>

The witness may affirm the statement but disclaim any memory of the underlying fact. "Yes, I said the light was green but I don't remember what color it actually was." He can hardly be effectively cross-examined as to the underlying fact if he persists in disclaiming any memory of it. In these circumstances, can cross-examination at trial really be said to substitute adequately for cross-examination at the time the prior statement was made? This was the situation in *California v. Green*.<sup>80</sup> Green was convicted of furnishing marijuana to a minor, Porter, largely on the basis of prior inconsistent statements made by Porter at Green's preliminary hearing. Porter, at trial, admitted making the statement but claimed that he had no recollection of the underlying fact—Green's delivery to him of the marijuana. After determining that the confrontation clause is not vio-

77. *Id.*, at 801-77.

78. The following discussion of possible witness responses is drawn in large part from the more detailed treatment in 4 WEINSTEIN § 801(d)(1)(A)[02] to [08] at 801-77 to 801-98. See that work for further possible responses a witness may make.

79. See note 55 *supra*.

80. 399 U.S. 149 (1970).

lated by admission of a declarant's out-of-court statements so long as he is testifying at trial and is subject to full cross-examination<sup>81</sup> the court remanded to the California Supreme Court for a determination whether, on the facts, the witness' alleged lapse of memory so affected Green's right to cross-examine as to make a critical difference in terms of confrontation.<sup>82</sup> The California Court examined the trial record and concluded, in part, that the prior statement could be used substantively because the trial court could properly disbelieve Porter's claim of lack of memory.<sup>83</sup> According to Weinstein, *Green* suggests that the trial judge may be called upon, under Rule 801(d)(1)(A) to make a determination as to the likelihood that the witness' asserted loss of memory is genuine; if he finds that it is not, the prior statement should come in.<sup>84</sup>

*Green* speaks to the constitutional issue; that the confrontation clause allows use of prior inconsistent statements substantively when the witness alleges no memory of the facts does not prevent state courts in states adopting the rules from taking the view that present inability to recall the facts is simply not logically inconsistent with the prior statement. In any event, the prior statement probably should not be admissible if the matters forgotten are crucial and the lack of memory is genuine.<sup>85</sup>

The witness may flatly deny any recollection of either the making of the statement or of the underlying fact. "I don't remember saying anything about a light, and I don't remember what color it was." Here there is nothing for cross-examination to work on, and the prior statement

- 
81. *Id.* at 153-64. The text states a simplified version of the *Green* holding. One writer (Graham) *supra* note 62, has found at least ten ways to read the holding in *Green*.
82. *California v. Green*, *supra* note 80, at 168-70.
83. *People v. Green*, 3 Cal. 3d 98, 92 Cal. Rptr. 494, 479 P.2d 998 (1971).
84. 4 WEINSTEIN ¶ 801(d)(1)(A)[04]. at 801-83. For a detailed description of the California court's analysis, see 4 WEINSTEIN ¶ 801-83 to 801-85. See also, *United States v. Insana*, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); *United States v. Collins*, 478 F.2d 837 (5th Cir.) *cert. denied*, 414 U.S. 1010 (1973).
85. WEINSTEIN at 801-86; *People v. Sam*, 77 Cal. Rptr. 804, 454 P.2d 700 (1969); *People v. Carter*, 120 Cal. Rptr. 181 (Ct. App. 1975).

should be excluded unless it comes under Rule 804(a)(2) or some other exception to the hearsay rule.

[T]he prior statement if admitted would truly become the present testimony of the witness, because there is no other testimony of the witness relating to the event on record. The statement would become the present testimony even though it had never been subject to cross-examination. Such a result is contrary to the scheme of the federal rules . . . and would probably violate the constitutional right of confrontation as well.<sup>86</sup>

### *Prior Inconsistent Statements in Wyoming*

The Wyoming courts have followed the orthodox practice of admitting prior inconsistent statements for impeachment, but not for their substantive value. "[T]hese previous statements made out of court must in no event be regarded as substantive evidence in proving a fact."<sup>87</sup> In *State v. Alexander*,<sup>88</sup> where the state's witness repudiated his former statement that defendant had sold him whiskey, the prior statement "did not subserve the purpose of affirmative testimony."<sup>89</sup> In *Cederburg v. Carter*,<sup>90</sup> the court, in asserting that a prior inconsistent statement could only affect the credibility of the witness, emphasized that the out-of-court statement was not made under oath.<sup>91</sup>

In considering the adoption of rules of evidence for Wyoming, the Supreme Court has at least four choices as to the treatment of prior inconsistent statements:

86. 4 WEINSTEIN ¶ 801(d)(1)(A)[07]. at 801-97. Perhaps the question is really whether, when a witness says "I don't remember anything at all about a statement or about what happened" he can be said to be "testifying concerning the statement" under Rule 801(d)(1)(A). The better view is that he is *not* testifying about the statement; otherwise one arrives at the absurd result that a witness may simultaneously be present and testifying under Rule 801(d)(1)(A) and "unavailable" under Rule 804(a)(3).

87. *Crago v. State*, 28 Wyo. 215, 202 P. 1099, 1102 (1922); *Also, In re Estate of Carey*, 504 P.2d 793 (Wyo. 1972); *Barber v. State Highway Commission*, 80 Wyo. 340, 342 P.2d 723 (1959).

88. 36 Wyo. 390, 256 P. 76 (1927).

89. *Id.* at 390; 256 P. at 76.

90. 448 P.2d 608 (Wyo. 1968).

91. *Id.* at 610.

- (1) To reject the substantive use of prior inconsistent statements altogether, retaining present law. This course has the disadvantage of running against the current of reform, and ignoring the criticism, often well-founded, which has been brought to bear against the orthodox rule for many years.
- (2) To adopt the "wide-open" rule allowing the substantive use of any prior inconsistent statement, deciding, in effect, that whatever dangers of abuse are inherent in the rule, they are outweighed by its utility.
- (3) To adopt the House version of the rule, giving Wyoming a rule somewhat more restrictive than that in use in the federal courts.
- (4) To adopt the form of the rule as passed by Congress and in present use in the federal courts. This choice has the advantage of bringing Wyoming practice into conformity with federal practice and making available federal precedent in the interpretation of the rule.

A choice between the "wide-open" rule, the House version, and the rule as passed by Congress turns upon one's opinion of the efficacy of cross-examination at trial, the significance of the oath as a guarantor of truthfulness, and the likelihood that juries, as a practical matter, give substantive effect to prior inconsistent statements in spite of limiting instructions. In these areas, the experience of judges and practicing attorneys of Wyoming may well be more useful than the theories of the commentators.

*Rule 801(d)(1)(B): Prior Consistent Statements.*

Rule 801(d)(1)(B) removes from the hearsay classification a prior statement of a witness testifying at trial which is consistent with his testimony and offered to rebut an express or implied charge of recent fabrication or improper influence or motive. Such statements have traditionally been considered admissible to rehabilitate the witness whose credibility has been attacked by prior inconsistent state-

ments; nevertheless, such prior consistent statements have been treated as hearsay.<sup>92</sup> Under the rule they are substantive evidence. The use of prior consistent statements under Rule 801(d)(1)(B) is not subject to the limitation imposed in the case of prior inconsistent statements that the prior statement must have been made under oath.

Since the prior consistent statement may come in only to rebut a charge of recent fabrication or improper influence or motive, the witness must first be impeached before the prior statement may be introduced.<sup>93</sup> Whether or not there has been a charge of recent fabrication or improper influence or motive will be determined by the trial judge.<sup>94</sup>

Because the substance of the prior statement has already been heard in the course of the witness' testimony, it is difficult to see what practical effect substantive use of the prior consistent statement could have.<sup>95</sup> On the other hand, a limiting instruction appears to be pointless—the jury already has the trial testimony. How can the jury take the trial testimony as proof of the matter asserted and not simultaneously give similar effect to an extrajudicial statement asserting the same thing?<sup>96</sup>

92. McCORMICK § 251, at 604.

93. 4 WEINSTEIN ¶ 801(d)(1)(B)[01], at 801-100.

94. *United States v. Iaconetti*, 406 F. Supp. 554, 557-58 (E.D.N.Y. 1976) demonstrates the operation of the rule. Defendant, a government contract inspector, was found guilty of soliciting and accepting a bribe from a government supplier. On motion for new trial he argued that certain rebuttal evidence was improperly admitted. The government's chief witness, Mr. Lioi (an officer of a corporation seeking a government contract) testified that defendant had met with him and in the course of their conversation had solicited a bribe. Defendant flatly contradicted Lioi's account of the conversation, asserting that he had been offered a bribe by Lioi. In rebuttal, the government presented testimony by Lioi's business partner and the firm's attorney, who had met with Lioi immediately after the conversation with defendant, that Lioi had told them at that time that defendant had solicited a bribe. The trial court (Judge Weinstein) found that the rebuttal met the requirements of Rule 801(d)(1)(B) in that (1) Lioi was present and testifying at trial about the meeting; (2) the rebuttal witnesses' testimony was consistent with Lioi's; and (3) the evidence rebutted a charge of improper motive. "The total variance between the two accounts . . . is sufficient to constitute an implied claim by the defendant that Mr. Lioi lied because of improper motive." Defendant had also expressly asserted that Lioi had lied to cover up the fact that he had attempted to bribe defendant.

95. Blakey, *supra* note 66, at 26.

96. Comment to CAL. EVID. CODE § 1236 (West 1966): "It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true."

Since the statement is used to defend the reliability of the witness' testimony against attack, and is highly probative on that point, it seems sensible to remove such evidence from the hearsay classification, which after all is designed to exclude evidence thought to be unreliable. Needless cumulation of evidence may be prevented by the trial judge under Rule 403.

*Rule 801(d)(1)(C): Statements of Identification.*

Rule 801(d)(1)(C) as promulgated by the Supreme Court was deleted by Congress but reinstated by amendment effective October 31, 1975.<sup>97</sup> Under the rule a prior statement of identification of a person made after perceiving him is not hearsay. The rule is, of course, subject to the general 801(d)(1) limitation that the person who made the extrajudicial statement must be present at trial and testifying concerning the statement.

Rule 801(d)(1)(C) differs from the rules governing prior inconsistent and prior consistent statements in that it operates independently of the impeachment process. There is no requirement that the prior statement of identification have been made under oath, as in Rule 801(d)(1)(A) and its use is not limited to rebuttal as in Rule 801(d)(1)(B).

Though prior statements of identification are admissible only if the declarant is subject to cross-examination concerning them and this requirement remains an important safeguard, the greater emphasis in justifying substantive use of prior statements of identification is on the supposed greater reliability of an identification made at a time closer to the events in issue, as compared to an identification made at trial.<sup>98</sup> Though much has been written in recent years about the deficiencies of eyewitness evidence in general as exposed by studies in the psychology of perception and mem-

97. Pub. L. No. 94-113 (Oct. 16, 1975).

98. 4 WEINSTEIN ¶ 801(d)(1)(C)[01], at 801-103: "Congress has recognized, as do most trial judges, that identification in the courtroom is a formality that offers little in the way of reliability and much in the way of suggestibility. The experienced trial judge gives much greater credence to the out-of-court identification." See also 4 WIGMORE § 1130, at 277-79; McCORMICK § 251, at 603.

ory,<sup>99</sup> the question in the context of Rule 801(d)(1)(C) is not whether eyewitness identifications in general are more or less reliable. Instead, the issue is whether having admitted a pro forma in-court identification to prove that the defendant is the person who committed the crime, it makes sense to deny the same effect, as a matter of evidence law, to evidence of prior extrajudicial identifications.

Assuming the jury ought to have the most complete view possible of the relevant evidence, and knowing that most in-court identifications follow and are greatly affected by prior identifications by the witness, it seems proper to put the prior identification before the jury for whatever light it may shed on the fact in issue.

A great concern for the reliability of identification evidence is justified by experience. Where the identity of the culprit is in issue, and a witness says, (either in court or out), "that's the man who robbed me", hardly any evidence except a confession will weigh more heavily with the trier, or have more effect on the outcome of the case.<sup>100</sup> Clearly reliability ought to be insured to the greatest degree possible. Rule 801(d)(1)(C) can be seen as the outcome of the view that calling the prior identification hearsay and forbidding its substantive use is not the best way to achieve reliability. It reflects a recognition that the problem is not that the prior statement of identification is vulnerable to hearsay dangers, but that the out-of-court identification may have been conducted in such a way as to affect impermissibly the accuracy of the identification. Once this happens, the prior inadequately safeguarded identification may taint the in-court identification. Therefore, Rule 801(d)(1)(C) should be considered in conjunction with the constitutional safeguards the Supreme Court has applied to insure fairness on the occasion of the prior identification.<sup>101</sup>

99. Comment, *The Use of Proper Identification Evidence in Criminal Trials Under the Federal Rules of Evidence*, 66 J. CRIM. L. 240, 245-46 (1975) and works cited therein.

100. *Id.* at 245.

101. See, *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967); *Kirby v. Illinois*, 406 U.S. 682 (1972); 4 WEINSTEIN ¶ 801(d)(1)(C)[01], at 801-106 and 107.

There has been little agreement in the cases as to the treatment of prior statements of identification. They have been treated variously as inadmissible, admissible only to impeach, or as corroborative evidence, or to rehabilitate the witness.<sup>102</sup> Even before the passage of the Federal Rules of Evidence, however, a trend toward admitting prior identification substantively was perceptible in cases where the identifying witness was present and testifying.<sup>103</sup>

Under the rule, if the witness positively identified the accused extrajudicially, but was either uncertain or unable to identify him at all at the trial, the prior statement would be received as substantive evidence that the accused was the person who committed the crime charged. This result is subject to the court's determination as to whether the evidence meets Sixth Amendment confrontation standards, or is unduly prejudicial.<sup>104</sup> If the witness was uncertain in his earlier identification—"I'm not sure that that is the man who robbed me" and gives a positive identification at trial, the prior statement would come in as substantive proof of the matter asserted, i.e. that the witness, earlier, was not sure the accused was the culprit—a result identical to that obtained if the statement were used for impeachment only. If the trial judge considers the prior statement of identification unreliable he may exclude it under Rule 403 even though it is admissible under Rule 801(d)(1)(C).

No Wyoming case presenting an analysis of prior statements of identification in the hearsay context has been found. The federal rule, coupled with the constitutional standards designed to insure fairness at pre-trial identifications, is a sensible and workable rule for Wyoming.

*Rule 801(d)(2): Admissions of a Party Opponent.* Rule 801(d)(2) has five parts. It authorizes the substantive, non-hearsay use of personal and representative admis-

102. Annot., 71 A.L.R. 2d 449 (1960).

103. For one of the most influential statements of the rationale underlying admission of prior identifications by a testifying witness, see Judge Traynor's opinion in *People v. Gould*, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960).

104. 4 WEINSTEIN ¶ 801(d)(1)(C)[01], at 801-108 and 109.

sions, adoptive admissions, authorized admissions, admissions of an agent (with certain limitations), and co-conspirators' admissions (again with limitations). The rule thus resolves a longstanding but largely academic controversy over the nature of admissions<sup>105</sup> by removing them from the hearsay category altogether.

If a party defendant in an accident case disclaims any want of care on his part, and a witness is produced who will testify that defendant said on an earlier occasion "I was speeding and didn't see the red light," the statement will be admitted as an admission by defendant although it is clearly an out-of-court assertion offered to prove the matter asserted. Why should it not be treated as hearsay? The most persuasive answer is that the law of admissions is based not on the logical distinctions of evidence law but on the nature of the adversary system:

The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath. His adversary may use against him anything which he has said or done.<sup>106</sup>

It has also been argued that an admission is relevant conduct offered circumstantially to show an inconsistency, as to a fact in issue, between the position the party is taking at trial and his prior position, an approach somewhat analogous to the use of prior inconsistent statements to impeach.<sup>107</sup>

---

105. See generally, Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484 and 564 (1937); Morgan, *The Rational of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929); 4 WIGMORE § 1078; MCCORMICK § 262, at 628-29.

106. MORGAN, BASIC PROBLEMS OF EVIDENCE 231 (1954).

107. Strahorn, *supra* note 105, at 588; See, e.g., *State v. Willis*, 71 Conn. 293, 306, 41 A. 820, 823-24 (1898).

The courts often (and unfortunately) refer to admissions of a party as "admissions against interest," but the resulting confusion may be avoided by calling to mind the distinction between the rule allowing substantive use of a party's admissions and the hearsay exception for declarations against interest. An admission must be the statement of a party or his representative, offered against the party, and it need not have been against the party's interest when made. A declaration against interest will often not be the statement of a party, it must have been against interest when made, and the unavailability of the declarant is a precondition to admissibility.<sup>108</sup>

Rules 801(d)(2)(A), (B), (C), and (E) codify the common law as to personal, representative, adoptive, and authorized admissions, and admissions of co-conspirators as recognized by most jurisdictions.<sup>109</sup> These rules will not be separately discussed here as they are unlikely to make substantial changes in Wyoming practice.

*Rule 801(d)(2)(D): Vicarious Admissions.* Rule 801(d)(2)(D) defines as "not hearsay" an out-of-court statement offered against a party which was made by the party's agent or servant, concerning a matter within the scope of the agency or employment, and uttered while the relationship existed.

The rule represents a significant departure from the traditional approach to vicarious admissions. The view accepted in most jurisdictions has been that the admissibility of an agent's statements damaging his principal is governed by the substantive law of agency.<sup>110</sup> Thus the out-of-court statement of an agent not joined in the action is not deemed admissible against his principal unless he is first shown to have been authorized by his principal to make statements—that is, a finding of "speaking agency" is required.<sup>111</sup>

108. MCCORMICK § 262, at 630-31; FED. R. EVID. 804(b)(3).

109. Falknor, *Hearsay*, 1969 L. & SOC. ORD. 591, 599.

110. RESTATEMENT 2D OF AGENCY § 288(2) (1958): "Authority to do an act or to conduct a transaction does not of itself include authority to make statements concerning the act or transaction."

111. MCCORMICK § 267, at 640-41.

Under the practice in many jurisdictions, where the agent or servant is joined as a party-defendant, the agent's statement may come in substantively as the admission of a party, and here the "speaking agency" notion presents no problem; if the statement is sufficient to establish the *agent's* negligence, then the substantive law rule of *respondeat superior* comes into operation, and by virtue of substantive law, the principal is held liable.<sup>112</sup> A few courts, however, have held that even if the statement of the agent establishes his negligence, this negligence cannot be attributed to the principal because he cannot be bound by evidence not admissible against *him*—an illogical result which defeats the purpose and policy of *respondeat superior* and allows the one who set the risk-producing activity in motion and profited by it to avoid liability when it causes harm to others.<sup>113</sup>

Where the agent or servant is not joined as a party-defendant, but is available and testifies at trial, his prior statement is hearsay under the orthodox rule, and may come in only to impeach his testimony, unless it falls within an exception. Where the agent is not joined as a party and is also unavailable at trial, the traditional rule similarly excludes his statement altogether unless it qualifies under one of the exceptions to the hearsay rule.

The traditional rule has been much criticised. Its most obvious shortcoming is that much valuable evidence is lost, as the advisory committee states succinctly, since 'few principals employ agents for the purpose of making damaging admissions.'<sup>114</sup> In addition, especially in wrongful death actions, the agent may be the only person who knows what happened. The substantive law holds the master liable for the negligence of his servant. Where the problem is to determine what actually happened, i.e. to decide whether the servant was in fact negligent, it seems unfair to plaintiff (who has a substantive right to recover from the master if

112. See, *Madron v. Thomson*, 245 Ore. 513, 419 P.2d 611, *reh. denied* 423 P.2d 496; Annot., 27 A.L.R.3d 966, 974-76 (1969).

113. See, *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

114. FED. R. EVID. 801, Adv. Comm. Note.

the servant was at fault) to exclude relevant statements on the question by the person who is in the best position to know the truth.<sup>115</sup>

The traditional rule has had its defenders; Falknor memorably expressed his doubts about the wisdom of abrogating it:

Ought I not have the right to employ an experienced and skillful truck driver, who may at the same time be a careless, unreliable and erratic talker, without being subject to having used against me his casual utterances made long after an accident? If I authorize him to drive my truck it, of course, follows that I must be responsible for what he *does* in the course of such employment; but does it follow that necessarily I ought to be responsible for what he may *say*?<sup>116</sup>

It might be answered that Rule 801(d)(2)(D) does not hold the master responsible for the statements of his servant, but only allows them to be heard by the finder along with other evidence on the question whether, on a particular occasion, the servant behaved with the care expected of an "experienced and skillful" driver.

The approach represented by Rule 801(d)(2)(D) appears preferable to the traditional rule. The admissions of the agent may constitute evidence necessary to a determination of the facts such that its exclusion results in the defeat of just claims. Also, the agent's statements may be thought to carry circumstantial guarantees of trustworthiness in that an employee is unlikely to make false declarations against the interest of his employer because such statements are also against the employee's interest, since he has a stake in his job.<sup>117</sup> In addition, it is worth noting that the "speaking

115. As occurred in *Branch v. Dempsey*, *supra* note 113; *See also*, 4 WIGMORE § 1078, at 166, n. 2 on *Rankin v. Brockton Public Market*, 257 Mass. 6, 153 N.E. 97 (1926) (Customer hit by bottle; saleslady's admission that she threw the bottle excluded because she had no authority to bind defendant).

116. Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 856 (1961) (emphasis in original).

117. REPORT, NEW JERSEY SUPREME COURT, COMMITTEE ON EVIDENCE 165-67 (1963), quoted in WEINSTEIN ¶ 801(d)(2)(D) [01], at 801-138; *cf.* *Hetland, Admissions in the Uniform Rules: Are They Necessary?* 46 IOWA L. REV. 307, 328 (1961).

agency" rule clearly operates against plaintiffs, including those with valid claims to whom compensation ought to be paid. Since defendant will generally be insured it is better, where evidence law provides conflicting rationales, to choose the rule of evidence which tends toward a better distribution of the risk.<sup>118</sup>

The federal rule has the advantage of clarifying the law as to agents' admissions. It is not uncommon for the courts, when convinced that the agent's admissions are essential for a just determination, to find a speaking agency by whatever means possible. The result is much strained and circuitious reasoning. *Burwell v. Crist*,<sup>119</sup> an action for the death of an eleven year old child who was allegedly kicked by a horse at defendant's summer camp, provides an example. The trial court directed a verdict for defendant after ruling that the only account available of the circumstances of the accident, related to a policeman by a riding instructor employed by defendant, was inadmissible because the riding instructor had not been employed to make statements.<sup>120</sup> The Third Circuit reversed, holding that defendant's introducing the instructor to the policeman probably sufficed to constitute the instructor a speaking agent, and if not, the presence of defendant during some part of the ensuing conversation was enough to support admissibility.<sup>121</sup> Under Rule 801(d)(2)(D) there would have been no necessity for such fictions in that, given that the instructor made the statement while he was employed by defendant, the death of a pupil under his supervision and in his presence would clearly be a matter within the scope of his employment.

The approach to agents' admissions embodied in Rule 801(d)(2)(D) has support in the case law prior to the passage of the federal rules. Some courts faced the problem squarely and declined to exclude relevant admissions because "speaking agency" was absent. In *Martin v. Savage*

118. Report, *supra* note 117, at 167.

119. 373 F.2d 78 (3rd Cir. 1967).

120. *Burwell v. Crist*, 251 F. Supp. 686, 687 (M.D. Pa. 1966).

121. *Burwell v. Crist*, *supra* note 119, at 80.

*Truck Line, Inc.*,<sup>122</sup> a wrongful death action, the issue was admissibility of statements made by defendant's truck driver who died before trial, tending to show that the driver had been speeding at the time of the accident in question. Defendant's argument on appeal was that the driver was an agent for the purpose of driving the truck, not for the purpose of making statements:

To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer . . . seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy. It is almost like saying that a statement against interest in the instant case could only have been made had the truck been operated by an officer or the board of directors of the Corporation owning the truck; and trucks are not operated that way.<sup>123</sup>

It does not appear that Wyoming courts have required a showing of "speaking agency" before the declaration of an agent may be admitted against his principal. In the early case of *Henderson v. Coleman*,<sup>124</sup> on the issue of whether trespassing sheep belonged to defendant or to someone else, declarations of defendant's shepherd (shown by other evidence to be defendant's employee) were admitted against defendant with the proviso that "the persons . . . were at the time of the making of the declarations in the employ of the defendant . . . and were at the time acting within the line of their authority, and while in charge of the defendant's sheep."<sup>125</sup>

**Declarations of an agent when made in the course of, and accompanying, the transaction which is the**

---

122. 121 F. Supp. 417 (D.D.C. 1954).

123. *Id.* at 419.

124. 19 Wyo. 183, 115 P. 439, *reh. denied* 19 Wyo. 183, 115 P. 1136 (1911).

125. *Id.* at 445.

subject of inquiry, and acting within the scope and limits of his authority, do not come within the general rule excluding hearsay evidence, for the reason that such declarations, as well as the acts of the agent, under such circumstances, are considered and treated as the declarations of his principal.<sup>126</sup>

A leading case in the area of vicarious admissions is *Grayson v. Williams*,<sup>127</sup> a personal injury action arising out of a collision between two trucks. Defendants were the driver of one truck and his employer. The trial court, the Federal District Court for the District of Wyoming, admitted defendant driver's statements, made in the hospital some hours after the accident, that he "just didn't see the other truck." On appeal, defendants argued that the statement was improperly admitted because there was no showing that it was within the driver's authority to make such statements. The Tenth Circuit, apparently applying Wyoming law, declined to follow the "speaking agency" rule and quoted and approved the reasoning of *Martin v. Savage Truck Line, Inc.*<sup>128</sup>

In summary, Rule 801(d)(2)(D), while making substantial changes in other jurisdictions, would probably have little effect on Wyoming law since Wyoming seems to have followed the approach now embodied in Rule 801(d)(2)(D), a rule sound in both reason and policy.

P. S.

*Rule 803: Hearsay Exceptions; Availability of Declarant Immaterial*

*Rule 803(1):<sup>129</sup> Present Sense Impression.* Rule 803(1) recognizes what is in one sense a new exception to the rule against hearsay. While not invoking a distinct exception, however, some jurisdictions, including Wyoming, have for years admitted as part of the *res gestae*<sup>130</sup> declarations de-

126. *Id.*

127. 256 F.2d 61 (10th Cir. 1958).

128. *Id.* at 66.

129. FED. R. EVID. 803(1).

130. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Re-appraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 206-7 (1959-1960). The

scribing or explaining presently perceived events.<sup>131</sup>

It has been argued that unexcited descriptions and explanations are likely to be more accurate than excited utterances<sup>132</sup> since "[t]he declarant simply states what he sees or hears, and his sense impressions are not distracted by the pull of an emotional upheaval."<sup>133</sup> Notwithstanding this view, the limited judicial recognition accorded the instant exception stands in sharp contrast with the universally recognized exception for statements made under the stress of a startling event.<sup>134</sup> Inclusion in the Rules of Exception (1) is likely to increase the growing minority of state courts which grant explicit exception to the *unexcited* declaration.<sup>135</sup> Several states have already included the exception in their codified court rules.<sup>136</sup>

---

Rule's rejection of the *res gestae* terminology has long been advocated by the commentators. Wigmore, for example, has stated:

The phrase "res gestae" has long been not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has even been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated as a vicious element in our legal phraseology. 6 WIGMORE § 1767.

131. *State v. Woodward*, 69 Wyo. 262, 240 P.2d 1157 (1952) (neighbor's testimony as to conversation overheard from house next door admitted as part of the *res gestae*); *Emens v. Lehigh Valley Ry.*, 223 Fed. 810 (N.D. N.Y. 1915) (unexcited declaration "Why don't the train whistle?" admitted as part of the *res gestae*); *Claybrook v. Acreman*, 373 S.W.2d 287 (Tex. Civ. App. 1963) (bystander's statement that cars passing by were racing and speeding admitted as part of the *res gestae*); *Marks v. I.M. Pearlstine & Sons*, 203 S.C. 318, 26 S.E.2d 835 (1943) (bystander's statement that "those trucks are going to kill somebody yet" admitted as part of the *res gestae*).
132. Excited utterances are excepted from the rule against hearsay under Rule 803(2).
133. *Slough, Res Gestae*, 2 KAN. L. REV. 246, 266-67 (1954). As stated by Hutchins & Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 439 (1928):  
[T]he best evidence of all is a statement made in immediate response to an external stimulus which produces no shock or nervous excitement whatever . . . With emotion absent, speed present, and the person who heard the declaration on hand to be cross-examined, we appear to have an ideal exception to the hearsay rule.
134. Quick, *supra* note 130, at 206-07; MCCORMICK § 297, at 704. Some courts use *res gestae* terminology, but all courts make exception to the rule against hearsay for declarations evoked by a startling event.
135. BINDER, *THE HEARSAY HANDBOOK*, at 37-39 (1975). For example, *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942) (declarations regarding speed of passing car admissible under present sense impression exception); *State v. Carvin*, 308 So.2d 757 (La. 1975); *Commonwealth v. Coleman*, 458 Pa. 112, 326 A.2d 387 (1974) (declarant's descriptive statements to her mother over the telephone admissible under the present sense impression exception).
136. BINDER, *supra* note 135, at 39.

Rule 803(1) rests upon the assumption that there is inherent reliability in descriptive statements made upon or immediately after perception:

First, since the report concerns observations being made at the time of the declaration it is safe from any error . . . [of] memory. Second, a requirement that the declaration be made contemporaneously with the observation means that there will be little or no time for calculated misstatement . . . . Third, the statement will usually have been made to a third person (the witness who subsequently testifies to it) who, being present at the time and scene of the observation, will usually have an opportunity to observe the situation himself and thus provide a check on the accuracy of the declarant's statement.<sup>137</sup>

Because insistence upon precise contemporaneity would be unrealistically rigid, the Rule permits the admission of statements made immediately after the observed event. It is important, however, that the statement be nonetheless spontaneous "in the sense that what is said is part of the event or condition and is not dependent for its force on the veracity of the declarant."<sup>138</sup> A too-liberal interpretation of "immediacy" would negate the spontaneity upon which trustworthiness is predicated. Although it is assumed that in most cases the testifying witness will himself have observed the event to which the declaration relates, corroborating observation is not prerequisite to admissibility. It may, however, influence the trial court's determination of the reliability of the post-occurrence declaration.<sup>139</sup>

The requirement that the declaration "describe" or "explain" the event or condition perceived is a concomitant of the required spontaneity: "the utterance in question must be spontaneous, the test being . . . whether the declaration was the facts talking through the party, or the party talking about the facts."<sup>140</sup> Although recitations of past events

137. MCCORMICK § 298, at 710.

138. M. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 252 (1961).

139. 4 WEINSTEIN ¶ 803(1) [01], at 803-75; Slough, *supra* note 138, at 252 n.136.

140. *State v. Ling*, 186 S.C. 439, 445, 195 S.E. 624, 626 (1938).

necessarily fall outside this limitation, the declaration need not directly describe the ultimate fact in issue. In *Houston Oxygen Co. v. Davis*,<sup>141</sup> for example, declarant remarked upon the excessive speed of a passing automobile shortly before and four or five miles from the scene of a subsequent collision. Although not descriptive of the accident itself, the statement, made at the moment the passing car was observed, was properly admitted as a contemporaneous and spontaneous description of a relevant evidential fact.<sup>142</sup>

*Rule 803(2)*:<sup>143</sup> *Excited Utterance*. Rule 803(2) codifies the long established<sup>144</sup> hearsay exception for statements precipitated by a startling event. Two basic elements underlie admissibility:

First, there must be some occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.<sup>145</sup>

The trustworthiness of the excited utterance is believed to stem from its spontaneity: "[t]he theory . . . is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."<sup>146</sup>

141. 139 Tex. 1, 161 S.W.2d 474 (1942). This is the first and most commonly cited present sense impression case.

142. See 4 WEINSTEIN ¶ 803(1)[01], at 803-79; Slough, *supra* note 138, at 250-51.

143. FED. R. EVID. 803(2).

144. "Since Wigmore formulated the exception from an analysis of *res gestae* cases, the excited utterance has been a recognized exception to the hearsay rule." Symposium, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1076, 1109-10 (1969).

145. MCCORMICK § 297, at 704.

146. FED. R. EVID. 803(2), Adv. Comm. Note. The Note reflects Dean Wigmore's formulation:

This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of un-

The excited utterance, however sincere, is nonetheless accepted at some risk:

Dean Hutchins and Donald Slesinger long ago pointed out that psychological studies have demonstrated that perceptual accuracy and judgment are inversely proportioned to the startling nature of an event. They concluded, "[w]hat the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation."<sup>147</sup>

It may well be that the courts prefer the risks of perceptual inaccuracy to the danger of rendering judgment absent adequate reconstruction of the facts; in any case, the exception is well-established.

It has been noted that the unexcited declaration derives its reliability from a substantial contemporaneity between statement and event. Since "lack of *capacity* to fabricate rather than lack of *time* to fabricate"<sup>148</sup> underlines the instant exception, the excited utterance need only coincide with the emotion provoked by the startling event. There is, of course, no set duration to emotion; in *State v. Stafford*,<sup>149</sup> a statement made fourteen hours after a severe beating was deemed spontaneous, while in *Micheli v. Foye Brothers Yellow Cab Co.*,<sup>150</sup> a statement made fifteen minutes after a collision was excluded as deliberate.

The duration of excitement can only be assessed on a case-by-case basis:

The precise amount of time that may elapse before a statement loses its spontaneity as an excited utterance evoked by a startling event and be-

---

trustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts. 6 WIGMORE § 1747, at 135 (3d ed. 1940).

147. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1113-14, quoting in part from Hutchins & Slesinger, *Some Observations on the Law of Evidence: Spontaneous Declarations*, 28 COLUM. L. REV. 432, 437 (1928).

148. 4 WEINSTEIN ¶ 803(2) [01], at 805-85. [Emphasis added].

149. 237 Iowa 780, 23 N.W.2d 832 (1946).

150. 174 So. 2d 168 (La. App. 1965).

comes a mere narrative cannot be established by an absolute rule of law and accordingly, “[m]uch must be left to the discretion of the court in admitting or rejecting such testimony.”<sup>151</sup>

Professor McCormick states as a rule of thumb that “where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.”<sup>152</sup>

Although the Rule does not require the declarant to have been a participant in the exciting event,<sup>153</sup> some courts have been reluctant to apply the exception to the declarations of bystanders. This view, apparently based upon a belief that the non-participant does not experience the requisite emotion, has been repudiated in a majority of jurisdictions. Indeed it has been stated that “the lack of prejudice and lack of interest on the part of the bystander should inhere in his favor.”<sup>154</sup>

The event which precipitates the excited declaration is normally established by independent proof. Sometimes, however, the only proof of the event is the declaration itself. Although “[i]t is clearly circuitous to say that a statement may enter because of the excitement—when the only proof of the excitement *is* the statement,”<sup>155</sup> most courts consider the declaration alone sufficient proof of the exciting event. The case usually cited for this proposition is *Travelers’ Ins. Co. v. Mosley*,<sup>156</sup> in which the United States

151. *State v. Martineau*, 14 N.H. 552, 324 A.2d 718, 721 (1974) (statements by rape victim 2 or 3 hours after crime admitted as excited utterance).

152. MCCORMICK § 297, at 706. Such proof may be supplied by testimony that declarant “seemed upset” [*May v. Wright*, 62 Wash. 2d 69, 381 P.2d 601 (1963)], was in pain [*Wetherbee v. Safety Casualty Co.*, 219 F.2d 274 278 (5th Cir. 1955)], or had been rendered unconscious [*Guthrie v. United States*, 207 F.2d 19, 22 (D.C. Cir. 1953)].

153. FED. R. EVID. 803(2), Adv. Comm. Note.

154. Slough, *supra* note 138, at 242 n.88. See also Annot., 53 A.L.R.2d 1245, 1283 (1957); 163 A.L.R. 15, 179 (1946).

155. Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661, 672 (1969).

156. 75 U.S. (8 Wall.) 397 (1869). Mr. Justice Clifford, dissenting, stated that the declarations were not admissible “to prove that they were occasioned by such an accident as that alleged in the declaration as the foundation of the plaintiff’s claim.” *Id.* at 419-20.

Supreme Court affirmed as proof that the deceased had died from accidental causes his statements to his wife and son that he had fallen down the stairs and hurt himself badly. *Mosley* did present some evidence of declarant's fall other than his own assertion, however, for there was also testimony that declarant's voice had trembled and that he appeared to be in great pain.

The Wyoming Supreme Court has ruled similarly. In *Bankers Life Co. v. Nelson*,<sup>157</sup> the deceased's statement to his wife that "I believe I have ruptured myself on that engine" was held properly admitted as proof that he had died as the result of accidental injury. Although the court pointed out that the deceased's injury corroborated his statement,<sup>158</sup> the real basis of admissibility appeared to be the evident sincerity of the statement:

The man was not talking about the fact of injury with the idea of building up a case under the life insurance policy. That was something which undoubtedly at that time never entered his mind. . . . He was worried over what had just happened to him and it was of such a nature as to still his reflective faculties and remove their control. . . .<sup>159</sup>

The excited utterance is not limited, as is the present sense impression, to "descriptions" or "explanations"; it need only "relate to" the precipitating event. This difference in scope accords with theory: "[s]ince the reliability of the [excited utterance] is dependent not upon its subject matter but upon the lack of reflection, consistency with theory requires that the utterance not be confined to the startling event as long as the standards of relevancy are not strained and the reflective faculties remain stilled."<sup>160</sup> For example, the following declaration would "strain" relevancy:

---

157. 56 Wyo. 243, 108 P.2d 584 (1940).

158. Nelson's wife testified that she had observed the hernia caused by the accident and that her husband had had to struggle to keep the machine going under adverse weather conditions. *Id.* at 588.

159. *Id.*

160. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1113.

Suppose, for example, an injured passenger in a railway collision, thinking of his family's condition, exclaims, "I hope that my insurance-premium, which I mailed yesterday, has reached the company," referring to premium-money alleged by the insurance-company not to have been received.<sup>161</sup>

Many statements that go beyond description or explanation, however, are such as would naturally be provoked by an exciting event. The statement of a driver immediately after an automobile accident "that he was sorry . . . he had to call on a customer and was in a bit of a hurry to get home,"<sup>162</sup> and the statement of a clerk after a customer slipped and fell that "that has been on the floor a couple of hours,"<sup>163</sup> have both been admitted under the rationale of the exception.

*803(3): Then Existing Mental, Emotional, or Physical Condition.*<sup>164</sup> Although possessed of a common derivation<sup>165</sup> and rationale,<sup>166</sup> the four provisions subsumed under exception (3) are sufficiently dissimilar to warrant separate analysis.

161. WIGMORE § 1754, at 159, quoted in WEINSTEIN ¶ 803(2) [01], at 803-89.

162. *Murphy Auto Parts Co. v. Ball*, 249 F.2d 508 (D.C. Cir. 1957), cert. denied, 355 U.S. 932 (1958) (statement admitted to show agency relationship).

163. *Sanitary Grocery Co. v. Snead*, 90 F.2d 374 (D.C. Cir. 1937).

164. FED. R. EVID. 803(3). "Exception (3) is essentially a specialized application of exception (1), presented separately to enhance its usefulness and accessibility." FED. R. EVID. 803(3), Adv. Comm. Note.

165. "[The exception for] an existing state of mind . . . was an outgrowth of the exception for declarations of physical condition. As was true in the case of declarations of bodily condition, the early decisions were inclined to require that declarations of intentions or of mental state accompany the happening of an act so as to form part of the *res gestae*." Slough, *supra* note 138, at 224.

166. Although statements of presently existing mental, emotional, or physical feelings can be consciously fabricated, the majority of such declarations are thought to possess a sincerity and spontaneity which assures their reliability. See generally, MCCORMICK §§ 291 and 294, at 689, 695. "Such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time, than the subsequent testimony of the same person." *Elmer v. Fessender*, 151 Mass. 359, 24 N.E. 208 (1889) (Holmes, J.). Moreover, there is often special need for such evidence, since the subjective feelings of another cannot be directly observed. 6 WIGMORE § 1714, at 58. For these reasons, statements contemporaneous with the mental, emotional, or physical feelings they describe are admissible regardless of the availability of the declarant. WEINSTEIN ¶ 803(3) [01], at 803-92.

*A. Statements of present physical condition*<sup>167</sup>

Rule 803(3) codifies the traditional hearsay exception for "natural and spontaneous"<sup>168</sup> statements expressive of presently existing pain and other physical symptoms. Its primary applicability lies in negligence<sup>169</sup> and compensation<sup>170</sup> cases. Although only *statements* of physical condition are covered by the rule, it should be noted that involuntary cries and non-verbal expressions constitute non-assertive behavior and are thus admissible as lying outside the realm of hearsay.

The keystone of this exception is spontaneity. Because a statement contemporaneous with the condition it describes is considered less subject to distortion than the declarant's subsequent testimony at trial,<sup>171</sup> it can be admitted despite the declarant's availability merely upon a showing that it "purports to describe a then existing bodily condition of the declarant."<sup>172</sup> Should the circumstances fail to permit the inference that the statement was a genuine and natural expression of a contemporaneous physical sensation, the trial judge has wide discretion to exclude it.<sup>173</sup>

The particularities of the exception are implicit in its underlying rationale. The statement need not have been made to a physician,<sup>174</sup> for spontaneity rather than desire for

167. "A statement of the declarant's then existing . . . sensation; or physical condition (such as . . . pain, and bodily health). . . ." FED. R. EVID. 803(3).

168. MCCORMICK § 291, at 690.

169. *Kickham v. Carter*, 335 S.W.2d 83, 91 (Mo. 1960) (evidence that plaintiff complained of pain in his back admissible in action for personal injuries); *Shover v. Iowa Lutheran Hospital*, 252 Ia. 706, 107 N.W.2d 85 (1961) (testimony by hospital roommate that plaintiff said she hurt admissible).

170. *Wetherbee v. Safety Casualty Company*, 219 F.2d 274 (5th Cir. 1955) (error to exclude in workmen's compensation case wife's testimony that husband said he was sick and thought he had just ruptured himself kicking on the engines); *DePaepe v. Richardson*, 464 F.2d 92 (5th Cir. 1972) (error to disregard in proceeding for disability benefits under Social Security Act wife's testimony that claimant could not stand noise and complained of dizziness).

171. "Made without an apparent motive to misrepresent, the extrajudicial statement is more reliable than the testimony of the declarant at trial which is subject to the defects of memory and calculated distortion." *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1121 (1969).

172. MCCORMICK § 291, at 690.

173. *Id.*

174. *Gaultney v. Weinberger*, 505 F.2d 943, 945 (5th Cir. 1975) (" . . . we have often held that the judge must consider subjective evidence of pain as

treatment is the guarantee of trustworthiness under Rule 803(3).<sup>175</sup> Members of the declarant's family and even bystanders may testify to the declaration. Although statements made in response to a question<sup>176</sup> or after the claim or controversy arose<sup>177</sup> can nonetheless be considered spontaneous, those which relate *past* symptoms<sup>178</sup> or attempt to ascribe cause<sup>179</sup> are thought to reveal reflection and are therefore without the scope of the present exception. They may be admissible, however, under other rules.<sup>180</sup>

### B. State of Mind

The exception for state of mind has been termed "one of the most confused areas in the law of hearsay."<sup>181</sup> Part of this confusion stems from the fact that statements of the declarant's then existing state of mind are relevant in three distinct contexts, but entirely admissible only in two:

(a) Where mental state of the declarant must itself be proved "as an operative fact upon which a cause of action or

testified to both by the claimant and by other lay witnesses."); *Keyes v. City of Cedar Falls*, 107 Iowa 509, 78 N.W. 227 (1899) (statement admissible regardless of to whom made). See also *Slough*, *supra* note 138, at 225.

175. The declarant's motive to promote effective treatment is thought to assure the trustworthiness of the statements admissible pursuant to Rule 803(4).
176. *Slough*, *supra* note 138.
177. "While it is irrelevant for the purposes of admissibility whether the statement was made after the claim or controversy arose, the trier of fact may assess this factor in deciding how much weight the statement should be given." 4 WEINSTEIN ¶ 803(3)[01], at 803-93-94.
178. The courts tend not to apply this rule rigidly. "Symptoms of pain and suffering may be continuous over a period of years, and likewise periods of relief may be long or short. . . . It is not surprising to find that some of the courts which generally exclude statements as to past pain will admit statements relative to past condition by classifying them as declarations of present symptoms. . . . Likewise, statements concerning the duration of an illness are received, though they may refer in part to past symptoms." *Slough*, *supra* note 138, at 227. See also MCCORMICK § 291, at 689-90 n.23.
179. See generally WIGMORE § 1722(a); MCCORMICK § 291, at 689-90.
180. ". . . as admissions or prior inconsistent statements pursuant to Rule 801, as excited utterances pursuant to Rule 803(2), as statements for purposes of medical diagnosis pursuant to Rule 803(4), as statements against interest pursuant to Rule 804(b)(3), or under Rule 703 as the basis for testimony by a medical or other expert if "of a type reasonably relied upon by experts in the particular field." 4 WEINSTEIN ¶ 803(3)[01], at 803-93.
181. Note, *Mental State in the District of Columbia*, 48 GEO. L. J. 160, 169 (1969).

defense depends,"<sup>182</sup> in which case the statements of declarant are clearly admissible;

(b) Where mental state is relevant "not as an end in itself but as the basis for an inference that [declarant] subsequently acted on the basis of his earlier intention or design,"<sup>183</sup> in which case again the statements of declarant are clearly admissible;

(c) Where statements of memory or belief indicate the occurrence of past events, in which case the statements are not admissible unless relevant to prove facts related to the execution, revocation, identification, or terms of declarant's will.

Compounding the complexity surrounding the state of mind exception is the fact that courts frequently fail to distinguish hearsay assertions from non-hearsay declarations which tend to prove state of mind circumstantially.<sup>184</sup> That distinction has been made as follows:

Briefly stated, the state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant at that time if that is at issue in the case. . . . In showing the declarant's state of mind the statements may either consist of direct or circumstantial evidence. Thus the statement "X is no good" circumstantially indicates the declarant's state of mind toward X and, where that mental state is a material issue in the case, such statement would be admissible with a limiting instruction. Technically it is not even hearsay since it is not being admitted for the truth of the matter alleged. We do not care whether X is in fact "no good" but only whether the declarant disliked him. However direct statements are also admitted. Thus the statement "I hate X" is direct evidence of the declarant's state of mind and, since it is being introduced

182. MCCORMICK § 294, at 694.

183. 4 WEINSTEIN ¶ 803(3)[02], at 803-98.

184. See generally WEINSTEIN at 803-94 and MCCORMICK § 294, at 694. For a discussion of case law relative to circumstantial evidence of state of mind see BINDER, THE HEARSAY HANDBOOK, §§ 5.1-5.3 (1975).

for the truth of the matter alleged, must be within some exception to the hearsay rule in order to be admissible. Since the state of mind exception does permit just such testimony, the distinction is not very important.<sup>185</sup>

(a) Statements of Present Mental or Emotional Condition Where Mental or Emotional State is in Issue.<sup>186</sup>

Rule 803(3) codifies the traditional<sup>187</sup> view that statements which reflect the present state of declarant's mind are admissible to prove state of mind whenever that is a fact in issue. This application of the exception has provoked little criticism:

In the case of declarations to prove a mental state the dangers of hearsay are reduced to the minimum. There is no danger of lack of personal knowledge, or of faulty perception, or of failing memory, if we agree that a man is conscious of his own states of mind. The only danger is that of misstatement, which is greatly reduced by the apparent absence of motive to deceive. In short, because of the uncertainty and inadequacy of purely circumstantial evidence in a large number of cases,

---

185. *United States v. Brown*, 490 F.2d 758, 762-763 (D.C. Cir. 1973). The distinction can, however, make a difference. In *Betts v. Betts*, 3 Wash. App. 53, 473 P.2d 403, 407-08 (1970), a custody proceeding, a child's out-of-court statement that her stepfather ". . . killed my brother and he'll kill my mommie too" was admitted as circumstantial evidence of the child's feeling toward her stepfather. The court pointed out that there can be an important distinction between non-hearsay statements which circumstantially indicate a present state of mind *regardless of their truth*, and hearsay statements which indicate a state of mind *because of their truth*:

[Hearsay] evidence derives its value, not solely from the credibility of the in-court witness himself, but also in part, from the veracity and competence of the person who made the out-of-court statement. . . . [The better rule is that] all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made.

However, we are not considering the testimony of the 5-year-old child as an exception to the hearsay rule, but as a non-hearsay statement which circumstantially indicates the state of the child's mind regardless of the truth of the statement. Under such circumstances, the statement would be admissible even though the child may not have been competent to serve as a witness in the case.

186. "A statement of the declarant's then existing state of mind, emotion, . . . such as . . . motive, . . . mental feeling. . ." *FED. R. EVID.* 803(3).

187. *See generally*, Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934).

declarations of intention constitute the "best evidence that the nature of the case will admit."<sup>188</sup>

State of mind is itself at issue in a wide variety of situations. Declarations of state of mind have been admitted to prove: mental suffering as an element of damages;<sup>189</sup> the victim's fear in prosecutions for extortion;<sup>190</sup> intent to establish a particular domicile;<sup>191</sup> intent or lack of intent to defraud;<sup>192</sup> the reaction engendered by a libelous statement;<sup>193</sup> motivation;<sup>194</sup> malice or the required state of mind in homicide prosecutions;<sup>195</sup> affection or alienation;<sup>196</sup> competency;<sup>197</sup> lack of intent to consummate delivery;<sup>198</sup> and so on. A problem of growing importance is the admissibility of survey evidence.<sup>199</sup> Although there is no hearsay question if public opinion polls are offered merely to show the responses obtained, polls offered to prove the truth of those responses are subject to hearsay strictures. Under the present exception, however, the latter should be admissible

188. *Id.* at 414.

189. *Caspermeyer v. Florsheim Shoe Store Co.*, 313 S.W.2d 198 (Mo. App. 1958) (husband's testimony concerning wife's expression of worry about unborn child after accident admissible on issue of mental anguish).

190. *United States v. Hyde*, 448 F.2d 815, 845 (5th Cir. 1971), *cert. denied* 404 U.S. 1058 (1972) ("the victim's fearful state of mind is a crucial element in proving extortion"); *United States v. Zito*, 467 F.2d 1401 (2d Cir. 1972) (approved admission of testimony that the victim's wife said she was "afraid").

191. *See generally* 7 WIGMORE § 1727; *Note, Evidentiary Factors in the Determination of Domicile*, 61 HARV. L. REV. 1232, 1237 (1948).

192. *Sanger Brothers v. Colbert*, 84 Tex. 668, 19 S.W. 863 (1892) (statement of intent to pay debts admissible).

193. *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 748 (Pa. 1968), *rev'd.* on other grounds, 415 F.2d 892 (3rd Cir. 1969), *aff'd* 403 U.S. 29 (1971): "the reasons given by the plaintiff's customers for refusal to deal constituted a well-established exception to the hearsay rule: 'a declaration of a present existing motive or reason for action.'" [Citations omitted].

194. *Oneonta Dress Co. v. NLRB*, 333 F.2d 1 (2d Cir. 1964) (declarant's statements that his decision to close a factory department were motivated by business losses rather than by a desire to prevent unionization held admissible).

195. *Note, Malice in a Criminal Prosecution—Admissibility of General Threats Made by the Defendant*, 20 TEX. L. REV. 487 (1942).

196. *See Annot.*, 82 A.L.R. 825 (1933).

197. *Seattle-First National Bank v. Randall*, 532 F.2d 1291 (9th Cir. 1976) (entries in declarant's diary that "I am very addled" and "memory very bad" admissible on the issue of competency).

198. *Raborn v. Hayton*, 34 Wash.2d 105, 208 P.2d 133 (1949) (declarant's statement that she would deliver a deed only upon receipt of money admissible to show her intent).

199. *Wheaton, What is Hearsay?* 46 IOWA L. REV. 210 (1961).

as evidence of the then existing state of mind of the interviewees.<sup>200</sup>

Declarations of present state of mind are thought to possess the same spontaneity and therefore reliability that accompanies expressions of present physical condition: “[p]resumably [both] are the sincere and natural manifestation of a subjective condition.”<sup>201</sup> As it relates to state of mind, however, spontaneity is given something of a “penumbra” effect. Recognizing that there tends to be a certain continuity to states of mind,<sup>202</sup> courts admit statements of declarant’s present mental or emotional condition to prove a similar mental or emotional condition *both prior and subsequent* to the time of speaking.<sup>203</sup> Although continuity is not inevitable, it seems a phenomenon of sufficient frequency to justify the extension. In any specific application, however, the trial court must assess the likelihood of continuity in light of the nature of the relevant emotion and the length of the interval between the time of speaking and the time of the event at issue.<sup>204</sup>

A statement descriptive of both an existing state of mind and the act or event which provoked it may cause

- 
200. *Randy’s Studebaker Sales Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (1976) (survey results properly admitted to show the attitude of plaintiff’s customers toward the quality of his service); *Standard Oil Co. v. Standard Oil Co.*, 252 F.2d 65 (10th Cir. 1958) (results of public recognition survey properly admitted to show whether trade symbols had achieved a particular degree of public recognition).
201. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1120. See generally WIGMORE § 1714; MCCORMICK § 294, at 695; Slough, *supra* note 138, at 230.
202. MCCORMICK § 294, at 695-96. That a similar continuity may exist with regard to physical symptoms is often given implicit recognition.
203. *McFadden v. French*, 29 Wyo. 401, 213 P. 760 (1923) (statements subsequent to delivery admissible to show whether deed was intended as conveyance or mortgage); *Ickes v. Ickes*, 237 Pa. 582, 85 A. 885 (1912) (husband’s statements the day before leaving wife admissible as evidence of same motive on day of leaving); *Casey v. Casey*, 97 Cal. App.2d 875, 218 P.2d 842 (1950) (prior and subsequent statements admissible to show whether conveyance intended as gift or in trust); *Troseth v. Troseth*, 224 Minn. 35, 28 N.W.2d 65 (1947) (prior and subsequent declarations of grantor admissible to show intent to deliver); *Crampton v. Osborn*, 356 Mo. 125, 201 S.W.2d 336 (1947) (decedent’s statements subsequent to mutilation of will).
204. *Garford Trucking Corp. v. Mann*, 163 F.2d 71, 73 (1st Cir. 1947), *cert. denied*, 332 U.S. 810 (1947) (prior and subsequent declarations admissible “if sufficiently near in point of time”); *Brawner v. Royal Indemnity Co.*, 246 Fed. 637 (5th Cir. 1917) (prior threats of suicide admissible where other evidence showed that at the time in issue deceased had suffered financial failures similar to those which had occasioned the earlier threats).

evidentiary difficulties. In *Elmer v. Fessenden*,<sup>205</sup> for example, plaintiff sued in tort, claiming that defendant had circulated a false report that the materials handled by his workers contained arsenic, and that because of this report his workers had quit. Testimony that the workers had stated that the defendant's report was their reason for leaving was held admissible to show their motivation, but not to show that the defendant did circulate the report.

If the causal portion of a dual assertion can be severed, there is, of course, no problem. Frequently, however, as in the case just cited, truncating the statement will destroy its sense. Where this is the case, the jury is normally instructed to consider the declaration as proof of state of mind only, and to disregard it with respect to other acts in issue.<sup>206</sup> Since "[c]ompliance with these instructions is probably beyond the jury's ability and almost certainly beyond their willingness,"<sup>207</sup> the court may exclude altogether evidence whose probative value is outweighed by the dangers of confusion or prejudice.<sup>208</sup>

(b) Statements of Present Intention Used to Prove Subsequent Act or Event.<sup>209</sup>

205. 151 Mass. 359, 24 N.E. 208 (1889).

206. *Adkins v. Brett*, 194 Cal. 252, 193 P. 251 (1930) (in action for alienation of affections, wife's statements that she had dined with defendant and had received flowers from him admissible to show feelings of the wife, but jury must be instructed not to consider the statements as probative of the acts of defendant); *Scott v. Townsend*, 106 Tex. 322, 166 S.W. 1138 (1914) (testatrix' statements admissible to show her state of mind but not to show acts of undue influence); *Herman Schwabe, Inc. v. United States Machinery Corp.*, 297 F.2d 906 (2nd Cir. 1962), cert. denied 369 U.S. 865 (1962) (Statements of customer as to reasons for not dealing with supplier admissible for limited purpose of showing motive).

207. MCCORMICK § 294, at 696.

208. *Id.* The author goes on to say:

Where there is adequate evidence on the other issues, [the limiting instruction] probably does little harm. But in a case where the mental state is provable by other available evidence and the danger of harm from improper use by the jury of the offered declarations is substantial, the judge's discretion to exclude the declarations has been recognized.

See also FED. R. EVID. 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

209. "A statement of the declarant's then existing state of mind . . . such as intent, plan, . . . design. . . . FED. R. EVID. 803(3).

Rule 803(3) recognizes the long-established<sup>210</sup> exception under which declarations of present intent are admissible to prove the probable performance of the act intended.

The classic case in this area, decided by the United States Supreme Court in 1892, is *Mutual Life Ins. Co. v. Hillmon*.<sup>211</sup> Plaintiff, suing to recover the proceeds of several policies issued on the life of one John Hillmon, claimed that Hillmon had been shot and killed in Crooked Creek, Kansas. The defense contended that the deceased was instead one Frederick Walters, and sought to introduce letters written by Walters evincing an intent to accompany Hillmon on a journey in that direction. Since the basic issue in the case was the identity of the deceased, Walters' declared travel plans were not themselves in issue. They were relevant, however, as the basis for an inference that he was present in Crooked Creek at the time of the shooting. His presence in Crooked Creek, in turn, was relevant to a determination of the deceased's identity.

Reversing the trial court's ruling that the letters were inadmissible as hearsay, the Supreme Court stated:

The letters in question were competent . . . as evidence that shortly before the time when other evidence tended to show that [Walters] went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.<sup>212</sup>

The inference from declaration to state of mind, "if we agree that a man is conscious of his own states of mind,"<sup>213</sup> is direct. The only real problem here is that of deception.

210. "The use of intention to prove subsequent acts has become well established since *Mutual Life Insurance Co. v. Hillmon*." *Hearsay under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1123.

Intention may also be relevant where the issue is only whether the intended act *could have been* accomplished. See *Blackburn v. Aetna Freight Lines, Inc.*, 368 F.2d 345 (3rd Cir. 1966) and *Maxworthy v. Horn Electric Service, Inc.*, 452 F.2d 1141 (4th Cir. 1972) (intention to enter more lucrative employment admissible as evidence of pecuniary loss in tort actions).

211. 145 U.S. 285 (1892).

212. *Id.* at 295-96.

213. Hinton, *supra* note 187, at 414.

But any of a number of factors may intervene between intention and subsequent conduct. As Professor Hinton has pointed out:

Intention alone is frequently an inadequate basis for a conclusion that the intended act was done, because there may be too many chances of accidental frustration. These possibilities, of course, vary very greatly according to the nature of the action intended and the steps necessary to its accomplishment. When I leave my house at 8:30 in the morning for a ten minute walk to the Law School to meet a nine o'clock class, the probability of accomplishment is high. If my neighbor leaves at the same time to keep an appointment in the Loop, the chances are somewhat less because of traffic conditions. It is easy to think of cases where the chances of accomplishment decrease to the vanishing point. The time element is also important because the intention may not continue.<sup>214</sup>

Because a declaration of intent is far more probative of the intent asserted than of subsequent accomplishment of the intended act, some have suggested that declarations not be admitted on the latter basis in the absence of corroborating evidence.<sup>215</sup> Corroboration is not invariably required, but most courts do insist upon it when admitting threats by a third person offered to exculpate the defendant,<sup>216</sup> and when admitting threats by a homicide victim, not communicated to the defendant, offered to prove that the defendant acted in self-defense.<sup>217</sup>

A problem ignored by the Supreme Court in *Hillmon* is that posed when the intended act is one which requires the participation of another. If the other person's acts are not in themselves in issue, the problem is merely one of probative value. To the extent that *Hillmon* was not willing to travel with Walters, for example, the probability that Walters was able to accomplish his intention to travel with *Hillmon*

214. *Id.* n.53 at 413.

215. Slough, *supra* note 138, at 236; McCORMICK § 295, at 701.

216. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, n.63 at 1124.

217. Slough, *Res Gestae*, 2 KAN. L. REV. 121, 141 (1953).

is reduced. Where, however, the acts of the other *are* in issue, declarant's statement of intention cannot be admitted without the risk that the jury will accept it as proof of the acts of the presumed participant.

In *People v. Alcalde*,<sup>218</sup> for example, the court affirmed the admission of testimony that the deceased had declared her intention to go out with "Frank," the name of the defendant, on the night of her murder. The victim's declaration was indeed probative of her own future conduct, but, as Justice Traynor pointed out in his dissent:

A declaration as to what one person intended to do . . . cannot safely be accepted as evidence of what another probably did. . . . The declaration of the deceased . . . that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him . . . without necessarily showing that he went out with her.<sup>219</sup>

Although the inevitable dual inference appears to broaden unwisely the state of mind exception, courts have tended to sanction the admission of such declarations, instructing the jury to consider them as bearing on the declarant's conduct only.<sup>220</sup>

The House Judiciary Committee qualified its approval of Rule 803(3) by stating that the rule should be construed "so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."<sup>221</sup> At a minimum, such construction requires a limiting instruction. Where the instruction is likely to be ineffective, there seems room for argument that in the Committee's view, declarations such as those in *Alcalde* should be excluded altogether.<sup>222</sup>

218. 24 Cal. 2d 177, 148 P.2d 627 (1944).

219. *Id.* at 633.

220. MCCORMICK § 295, at 669.

221. REPORT ON FEDERAL RULES OF EVIDENCE, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 93rd Congress, 1st Session, No. 93-650, pp. 13-15 (1973).

222. *But see* *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 533 (3rd Cir. 1976) (although it "would have been better" for the court to instruct the jury that declarant's statement was not admissible to show the participa-

## (c) Statements of Memory or Belief Concerning Past Events

Under Rule 803(3), as under the prevailing case law, mental state may not be offered to prove a *past*<sup>223</sup> act or event except in cases relating to the execution, revocation, identification, or terms of declarant's will.

Hearsay questions aside, it is clear that present state of mind often bears logically upon past conduct. Professor Hinton has noted that "[a]s a mere matter of logic and experience, A's declared intention to pay B a sum of money on the first of the next month might naturally lead to the conclusion that A had previously incurred an obligation to B, because that accords in general with experience."<sup>224</sup> The inference from present intention to past conduct, explains Hinton, involves premises something like these: "A would not intend to pay B unless he *remembered* or *believed* that he had previously incurred an obligation to him. If he remembered, or believed, that such events happened, they probably did."<sup>225</sup>

Professor Payne<sup>226</sup> has argued that evidence of memory often presents more cogent proof than evidence of intent. He posits a case in which a material fact is whether or not A went to the movies on Sunday. In purely logical terms, A's statement on Monday that he went to the movies Sunday has a greater tendency to prove the doing of the act than A's statement on Saturday that he intends to go on Sunday. The statement of the remembered event does involve questions of memory and perception not involved in the statement of intent, but where the time lapse is small and the declarant of ordinary perceptual ability, "in many conceivable cases, including the illustration used here, the probability of default in memory is no greater than, and perhaps not so great as, the probability of frustration or al-

---

tion of others in an alleged conspiracy, failure to give the limiting instruction was harmless since evidence was admissible to show declarant's state of mind and was merely cumulative as proof of conspiracy).

223. Present mental state may be offered to prove past *mental state*, however. See text accompanying notes 203 and 204, *supra*.

224. Hinton, *supra* note 187, at 420.

225. *Id.* at 421.

226. Payne, *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955).

ternation of intention."<sup>227</sup> Either statement, of course, may have been fabricated, and if this danger is greater with the statement of memory it is only where "the declarant, after the act is accomplished, has acquired an interest of which he is aware at the time of the declaration and which is served by the declaration."<sup>228</sup> Such problems of deception, suggest Payne, could be handled by limiting the reception of the evidence to declarations made at a time when declarant had no apparent motive to falsify.<sup>229</sup>

If it can be assumed that some statements of memory and belief are reliable, why should such evidence invariably be excluded? The Rules Advisory Committee explains the exclusion in this way:

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.<sup>230</sup>

The potential for destruction of the hearsay rule lies in the fact that every statement of a remembered event can be construed as a declaration that the declarant is *presently aware* of the memory. Since even memory would thus evince a present state of mind, no statement would be outside the bounds of the state of mind exception.

227. *Id.* at 1023-24.

228. *Id.*

229. *Id.*

230. FED. R. EVID. 803(3), Adv. Comm. Note. *See also* Shepard v. United States, 290 U.S. 96, 105-06 (1933) (Cardozo, J.). In *Shepard*, the United States Supreme Court specifically refused to extend the *Hillmon* rationale. In *Shepard's* trial for the murder of his wife, the government was permitted to prove statements by the deceased that her husband had poisoned her. The Supreme Court reversed on the ground that the testimony had been offered for the purpose of proving the commission of an act by the decedent's husband. The court said that *Hillmon* marks the high water line beyond which courts have been unwilling to go. . . . Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backward to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

It has also been argued that although a jury is unlikely to conclude that because an act was intended, it must have been accomplished, there is a significant danger that it might take as conclusive declarant's statement that the act in fact occurred. This danger should not be underestimated, but neither should it invariably override the admission of reliable and often crucial evidence:

Frank recognition that some statements of memory and belief are reliable would encourage consideration of the actual dangers presented by the facts of the particular case. It would moderate the highly theoretical discussions in which some courts indulge . . . and might lead to more reliable decisions.<sup>231</sup>

In two relatively recent cases the Wyoming Supreme Court was asked, in effect, to overrule the admission of declarations of memory to prove the facts remembered. Because the decisions were contradictory, and because the Court did not analyze the challenged statements as statements of memory, the status of memory evidence in Wyoming remains unclear.

In *State v. Kump*,<sup>232</sup> a prosecution in which defendant was charged with second degree murder for killing his wife, the state was allowed to introduce as evidence of the victim's state of mind testimony by two friends of the victim that the day before her death the victim had told them that her husband had threatened to choke her to death. The Court held that this testimony had been improperly admitted:

The attitude of the mind of deceased toward the defendant . . . is at times relevant when the defendant pleads self-defense. . . . In such case the attitude of mind is to show the *hostile* attitude of the deceased which would justify self-defense. . . . That is not the situation in the case at bar. The important fact here is the attitude of mind of the *defendant*, not that of *deceased*. The attitude of mind

---

231. WEINSTEIN ¶ 803(3) [05], at 803-114.

232. 76 Wyo. 273, 301 P.2d 808 (1956).

of the deceased toward the defendant was immaterial.<sup>233</sup>

Because it was "quite clear the jury ignored that testimony when they found the defendant guilty only of manslaughter,"<sup>234</sup> the court held that the improper admission did not constitute reversible error.

This decision is clearly in line with the exclusion in Rule 803(3) of "statements of memory or belief to prove the fact remembered or believed," since Mrs. Kump's memory that her husband had threatened to kill her was being offered to prove that the threat had in fact been made. There was, however, an internal inconsistency in the *Kump* decision, for the court did not complain of the receipt of testimony by a deputy sheriff that the day before her death the deceased did not want to go home alone and had asked him to accompany her. It would appear that the prosecution offered this testimony as the basis for the following series of inferences: the request must have indicated fear, the fear must have been engendered by a belief that the defendant had threatened to kill her, and therefore the defendant must have threatened to kill her. Like the testimony of the victim's two friends, the testimony of the deputy sheriff tended to prove the victim's state of mind, which the court had declared "immaterial." And like the friends' testimony, the sheriff's testimony in effect proved elements of the victim's memory from which the jury was asked to infer past events.

Fifteen years after *Kump*, and within the context of a surprisingly similar factual situation, the Wyoming Supreme Court affirmed the admission of a statement of memory offered to prove the fact remembered. The decision in *Alcala v. State*<sup>235</sup> grew from a prosecution for second degree murder in which defendant was charged with killing his wife. At issue was the state's introduction of a witness' testimony that ". . . I told [the victim] . . . that [defendant] had

---

233. *Id.* at 812.

234. *Id.* at 817.

235. 487 P.2d 448 (Wyo. 1971).

threatened her, and she said, "This is not the first time, he has done this for years."<sup>236</sup> Relying, inappropriately, on *Kump's* holding that such admission did not constitute reversible error, the court held that the testimony was *properly* admitted:

The Witness who testified concerning the declaration of Mrs. Alcalá is the same witness who testified that defendant had on the same day threatened to break every bone in the victim's body. According to the witness, she told Mrs. Alcalá about this threat, and it was only proper for the court to receive evidence which tended to show the mental state of Mrs. Alcalá when she learned of the threat.<sup>237</sup>

Defendant's statement to the witness that he intended to "break every bone" in the victim's body fell clearly within the *Hillmon* doctrine and did not give rise to objection. It would appear that the victim's statement was offered to refute a potential inference that the defendant's words to the witness were those of the heat of the moment. The victim's memory that she had been threatened, then, was offered to prove the fact remembered.

Perhaps the *Alcalá* decision reflects the court's determination that exception to the hearsay doctrine was warranted because a wife's memory that her husband has threatened her is not only relevant, but inherently reliable. It seems hard to escape the conclusion, however, that the court simply overlooked the fact that here the victim's statement was not within the traditional scope of the state of mind exception, since it amounted to proof of memory as evidence of a past event. As to the *relevancy* question, it seems that Mrs. Alcalá's statement could cut two ways. Her acknowledgement that "he has done this for years," absent any indication of fear or distress, could as easily present the basis for the inference that his words were of no import as for the inference that his words espoused a real intent.

---

236. *Id.* at 455.

237. *Id.*

Under Rule 803(3),<sup>238</sup> statements of memory or belief may be admitted to prove the facts remembered or believed if they relate to the execution,<sup>239</sup> revocation,<sup>240</sup> identification<sup>241</sup> or terms<sup>242</sup> of declarant's will.

This special hearsay exception is based upon need rather than upon any particular assurance of reliability.<sup>243</sup> The testator cannot, of course, be examined, and his prior statements are often the only evidence available. As the Advisory Committee Note points out, the Rule finds widespread support in the case law.<sup>244</sup>

*Rule 803(4):*<sup>245</sup> *Statements for Purposes of Medical Diagnosis or Treatment.* Statements of present physical condition made to a physician consulted for treatment are almost universally excepted from the rule against hearsay.<sup>246</sup> Such statements are presumed reliable because the patient must give accurate information in order to promote effective treatment.<sup>247</sup> Reflecting the belief that the same guarantee of trustworthiness extends to statements relating medical history, past symptoms, and the cause of the condition to be treated, Rule 803(4) goes considerably beyond majority practice<sup>248</sup> by admitting these statements "insofar as reasonably pertinent to diagnosis or treatment."<sup>249</sup>

238. A statement of the declarant's then existing state of mind . . . 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. FED. R. EVID. 803(3).

239. *In re Estate of Karras*, 109 Ohio App. 403, 166 N.E.2d 781 (1959) (declarations of deceased in regard to execution admissible).

240. *Crampton v. Osborn*, 356 Mo. 125, 201 S.W.2d 336 (1947) (intent to revoke); *Thompson v. Woods*, 44 Cal. App.2d 774, 112 P.2d 937 (1941) (intent not to revoke).

241. *State v. Scott*, 198 Cal. 1, 242 P. 939 (1926) (testimony of deceased that exhibited document his last will admissible).

242. *In re Roeder's Estate*, 44 N.M. 429, 103 P.2d 631 (1940) (declarations admissible to show changes in will).

243. Wigmore states that the probability of a testator's feigning conduct "in order to deceive designing relatives and to obtain peace and quiet, is in general experience not a small one." 2 WIGMORE § 271.

244. FED. R. EVID. 803(3), Adv. Comm. Note.

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

246. MCCORMICK § 292, at 690.

247. *Id.*

248. Few jurisdictions allow as substantive evidence statements relating past pain and suffering or the cause and nature of an injury. A majority of jurisdictions do allow such statements, however, to explain and qualify the expert opinion of the treating physician. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1130-31.

249. FED. R. EVID. 803(4). The Advisory Committee points out that statements as to *fault* do not ordinarily qualify for admission under the Rule:

The Rule departs even more significantly from conventional doctrine in admitting as substantive evidence statements made for the purposes of medical diagnosis *or* treatment. In most jurisdictions, as in Wyoming,<sup>250</sup> statements made to a physician consulted solely for the purpose of testimony are admissible only to show the basis of the physician's diagnosis or opinion.<sup>251</sup> Their admission under the Rule as substantive evidence has been criticized on the basis that "[s]tatements made to a physician employed only to testify do not possess the requisite guarantee of trustworthiness. On the contrary, the declarant has every motive not to speak truthfully."<sup>252</sup>

The draftsmen note, however, that the distinction serves little practical purpose, since jurors are unlikely to distinguish between statements admissible as substantive evidence and those admissible only as a foundation for expert testimony.<sup>253</sup> Judge Weinstein points out, in addition, that "as a matter of policy, a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription."<sup>254</sup>

The Rule does not require that the statement be made to a physician, since statements motivated by a desire for treatment might well be made to ambulance drivers, hospital attendants, and even members of the family.<sup>255</sup> Further, the statement does not have to be made by the patient. The belief that accuracy is essential to effective treatment will often assure the reliability of statements made by others, particularly if the relationship between declarant and patient is close. The determination of reliability under such cir-

---

"Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light."

250. *Acme Cement Plaster Co. v. Westman*, 20 Wyo. 143, 122 P. 89, 93 (1912) (statements of past symptoms are admissible for the purpose of affording the jury the means of determining the weight to be given to the opinion of the physician, but not as evidence tending to prove the actual condition of the plaintiff at the time of which he spoke).

251. 4 WEINSTEIN ¶ 803(4) [01], at 803-124.

252. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1134.

253. FED. R. EVID. 803(4), Adv. Comm. Note.

254. 4 WEINSTEIN ¶ 803(4) [01], at 803-125.

255. FED. R. EVID. 803(4), Adv. Comm. Note.

cumstances is a matter within the discretion of the trial court.<sup>256</sup>

*Rule 803(6)*:<sup>257</sup> *Records of Regularly Conducted Activity*. The hearsay exception for business records, statutory in most jurisdictions,<sup>258</sup> is governed in Wyoming by the Uniform Business Records as Evidence Act.<sup>259</sup> Although Rule 803(6) is in many ways equivalent, it does present a change in emphasis.

Under the common law, only the *commercial* record was excluded from the rule against hearsay. Such records were assumed unusually trustworthy because of "the reliance placed upon them by the commercial world and the duty of accuracy required and expected by the employer."<sup>260</sup> A recognition that the records of other organizations possess similar guarantees of reliability led the Uniform Act and other statutory formulations<sup>261</sup> to expand the scope of the exception to include "every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."<sup>262</sup> This very broad definition of "business" is carried over into Rule 803(6).<sup>263</sup>

256. 4 WEINSTEIN ¶ 803(4)[01], at 803-124: "The court in its discretion pursuant to Rule 403 will have to assess the probative worth of the statement, which will depend on its significance, its contents, by whom it was made, and in what circumstances it was made, and decide whether admission is warranted despite the dangers of prejudice, confusion and waste of time."

257. FED. R. EVID. 803(6).

258. Symposium, *Federal Rules of Evidence*, 36 LA. L. REV. 59, at 72 n.204 (1975).

259. WYO. STAT. §§ 1-170 et. seq. (1957).

260. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1150.

261. Federal Business Records Act [28 U.S.C. § 1732(a) (1970)]; MODEL CODE OF EVID. rule 514 (1942); UNIFORM RULE OF EVID. 63(13) (1953). The Model Act and the federal statute defined business to include "business, profession, occupation and calling of every kind." The Uniform Act and Uniform Rules added to this "or operation of institutions, whether carried on for profit or not." 4 WEINSTEIN ¶ 803(6)[01], at 803-144.

262. Uniform Business Records as Evidence Act, 9 A U.L.A. § 506 (1965). There is some slight indication that Wyoming has restricted this broad definition. In *In re Shreve*, 432 P.2d 271 (Wyo. 1967) the court held inadmissible under the Uniform Official Reports as Evidence Act [WYO. STAT. § 1-165 et seq. (1957)] reports of the Welfare Department. Although their admissibility as business records was not before the court, it would seem that the reports should have been admissible upon that basis.

263. The Advisory Committee's suggestion that non-business activities also be incorporated was rejected by Congress. Congress so expanded the definition of "business," however, that results under both formulations should be identical.

The requirement embodied in previous statutory schemes that the record be kept in the *regular course* of business was seen by the Rules Advisory Committee as an undue emphasis upon routine and repetition. "The test was not whether that particular type of record was being made routinely, but whether the record was made in conjunction with a routine, established, regular operation."<sup>264</sup> Consequently, Rule 803(6) requires that the record be kept in the *course* of a *regular* business.

Rule 803(6) expands the scope of acceptable record entries by making explicit provision for opinions and diagnoses. This language, "directed squarely at the divergent case law regarding expert opinion in hospital records,"<sup>265</sup> encompasses as well non-medical opinions in commercial records. Although the Uniform Act provides only for records of an "act, condition or event," the construction of those words in Wyoming reflects the liberal approach of the Rule. In *Colorado Serum Company v. Arp*,<sup>266</sup> for example, the Wyoming Supreme Court affirmed admission under the Act of a federal veterinarian's report that an outbreak of cholera in plaintiff's swine herd had been caused by defendant company's vaccine; and in *In Re Estate of Morton*,<sup>267</sup> the Court held that hospital record entries that a patient was "lethargic," "confused," and "weaker and more malaise" would have been admissible under a proper offer of proof.

Under Rule 803(6), as under the Uniform Act, each participant in the record keeping process must be acting in

264. 4 WEINSTEIN ¶ 803(6) [01], at 803-144. "Rule 803(6) should be interpreted so that the absence of routineness without more is not sufficiently significant to require exclusion of the record. Nonroutine records made in the course of a regularly conducted 'business'—as that term is very broadly defined—should be admissible if they meet the other requirements of Rule 803(6) unless 'the sources of information or other circumstances indicate lack of trustworthiness.'" *Id.* at 803-145-46.

265. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, *supra* note 144, at 1151. See also 4 WEINSTEIN ¶ 803(6) [04], at 803-156:

[A]ll statements by physicians incorporated in a hospital record or in a report concerning the patient's condition or cause of his condition consist of opinion except for recordation of facts directly observed, such as temperature, blood pressure, and other objective factors.

266. 504 P.2d 801, 804 (Wyo. 1972). It was sufficient for admissibility that an investigation and report are "programmed procedure" whenever there is a hog cholera outbreak.

267. 428 P.2d 725, 731 (Wyo. 1967).

the course of business. Although the initial informant must have had first-hand knowledge, the name of that person need not even be known so long as the regular practice was to get the information from such a person.<sup>268</sup>

*Rule 803(18):*<sup>269</sup> *Learned Treatises.* By authorizing the substantive use of statements contained in learned treatises,<sup>270</sup> Rule 803(18) completely changes majority law and presumably that of Wyoming. Such materials traditionally have been admissible only for purposes of impeaching the expert witness on cross-examination. The prerequisites for this impeachment use have varied:

Most courts would permit this use where the expert has relied upon the specific material in forming the opinion to which he testified on direct; some of these courts would extend the rule to situations in which the witness admits to having relied upon some general authorities although not that particular material sought to be used to impeach him. Other courts would require only that the witness himself acknowledge that the material sought to be used to impeach him is a recognized authority in his field; if he does so, the material may be used although the witness himself may not have relied upon it. Finally, some courts would permit this use without regard to the witness' having relied upon or acknowledged the authority of the source if the cross-examiner establishes the general authority of the material by any proof or by judicial notice.<sup>271</sup>

Rule 803(18) represents a further extension of this last position, which, although the most liberal, "still was predicated on the questionable assumption that jurors can distinguish between impeachment and substantive use, handicapped plaintiff in establishing his case, deprived the jury of reliable evidence, and reached the illogical result that

268. 4 WEINSTEIN ¶ 803(6) [02], at 803-150.

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

270. The Rule defines "learned treatises" as "published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art." FED. R. EVID. 803(18).

271. McCORMICK § 321, at 743.

conclusions based solely on book learning were admitted, but that the treatises themselves must be excluded."<sup>272</sup>

Because the Advisory Committee felt that jurors might misunderstand and misapply learned material without expert assistance, the Rule allows such materials to be used substantively only in conjunction with expert testimony. This limitation "guarantees that the trier of fact will have the benefit of expert evaluation and explanation of how the published material relates to the issues in the case."<sup>273</sup>

Although the publication must be established as authoritative, that authority need not be acknowledged by the testifying witness.<sup>274</sup> The prerequisite can be met through other expert testimony, and where this is not possible, it has been suggested that reading lists used in graduate schools and seminars might be admissible pursuant to Rule 803 (17),<sup>275</sup> and that a court might take judicial notice of books admitted in the course of other litigation.<sup>276</sup>

M. M.

#### *Rule 804: Hearsay Exceptions; Defendant Unavailable*

Rule 804 complements Rule 803 by codifying the traditional hearsay exceptions which require the unavailability of the declarant as a condition precedent to admissibility. Rule 804 consists of two parts: Subdivision (a) defines "unavailability of a witness," and Subdivision (b) enumerates hearsay exceptions requiring unavailability.<sup>277</sup> While basically reflecting the majority common law rules, Rule 804 has incorporated some minority views which reflect modern trends and the better view. Analysis of Rule 804 reveals that by unifying, updating, and filling gaps in Wyoming's currently scattered law in this area of hearsay exceptions,

272. WEINSTEIN ¶ 803(18)[02], at 803-219.

273. *Id.* at 803-220.

274. "The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness." FED. R. EVID. 803(18), Adv. Comm. Note.

275. ". . . published compilations, generally used and relied upon by the public or by persons in particular occupations." FED. R. EVID. 803(17).

276. WEINSTEIN ¶ 803(18)[02], at 803-222.

277. FED. R. EVID. 804.

Rule 804 would have a beneficial impact on the practice of law in Wyoming.

*Rule 804(a): Definition of Unavailability.* At common law each hearsay exception requiring unavailability of the declarant developed a separate definition of unavailability.<sup>278</sup> Finding no apparent reason for these separate definitions,<sup>279</sup> the drafters of Rule 804 abandoned the common law approach and adopted a uniform definition applicable to all hearsay exceptions which require unavailability. This reflects the modern trend.<sup>280</sup> While a comprehensive, uniform definition does extend certain types of unavailability to exceptions which had not previously recognized them,<sup>281</sup> the effect of this extension is minimal and does not undermine the theoretical bases of these exceptions.

Rule 804(a) defines 'unavailability as a witness' in terms which make clear that the crucial factor is not the lack of the declarant's physical presence, but the unavailability of his testimony.<sup>282</sup> For example, under 804(a) (1), (2), or (3) the declarant may be physically present at the trial, but because of a claimed privilege, a refusal to testify, or lack of memory his testimony is unavailable to the trier of fact. Note, however, that 804(a) (1), (2), and (3) require the witness to assert the unavailability of his testimony in court. Thus, the claimed basis of unavailability will sometimes be subjected to cross-examination and so acquire some guarantees of trustworthiness.

Rule 804(a) (4) includes death and physical or mental infirmity within the definition of unavailability,<sup>283</sup> but is silent on the question of how to handle temporary disabilities. The better view is that the trial court should have discretion to evaluate the importance of the testimony in relation to the expected duration of the disability and to de-

278. MCCORMICK § 253, at 608; FED. R. EVID. 804(a), Adv. Comm. Note.

279. FED. R. EVID. 804(a), Adv. Comm. Note.

280. MCCORMICK § 253, at 608.

281. *E.g.*, the traditional exception for dying declarations recognized only death as a type of unavailability. See generally, MCCORMICK § 282.

282. MCCORMICK § 263, at 608.

283. These are traditional types of unavailability. See generally MCCORMICK § 253.

termine on that basis whether to postpone the trial or to find the declarant unavailable.<sup>284</sup>

Rule 804(a)(5) is the most complex part of the definition of unavailability. This subdivision in effect conditions a finding of unavailability upon a showing that the proponent of hearsay evidence employed "process or other reasonable means" to procure the attendance of the witness. Contrary to case law, Rule 804(a)(5) makes no distinction between civil and criminal actions and sets no clear guidelines concerning what constitutes "reasonable means" of procuring attendance of a witness. However, the effort that must be made to procure attendance may vary depending on whether it is a civil or criminal action.<sup>285</sup> Civil actions require due diligence,<sup>286</sup> while a more stringent "good faith" effort is required in criminal cases to satisfy the confrontation clause.<sup>287</sup>

Rule 804(a)(5) also draws a distinction between the exception for former testimony and the exceptions for dying declarations, statements against interests, and statements of personal or family history. In the latter three exceptions unavailability is conditioned upon a showing that the proponent sought to depose the declarant. Thus, the Rule displays a distinct preference for testimony, even if in the form of a deposition transcript, over hearsay evidence.

While Wyoming has not adopted a comprehensive definition of unavailability relating to hearsay exceptions, Wyoming law is basically consistent with 804(a). Rule 804(a) codifies types of unavailability recognized at common law and which Wyoming would probably apply. Wyoming's procedural rules governing the use of depositions also close-

---

284. 5 WIGMORE § 1406.

285. McCORMICK § 253; 5 WIGMORE § 1401.

286. McCORMICK § 253, at 609.

287. In *Barber v. Page*, 390 U.S. 719 (1968), the Court indicated that the mere ascertainment that a witness is beyond the reach of process is not sufficient in criminal cases. While this amount of effort may suffice in civil cases, further efforts must be made to procure the attendance of witnesses in criminal cases. See also McCORMICK § 253, at 610; 5 WIGMORE § 1404.

ly parallel the definitions of unavailability in Rule 804(a).<sup>288</sup> Thus, the major effect of a uniform definition of unavailability for hearsay exceptions would be to codify existing principles of law into one rule.

*Rule 804(b): Hearsay Exceptions.* The unavailability prerequisite contained in subdivision (b) indicates a preference for live testimony.<sup>289</sup> Inclusion of former testimony as a hearsay exception requiring unavailability reinforces this preference and stresses the importance of allowing the trier of fact to observe the demeanor of the witness. However, by providing these exceptions Rule 804 also indicates a preference for certain types of hearsay over no evidence at all.<sup>290</sup> Thus, while dying declarations, statements against interest, and statements of personal or family history possess in some degree circumstantial guarantees of trustworthiness,<sup>291</sup> they are not regarded as necessary unless the declarant is unavailable.<sup>292</sup> Thus Rule 804 exceptions are in a sense inferior to Rule 803 exceptions, under which statements are admissible even when the declarant is available as a witness.<sup>293</sup>

*Rule 804(b)(1): Former Testimony.* While most authorities regard former testimony as hearsay evidence which is admissible under an exception to the general exclusionary rule,<sup>294</sup> this exception is unique. Former testimony has the strongest possible guarantees of trustworthiness, as it was given under oath and subject to cross-examination. The remaining basis of the hearsay rule, the trier's inability to observe the declarant's demeanor, is overcome by the necessity principle and consequently former testimony is received as an exception to the rule.<sup>295</sup> It should be noted that this exception aims at the substantive use of former testimony,

---

288. See WYO. R. CIV. P. 32(a)(3); WYO. R. CRIM. P. 17(e).

289. MCCORMICK § 253, at 608.

290. *Id.*

291. 5 WIGMORE § 1422.

292. *Id.* § 1421.

293. MCCORMICK § 253, at 608.

294. *Id.* § 254, at 614.

295. FED. R. EVID. 804(b)(1), Adv. Comm. Note.

and the Rule does not relate to the use of former testimony to impeach as a prior inconsistent statement.<sup>296</sup>

Rule 804(b)(1) basically reflects the traditional common law approach,<sup>297</sup> but still leaves some questions unanswered. First, this Rule would allow former testimony to be used against the person by whom it was originally offered, as well as against the person against whom it was originally offered.<sup>298</sup> This raises the question of whether the original proponent of former testimony has a motive to fully develop the testimony. Are direct and re-direct examination equivalent to cross-examination for developing testimony? Is it fair to expect the proponent of evidence to fully develop it in anticipation of its possible future use against him? Second, in civil actions former testimony may be received under the Rule if the opponent or "a predecessor in interest" of the opponent had a motive and opportunity to develop the testimony. Who is a "predecessor in interest"? The Rule gives no clue for making this determination. Third, the Rule does not consider the age of the former testimony. If the former testimony was given several years prior to the current litigation, should it still be admissible? Might not increased knowledge and improved techniques lead to different testimony from that given several years before?

Wyoming recognizes a hearsay exception for former testimony which is in substantial compliance with Rule 804(b)(1).<sup>299</sup> However, under Wyoming law the admissibility of former testimony may be affected by its age, i.e. old former testimony may be excluded.<sup>300</sup> Thus, although Rule 804(b)(1) basically codifies Wyoming's present exception, Wyoming law imposes an additional consideration.

*Rule 804(b)(2): Statements Under Belief of Impending Death.* The long-recognized exception for dying declarations

296. MCCORMICK § 254, at 615; Rule 804(b)(1) should also be distinguished from Rule 801(a)(1) which deals with substantive use of prior inconsistent testimony of a witness present at trial.

297. See generally, MCCORMICK, Chapter 25.

298. FED. R. EVID. 804(b)(1), Adv. Comm. Note.

299. Meldrum v. State, 23 Wyo. 12, 146 P. 596 (1915); Ivey v. State, 24 Wyo. 1, 154 P. 589 (1916).

300. See Ben Realty v. Gothberg, 56 Wyo. 294, 109 P.2d 455, 462 (1941).

is based on the belief that religious and psychological pressures compel a person to be truthful when in fear of impending death.<sup>301</sup> Nevertheless, the common law imposes arbitrary limitations on the use of dying declarations.<sup>302</sup> Under the traditional common law approach dying declarations could only be used in criminal cases, and then only in homicide prosecutions, and only statements relating to the cause of death were admissible.<sup>303</sup> Most authorities believe that these limitations are arbitrary and unsound.<sup>304</sup>

Rule 804(b) (2) expands the applicability of this exception in accordance with a more modern and rational view of the dying declarations exception. Under Rule 804(b) (2) dying declarations may be used in civil actions, but the restriction to homicide prosecutions in criminal actions is retained. The original common law rule<sup>305</sup> and recent cases and statutes<sup>306</sup> allow the use of dying declarations in civil actions. At common law, death was the only type of unavailability recognized by this exception<sup>307</sup>—which makes some sense inasmuch as the exception only operates when a declarant believes his death to be imminent. It seems unlikely that a proponent will be able in many cases to prove this preliminary fact where the declarant in fact survives. However, the uniform definition of unavailability in 804(a) expands this exception by applying to it all the recognized types of unavailability, with the result that the statement of a declarant who sincerely, but erroneously believes that he is dying may be received under Rule 804(b) (2). This extension is consistent with the theories underlying the exception for dying declarations, as it is the anticipation and fear of impending death, and not the fact that death thereafter occurred, which gives dying declarations their trustworthiness.<sup>308</sup>

---

301. 5 WIGMORE § 1438.

302. See generally, McCORMICK §§ 282, 283; 5 WIGMORE §§ 1432-1434.

303. McCORMICK § 283.

304. See generally, McCORMICK § 283; 5 WIGMORE § 1436.

305. McCORMICK § 283.

306. McCORMICK § 287.

307. McCORMICK § 282, at 681; 5 WIGMORE § 1431.

308. McCORMICK § 282, at 680; 5 WIGMORE § 1431.

Wyoming has followed the traditional, restricted common law rule.<sup>309</sup> Therefore, the Rule's modification of the common law would also operate to change Wyoming law. It should be noted, however, that the only Wyoming authority is quite old.<sup>310</sup> Thus, Rule 804(b)(2) would have a beneficial impact on Wyoming legal practice by up-dating Wyoming's approach to dying declarations and by bringing Wyoming law into conformity with the better view.

*Rule 804(b)(3): Statements Against Interest.* This exception is based on the belief that a person will not make statements damaging to himself unless they are true.<sup>311</sup> The English common law limited this exception to statements against pecuniary or proprietary interest.<sup>312</sup> The American courts extended the exception to statements subjecting the declarant to civil liability or invalidating a claim which the declarant had.<sup>313</sup> Both, however, imposed a limit under which statements against penal interest were not admissible<sup>314</sup>—and this limit was unknown to the earlier common law.<sup>315</sup> This limit rests upon a fear of fabricated confessions and perjured testimony which could be used to exculpate the accused.<sup>316</sup> The leading authorities have taken the view that this limitation is not soundly based and should be discarded.<sup>317</sup>

Rule 804(b)(3) abandons the common law restriction against the use of statements against penal interest, and reinstates the earlier common law rule.<sup>318</sup> This reflects the better view that statements against penal interest are at least as trustworthy as statements against pecuniary or proprietary interests.<sup>319</sup> However, this Rule recognizes the possibility of perjured confessions and so requires statements which "expose the declarant to criminal liability" and

309. *Floey v. State*, 11 Wyo. 464, 72 P. 627 (1903).

310. *Id.*

311. FED. R. EVID. 804(b)(3); Adv. Comm. Note; 5 WIGMORE § 1456.

312. MCCORMICK § 277, at 612.

313. *Id.* at 672.

314. MCCORMICK § 278, at 673; 55 WIGMORE § 1476.

315. *Id.*

316. MCCORMICK § 278, at 674; FED. R. EVID. 804(b)(3); Adv. Comm. Note.

317. MCCORMICK § 278, at 674; 5 WIGMORE § 1477.

318. MCCORMICK § 278, at 673; 5 WIGMORE § 1476.

319. MCCORMICK § 278, at 647.

“exculpate the accused” to be supported by “corroborating circumstances” which show trustworthiness. In this way Rule 804(b)(3) strikes a balance between competing considerations<sup>320</sup> and updates and greatly improves the exception. Note that this exception as a practical matter only applies to witnesses, as statements of parties will always be admissible when offered by an opposing party under the broader “admission of a party opponent” exception provided by Rule 801(d)(2).

Several problems which arise in determining whether a statement is against interest should be noted:<sup>321</sup> (1) Whether a statement is against interest may depend upon outside facts. In these cases admission of the statement should relate to these outside facts. (2) Many statements have double meaning: They may be either disserving or self-serving depending on how they are used. When should these be admissible? (3) How should statements which have both disserving and self-serving aspects be handled? (4) If the declarant had a motive to falsify the statement should it be admissible? (5) Must the declarant know that the statement was against interest? Rule 804(b)(3) by referring to “a reasonable man in his position” indicates that an objective test would be used to determine what statements are against interest. It seems likely, however, that this “reasonable man” determination will be made in light of the circumstances surrounding the statement and hence the test will in effect be subjective. It should be noted that in resolving these problems a court has discretion under Rule 403 to exclude evidence if it is confusing, misleading, or unfairly prejudicial.

Wyoming apparently follows the common law rule prohibiting the use of statements against penal interests.<sup>322</sup> Rule 804(b)(3) would beneficially change this Wyoming practice.

---

320. FED. R. EVID. 804(b)(3), Adv. Comm. Note.

321. See McCORMICK § 279 for a discussion of these problems.

322. *Reavis v. State*, 6 Wyo. 240, 44 P. 62 (1896); 5 WIGMORE § 1476, at 357.

*Rule 804(b)(4): Statements of Personal or Family History.* This long-established exception is based on the theory that, absent a motive to falsify, statements relating to the declarant's personal or family history will be accurate.<sup>323</sup> Rule 804(b)(4) adopts the liberal view of this exception which makes two changes in the common law rule. First, the requirement that the statement be made before the controversy arose<sup>324</sup> is dropped. The Advisory Committee believed that this requirement should be dropped as relating more to the weight to be given the evidence than to its admissibility.<sup>325</sup> Second, Rule 804(b)(4) expands the common law limitation admitting only statements of family members<sup>326</sup> by allowing statements of persons "intimately associated" with the family. This variation has received some support and is the better view.<sup>327</sup>

Wyoming recognizes this exception, but the case law gives little indication of its scope<sup>328</sup> in Wyoming. In view of the judicial discretion given in Rule 403, the liberal version of this exception as set forth in 804(b)(4) would have little significant impact on the practice of law in Wyoming.

*Rule 804(b)(5): Other Exceptions.* Rule 804(b)(5) and Rule 803(24) create "catchall exceptions" and make clear that the Rules scheme of hearsay exceptions is not a closed system. It allows for growth and expansion when justified by circumstances.<sup>329</sup> This approach is consistent with the general purpose of the Federal Rules of Evidence as set forth in Rule 102—to promote the growth and development of the law of evidence.

Rule 804(b)(5) and Rule 803(24) codify, in general terms, the common law principles which underlie all hearsay exceptions. The "catchall exceptions" require circum-

---

323. 5 WIGMORE § 1482.

324. *Id.* § 1483; MCCORMICK § 322.

325. FED. R. EVID. 804(b)(4), Adv. Comm. Note.

326. 5 WIGMORE § 1487; FED. R. EVID. 804(b)(4), Adv. Comm. Note.

327. MCCORMICK § 322; 5 WIGMORE § 1487.

328. *In re Black's Estate*, 30 Wyo. 55, 216 P. 1059 (1923).

329. MCCORMICK § 326, at 755; FED. R. EVID. 803(24), Adv. Comm. Note.

stantial guarantees of trustworthiness<sup>330</sup> and necessity<sup>331</sup> as prerequisites to admissibility. The consideration of necessity is served by language requiring the proposed evidence to relate to a material fact and requiring that the proponent make a reasonable effort to obtain other evidence before this exception may be used. These "catchall exceptions" cannot cause surprise to the opponent for they are available only when the proponent has given fair notice that he intends to introduce evidence under one of these exceptions. These rules strongly affirm the theories of the hearsay exceptions and at the same time affirm the notice of procedural fairness whenever a proponent seeks to go beyond the specifically enumerated exceptions.

While Wyoming has no statute or rule comparable to Rule 804(b) (5) or Rule 803(24), Rule 27 of the Wyoming Rules of Criminal Procedure indicates that the admissibility of evidence should be governed by the principles of the common law (when not otherwise covered). For this reason, since the "catchall exceptions" rest on the common law principles underlying the hearsay doctrine, these exceptions should not radically change the practice of law in Wyoming.

The "catchall exceptions" of Rules 804(b) (5) and 803 (24) will not be widely used. Evidence to be admitted under these exceptions must have circumstantial guarantees of trustworthiness. In addition, the court must find that the evidence is material, more probative than any other available evidence, and that the interests of justice will best be served by admitting the evidence. These requirements when coupled with the notice requirement insure that these exceptions will only be used in cases which justify creating a new exception to the hearsay rule.

Rule 804 would be beneficial to the practice of law in Wyoming. At the present time, Wyoming law tends to be scattered, incomplete, and outdated in the area covered by Rule 804. Rule 804 would amount to a comprehensive cod-

---

330. 5 WIGMORE § 1422.

331. *Id.* § 1421.

ification which would bring Wyoming law into conformity with modern evidence law in this area. Rule 804 would make some changes in Wyoming practice, but all these would be sound ones reflective of the better view. Thus, the Wyoming legal community should welcome Rule 804 as a part of its evidence law.

K. L. A.

#### ARTICLE IX: AUTHENTICATION AND IDENTIFICATION

##### *Rule 901: Requirement of Authentication or Identification*

Through Rule 901(a), the Federal Rules of Evidence have accepted in general the common law concept of authentication, which conditions admissibility upon a showing that evidence is what it purports to be. "This requirement of showing authentication or identification falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104 (b)."<sup>1</sup> Thus, where the proponent introduces proof sufficient to support a finding that the evidence is what the proponent claims it to be, the court will admit the evidence. The evidence becomes relevant if the jury finds it to be what the proponent claims it to be and the jury may then consider it in making any decision. "The rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. The rest is up to the jury."<sup>2</sup>

Having accepted the authentication or identification requirement, Article IX proceeds to illustrate<sup>3</sup> and limit<sup>4</sup> the application of this requirement. Although the authentication rule is defended by assertion that it protects against fraud, the question arises whether this benefit is not outweighed by the time, expense and occasional unrealistic result produced by the traditional skepticism toward authenticity of

Copyright© 1977 by the University of Wyoming

1. FED. R. EVID. 901(A), Adv. Comm. Note.

2. WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, ¶ 901(A)[01], at 901-16 (1975) [hereinafter cited as WEINSTEIN].

3. FED. R. EVID. 901(b)(1) through 901(b)(10).

4. FED. R. EVID. 902 and 903.

writings.<sup>5</sup> Rules 902 and 903 incorporate case law and statutes under which authenticity is often taken as sufficiently established for purposes of admissibility without extrinsic evidence.<sup>6</sup>

*Rule 901(a)—General Provision:* Rule 901(a) states that the authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”<sup>7</sup> This terminology has raised questions as to the extent the Advisory Committee or the Congress intended the Rule to simplify the task of getting the evidence before the jury.<sup>8</sup> However, this general provision allows the state courts to decide to what extent their state, upon adopting the Rule, will adhere to the old common law doctrine of authentication.

Wyoming courts have required authentication of evidence. The standard employed is “that a proper foundation had been laid.”<sup>9</sup> The courts determine the proper foundation by looking to the specific circumstances and, then, by requiring the proponent to present to the court the substantiating facts which the common law has deemed necessary to authenticate. When a unique circumstance arises, it is for the court to decide the amount of factual evidence deemed necessary to authenticate the evidence to be admitted. This proper foundation concept is in conformity with Rule 901 since both establish a broad requirement concept which gets its tangible application to each circumstance from the experience embodied in the common law and state statutes.<sup>10</sup>

*901(b) Illustrations:* Since the illustrations in the Rules draw upon the experience embodied in the common law and state statutes, it is not surprising that Wyoming decisions are in conformity with the Rules in every situation

---

5. MCCORMICK § 218, at 545. [hereinafter cited as MCCORMICK].

6. FED. R. EVID. 902, Adv. Comm. Note.

7. FED. R. EVID. 901(a).

8. REDDEN, Rule 901, at 342 (1975).

9. See *Logan v. Pacific Intermountain Express Co.*, 400 P.2d 488, 492-93 (1965); *Pangarova v. Nichols*, 419 P.2d 688, 692 (1966); *Durham v. State*, 422 P.2d 691, 692 (1967); *In re Estate of Morton*, 428 P.2d 725, 731 (1967); *Colorado Serum Co. v. Arp*, 504 P.2d 801, 804 (1972).

10. FED. R. EVID. 901, Adv. Comm. Note.

where the Wyoming Supreme Court has had occasion to hear a case.<sup>11</sup> For those illustrated circumstances not considered by the Wyoming courts, the Rules provide express guidance; however, for those circumstances not illustrated by the Rules, the Wyoming court would be left on its own in determining the kind and amount of evidence necessary to lay a proper foundation, since it must determine how much evidence "is sufficient to support a finding that the matter is what its proponent claims." Rule 901 would thus create little change in Wyoming.

Two illustrations deserve a brief comment. First, Rule 901(b)(8) makes 20 years the determinative period for ancient documents; the common law period was 30 years. Since Wyoming has never decided the length of time applicable to ancient documents, this change should have no significant effect. Second, Rule 901(b)(10) indicates that

- 
11. FED. R. EVID. 901(b) provides the following illustrations which were discussed by the Wyoming case cited after the illustration:
- (1) Testimony of witness with knowledge: *Logan v. Pacific Intermountain Express Co.*, 400 P.2d 488, 492-93 (1965) upheld the admission of photographs once they had been identified by a qualified witness.
  - (2) Nonexpert opinion on handwriting: *Durham v. State*, 422 P.2d 691, 692 (1967) held that handwriting was sufficiently established since an eyewitness had testified that he saw the defendant signing the check. This case is the closest any Wyoming case has come to dealing with this situation.
  - (3) Distinctive characteristics and the like: *Pangarova v. Nichols*, 419 P.2d 688, 692 (1966) included among its reasons for admitting letters the fact that "a substantial number contain acknowledgments by each of the receipt of letters written by the other."
  - (4) Voice identification: *State v. Parmely*, 65 Wyo. 215, 199 P.2d 112, 116 (1948) stated that "the usual rule in admitting in evidence a telephone conversation is that in the absence of some proof of the identity of the speaker the declaration is not competent." Presumably the reverse would also hold true.
  - (5) Telephone conversations: No case has dealt specifically with the situations expressed in this rule although *State v. Parmely*, 65 Wyo. 215, 199 P.2d 112, 116 (1948) does involve a telephone call.
  - (6) Public records or reports: *Hecht v. Acme Coal Co.*, 19 Wyo. 10, 113 P. 786, 790 (1911); *Pool v. Baker*, 23 Wyo. 539, 154 P. 328, 329 (1916); *Atlas Realty Co. v. Rowray*, 51 Wyo. 318, 65 P.2d 1122, 1128 (1937); *Universal Credit Co. v. Wyoming Motor Co.*, 59 Wyo. 80, 136 P.2d 512, 516 (1943). All these cases adopt the view expressed in this rule.
  - (7) Ancient Documents: The closest any Wyoming court has come to a discussion of the authentication of ancient documents can be found in *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 100 P.2d 124, 136 (1940). The rule makes 20 years the determinative date for ancient documents, but the common law period was 30 years; however, Wyoming has never expressed a specific period necessary to make a document ancient for authentication purposes.
  - (8) Process or System, See Note, 3 WYO. L.J. 221 (1949).
  - (9) Methods provided by statute or rule: This is a catch-all provision which allows the legislature to establish other illustrations of factual evidence necessary to authenticate evidence to be admitted.

methods of authentication authorized by Acts of Congress are not to be superceded. This rule should be adopted in Wyoming but modified so that it applies equally to provisions of the Wyoming legislature.

*Rule 902: Self-Authentication.* Rule 902 lists ten specific circumstances in which authentication will not be required.<sup>12</sup> Again, the Rules have essentially adopted the approach established by case law and statutes.<sup>13</sup>

Because most of these categories are so similar to Wyoming case and statutory law and are self-explanatory, only limited comments on each are made below:

*Domestic public documents under seal and not under seal.* Rules 901(1) and (2) authenticate both official public documents under seal and not under seal when they are properly signed and certified as official documents of the enumerated entities.<sup>14</sup> Under Rule 44(a)(1) of the Wyoming Rules of Civil Procedure, the same result is accomplished, although the wording is different.<sup>15</sup>

*Foreign public documents.* Rule 902(3) is derived from Rule 44(a)(2) of the Federal Rules of Civil Procedure<sup>16</sup> which is also the basis for Rule 44(a)(2) of the Wyoming Rules of Civil Procedure.<sup>17</sup> The Wyoming Rule is very similar to this self-authenticating category.

12. FED. R. EVID. 902.

13. FED. R. EVID. 902, Adv. Comm. Note.

14. FED. R. EVID. 902(1) and (2).

15. WYO. R. CIV. P. 44. Proof of Official Record.

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Island, or the Ryuku Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

16. FED. R. EVID. 902(3), Adv. Comm. Note.

17. WYO. R. CIV. P. 44. Proof of Official Record.

(a) Authentication

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publi-

*Certified copies of public records.* Copies of public documents are deemed authentic if properly certified by a person authorized to do so. Rule 44(a) of the Wyoming Rules of Civil Procedure and Section 1-161 of the Wyoming Statutes both authorize certified copies of public documents to be admissible as prima facie evidence of the contents of such documents.<sup>18</sup>

*Official publications.* Section 1-161 of the Wyoming Statutes limits self-authenticating books, pamphlets and other publications to those in any of the executive departments of the United States, authenticated under the seals of such department.<sup>19</sup> Rule 902(5) goes beyond the Wyoming Statute. However, the Advisory Committee states that Rule 44(a) of the Rules of Civil Procedure has been to the same effect.<sup>20</sup> Thus, Wyoming Rule 44(a) may fulfill the purpose intended by the Advisory Committee.

*Newspapers, periodicals, trade inscriptions and the like.* Because of the minimal risk of forgery, Rule 902(6) and

---

cation thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

18. WYO. STAT. § 161 (1957).

Certified copies of records as evidence. A certified copy of any paper or record under the hand and seal of the officer who, by the laws of this state, has the legal custody of such paper or record shall be competent evidence in any court to prove, and shall be prima facie evidence of, the contents of such paper or record. Copies of any books, records, papers, documents in any of the executive departments of the United States, authenticated under the seals of such departments, respectively, shall be admitted as prima facie evidence of the originals thereof.

19. WYO. STAT. § 161 (1957).

20. FED. R. EVID. 902(5), Adv. Comm. Note.

Rule 902(7) ease the common law requirements of authentication for newspapers, periodicals, inscriptions, signs, tags, or labels as detailed and explained within these two Rules.<sup>21</sup> A strict application of the common law requirements result in decisions like the one found in *Keegan v. Green Giant Co.*<sup>22</sup> In this case the plaintiff sued for injuries resulting from eating peas from a can which was encircled by the label of the defendant. The Maine court refused to admit the labeled can as evidence that the defendant was the packer, manufacturer or distributor of the contents of the can. A strong dissent raised the same minimal risk of fraud arguments which the Advisory Committee's note expressed. The Rules appear to accept the label as authentic, unless the opponent shows that it is a forgery and not admissible. To shift the burden of proof to the opponent of the evidence is not unrealistic in today's marketing system where labels on packaged goods are readily accepted by consumers.

Wyoming has no statutory or case law in these areas; however, since the need for an authentication requirement is slight due to the minimal risk of forgery, the Wyoming courts should not be adverse to adopting these categories of self-authenticating evidence.

*Acknowledged documents.* In virtually every state, acknowledged documents of title are received in evidence without further proof.<sup>23</sup> Wyoming is no exception.<sup>24</sup> The only

---

21. FED. R. EVID. 902(6) and (7), Adv. Comm. Note.

22. 150 Me. 283, 110 A.2d 599 (1954).

23. FED. R. EVID. 902(8), Adv. Comm. Note.

24. WYO. STAT. § 34-23 (1957).

Admissibility of conveyance or record thereof as evidence. All deeds, mortgages, conveyances or instruments of any character, concerning any interest in lands within this state, which shall be executed, acknowledged, attested or proved in accordance with the provisions of this act or the laws of this state, or the local laws of any mining district wherein such real estate is situate, in force at the date of such acknowledgment, attestation or proof, may be read in evidence, without in the first instance additional proof of the execution thereof, and the record of any such deed, mortgage, conveyance or instrument, whether an original record of any mining district, or a copy thereof deposited in the register's [county clerk's] office of any county, in accordance with the laws of this state (as a part of the records of such mining district) or a record of such recorder's office, when the same appears by such record to be properly acknowledged, attested or proved in accordance with the laws of this state, or of the proper mining district in force at

limitation in Wyoming is that the acknowledgment be made in accordance with the provisions of the statute.

*Commercial paper and related documents.* The term "general" commercial law as used in Rule 902(9) refers to the Uniform Commercial Code which has been adopted in Wyoming and every other state but Louisiana.<sup>25</sup> Documents covered by Sections 1-202, 3-307, 3-510, 8-105(2) of the Uniform Commercial Code are treated as self-authenticating under Rule 902(9).<sup>26</sup> Thus, the corresponding sections of Wyoming's Uniform Commercial Code would be similarly treated under Rule 902(9).<sup>27</sup>

*Presumptions under Acts of Congress.* Rule 902(10) is self-explanatory and leaves open to the Congress the power to declare any signature, document or other matter prima facie authentic. This provision could apply as well to state legislatures if so worded in the Rules upon adoption by the state, and would preserve all statutory presumptions created by the legislature and not considered by the Rules.

*Rule 903: Subscribing Witness' Testimony Unnecessary*

Rule 903 abolishes the common law requirement that attesting witnesses be produced or accounted for except with respect to documents which are required by state law to be witnessed in order to be valid.<sup>28</sup> Today, it is the practice of most courts to allow the proof of execution of attested documents in the same manner as that of unattested ones, except where a statute expressly requires that the attesting witnesses be called.<sup>29</sup>

---

the date of such acknowledgment, attestation or proof, or a transcript from any such record, certified by the register [county clerk] of the proper county where such deed, mortgage, conveyance or instrument ought by law to be recorded, may, upon the affidavit of the party desiring to use the same, that the original thereof is not in his possession or power to produce, be read in evidence with like effect as the original of such deed, mortgage, conveyance or instrument properly acknowledged, attested or proved as aforesaid, but the effect of such evidence may be rebutted by other competent testimony.

25. WYO. STAT. § 34-1-101 through § 34-10-105 (Supp. 1975).

26. WEINSTEIN, ¶ 902(9)[02] at 902-35.

27. WYO. STAT. § 34-1-202 § 34-3-307, § 34-3-510, § 34-8-105(c) (Supp. 1975).

28. FED. R. EVID. 903, Adv. Comm. Note.

29. WEINSTEIN, ¶ 903[01] at 903-12.

Although no recent Wyoming case has expressly adopted this rule of evidence, the Wyoming court in *Boswell v. Bank* did allude to this modern trend, when it stated:

We have assumed without deciding that the instrument is one requiring the attestation of a witness. Though the common law rule applies to private writings generally bearing the signature of an attesting witness, it has not been adhered to very strictly in this country in the case of instruments not required by law to be witnessed, even if witnessed in fact.<sup>29</sup>

### *Conclusion*

Because Article IX is a codification of the case law and statutes of the majority of jurisdictions and the problem of authentication as dealt with by this Article raises no significant controversies, the State of Wyoming should adopt this Article in its entirety. Additionally, the adoption of the Rule would give legislative guidance to the courts in dealing with those situations undecided to date and would give to the State's legal profession an easily accessible and organized presentation of evidentiary law to be applied in Wyoming courts.

## ARTICLE X: CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

### A. *The Best Evidence Rule*

Historically, the "best evidence rule" was a very liberal principle merely requiring the courts to receive "the best proof that the nature of the thing will afford."<sup>1</sup> However, this principle eventually was unwisely expanded to require a man to produce the best evidence that is available—second best would not do. Although commentators during the 18th century and the better part of the 19th century argued that

---

Copyright© 1977 by the University of Wyoming

29. 16 Wyo. 161, 92 P. 642 (1907).

1. *Ford v. Hopkins*, 91 Eng. Rep. 250 (1700).

this expanded doctrine applied to all evidence, the courts never adopted this argument as an accurate statement of the governing law.<sup>2</sup> The courts' approach was to treat the best evidence rule as being applicable only to a situation where, if the contents of a writing are to be proved, the original writing must be produced.<sup>3</sup>

Today, the only rule is that "in proving the terms of a writing, where the terms are material, the original must be produced unless it is shown to be unavailable for some reason other than the serious fault of proponent."<sup>4</sup>

This modern rule is justified for several reasons. First, in many cases the exact words of the writing are of paramount importance, particularly where a contract, deed, or will is involved. Second, when oral testimony as to the terms of writing is given, it is subject to error since the witness relies on memory. Third, the traditional methods of reproduction of writings were unreliable. Finally, the use of the original greatly reduces the possibility of fraud. Although the great enlargement of the scope of discovery and related procedures has measurably reduced this justification for the rule, important areas of usefulness exist.<sup>5</sup>

### B. *Application of the Best Evidence Rule under the Federal Rules of Evidence*

Generally, Rule 1002 is a restatement of the modern "best evidence" rule. Its only variance from the traditional rule is that it expands the requirement of an original to include photographs and recordings as well as writings. With the new modes of communication developed since the inception of the traditional rule, this expansion was deemed necessary because "the essential form which the information ultimately

---

2. MCCORMICK § 229 at 559. [hereinafter cited as MCCORMICK].

3. *Id.* at 559-60.

4. *Id.* at 560.

5. FED. R. EVID. 1001, Adv. Comm. Note. The Advisory Committee includes as important areas of usefulness 1) the discovery of documents outside the jurisdiction may require substantial outlay of time and money, 2) the unanticipated document may not practically be discoverable, and 3) criminal cases have built in limitations on discovery.

assumes for useable purposes is words and figures.”<sup>6</sup> The definition of writings, recordings and photographs in Rule 1001(1) and (2) “are designed to end controversies over whether specific items are amenable to the best evidence rule.”<sup>7</sup>

The purpose of Rule 1002 is to require the original writing when the contents of the writing are to be proved. One difficulty which may arise under the Rule is the determination of whether the contents of a writing are sought to be proved. The rule applies if an event is sought to be proved by the written record rather than by non-documentary evidence which is available.<sup>8</sup> Because application of the rule is often difficult to determine, the following enumeration by Weinstein of situations when the rule does not apply may be useful:

The best evidence rule does not apply when a witness refreshes his memory with a document, when an expert resorts to material as a basis for his opinion, or when a witness testifies that examined books or records do *not* contain a particular entry. . . . [or, when] an event does not take the form of a writing, and is only incidentally put in writing, . . . the witness may testify to the underlying event.<sup>9</sup>

Because Rule 1002 by itself is susceptible to the possibility of an excessively technical application by the courts, the remainder of the Rules in Article X include built-in exceptions to prevent this possibility.<sup>10</sup>

(1) Rule 1001(4) gives accurate copies the status of duplicates which will ordinarily be admissible as originals under Rule 1003.<sup>11</sup> Traditionally, use of the copies of originals had to be satisfactorily explained by the proponent of the evidence. The major justifications for this approach were the imperfection of copying techniques and the fear of

---

6. FED. R. EVID. 1001(1), Adv. Comm. Note.

7. WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, ¶ 1001[02], at 1002-5 (1975) [hereinafter cited as WEINSTEIN].

8. FED. R. EVID. 1002, Adv. Comm. Note.

9. WEINSTEIN, ¶ 1002[03], at 1002-9 to 1002-10.

10. WEINSTEIN, ¶ 1002[02], at 1002-7.

11. FED. R. EVID. 1001(4), Adv. Comm. Note.

fraud. With the development of modern reproduction methods and pre-trial discovery devices, these justifications have been reduced to the point that modern commentators question the traditional approach. McCormick states:

Insofar as the primary purpose of the original documents requirements is directed at securing accurate information from the contents of material writings, free of the infirmities of memory and the mistakes of hand-copying, we may well conclude that each of these forms of mechanical copying is sufficient to fulfill the policy. Insistence upon the original, or accounting for it, places costs, burdens of planning and hazards of mistake upon the litigants.<sup>12</sup>

Rule 1003 represents an adoption of this modern thinking and presumes that a duplicate, as defined in Rule 1001(4), is admissible, unless the party opposing the evidence raises questions of authenticity or shows that its admission would be unfair in the particular circumstances. The result of the rule is that "when the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original."<sup>13</sup>

(2) Rule 1005 recognizes that public records call for different treatment because their removal would result in serious inconvenience to the public and to the custodian.<sup>14</sup>

(3) Rule 1006 recognizes that the admission of summaries of voluminous books, records or documents offers the only practical means of making their contents available.<sup>15</sup>

(4) "Rule 1004(1) to (3) codifies situations in which the original cannot be produced but its production is nevertheless excused."<sup>16</sup>

(5) Rule 1004(4) does not require the original when it is not closely related to the subject matter, because its production will not therefore serve any good purpose.<sup>17</sup>

---

12. MCCORMICK § 236 at 569.

13. FED. R. EVID. 1003, Adv. Comm. Note.

14. FED. R. EVID. 1005, Adv. Comm. Note.

15. FED. R. EVID. 1006, Adv. Comm. Note.

16. WEINSTEIN, ¶ 1002[02] at 1002-7 to 1002-8.

17. FED. R. EVID. 1004(4), Adv. Comm. Note.

(6) Rule 1007 allows proof of the contents of a written or testimonial admission by the party against whom offered, without accounting for nonproduction of the original.<sup>18</sup>

(7) Rule 1002 includes an exception to its application where provided otherwise by Acts of Congress.

With the many safeguards against an over-technical application of Rule 1002, the requirement of the original will be limited to those situations in which contents are in fact sought to be proved.

[W]hen there is any doubt, the secondary evidence should be admitted, leaving it to the jury to determine probative force discounted by the failure to produce an original. Reversals for admission will be rare to the vanishing point since almost never is there real prejudice that the opponent can not overcome.<sup>19</sup>

### C. *Comparison of the Federal Rules of Evidence to Wyoming Jurisprudence*

Although the Wyoming courts have often referred to "the best evidence" in opinions without defining the term,<sup>20</sup> the court in *Harned v. Credit Bureau of Gillette* finally stated the rule for Wyoming when it declared:

The best evidence rule requires that the original or primary evidence of an obligation be produced, and no evidence which is secondary or substitutionary shall be received if the original evidence can be had. The terms of a document must be proved by production of the document itself in preference to evidence about the document.<sup>21</sup> (Emphasis added).

In the above quoted language the court referred to the evidence of an "obligation." "Obligation" has connotations far

18. FED. R. EVID. 1007, Adv. Comm. Note.

19. WEINSTEIN, ¶ 1002[02], at 1002-9.

20. See, *Cullyford Co. v. Joss*, 35 Wyo. 10, 246 P. 27, 28 (1926); *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 P. 624, 630 (1907); *Cooley v. Frank*, 68 Wyo. 450, 235 P.2d 446, 450 (1951).

21. *Harned v. Credit Bureau of Gillette*, 513 P.2d 650, 652 (1973).

beyond a writing; however, the next sentence in the quoted passage refers specifically to documents and since the objection made in this case was to a written summary of invoices allegedly establishing the obligation, it seems reasonable to assume that the court was limiting the rule to writings.

The major difference between the Wyoming "best evidence rule" and Rule 1002 is the inclusion under Rule 1002 of recordings and photographs. In *Harned v. Credit Bureau of Gillette*, the Wyoming Supreme Court alluded to the "frightening prospect" of a plaintiff basing his claim solely upon recapitulations of computer printout sheets.<sup>22</sup> This awareness by the Court of modern communication methods and the need to control their use as evidence indicates that the concept behind Rule 1002 could meet with approval from the court.

The question now arises as to whether the Wyoming Supreme Court is equally willing to limit the best evidence rule to situations where "the terms of the documents must be proved." The *Harned* court acknowledged that "like all rules it has exceptions born of practical considerations."<sup>23</sup> By then referring the reader to the discussion found in *Jones on Evidence*<sup>24</sup> which details the numerous exceptions to the rule found in the common law, the court indicated its approval of the common law exceptions. In addition, the Wyoming Court has applied several of the exceptions listed in the above treatise.<sup>25</sup>

Similarly, the exceptions to Rule 1002 found in Rules 1004 through 1007 also track the common law exceptions

---

22. *Id.* at 652.

23. *Id.*

24. JONES, 2 EVIDENCE, 83 (6th ed. 1972).

25. *Cullyford Co. v. Joss*, 35 Wyo. 10, 246 P. 27, 28 (1926); *Caswell v. Ross*, 27 Wyo. 1, 188 P. 977 (1920) (Original lost and proponent acted in good faith); *First National Bank v. Ford*, 30 Wyo. 110, 216 P. 691, 699 (1923) (Discussion of notice to produce exception found in Rule 1004(3)); *Truck Terminal, Inc. v. Nielsen*, 80 Wyo. 223, 339 P.2d 413, 420 (1959) (Writing not closely related to payment of money; therefore, payment of money may be proved by parol without accounting for absence of receipt evidencing such fact); WYO. STAT. § 1-175 (1957) (Proof of original public document by use of a copy); *Northern Gas Co. v. El Fancho Verde, Inc.*, 332 P.2d 59, 64 (1958); *Harned v. Credit Bureau of Gillette*, 513 P.2d 650, 652 (1973) (Admission of summaries when production of originals would be burdensome); *Henderson v. Kirby Ditch Co.*, 373 P.2d 591, 594 (1962) (Copy of original letter admitted in light of opponent's admission that he received it.)

which have developed.<sup>26</sup> The only variance with the common law which can be found is the Advisory Committee's Note to Rule 1004 which states that the rule recognizes no "degrees" of secondary evidence.<sup>27</sup> While recognizing the Secondary evidence exception expressed in Rule 1004, majority of jurisdictions in the United States recognize a distinction between types of secondary evidence with a written copy being preferred to oral testimony and an immediate copy generally preferred to a more remote one.<sup>28</sup> The adoption of this minority view is justified by the argument that the same result will be achieved "through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not."<sup>29</sup> The above analysis indicates that with the exception of Rule 1003 the concept behind the rules is not generally adverse to the direction being taken by the Wyoming courts.

Article X represents an adoption by the Federal Rules of Evidence of the common law "best evidence" rule as applied in most jurisdictions today. The minority views adopted are the ones expressed in Rule 1003 and in the notes to Rule 1004, as detailed above. If the minority position to Rule 1004 is undesirable, an express adoption of the "preference" rule could be adopted by the Wyoming legislature. Rule 1003 presents a more realistic view of the treatment of duplicates which are routinely accepted in every phase of society today, except in the courts. It does not make duplicates per se admissible, but it places the burden on the opponent to show why they should not be admitted. Since in most instances no question will arise, it seems reasonable to so transfer the burden. For these reasons, Article X of the Federal Rules of Evidence should be adopted by Wyoming.

S.B.F.

---

26. For a more detailed discussion of the common law, see generally, those sections in McCormick cited by the Advisory Committee in its notes to Rules 1004 through 1007.

27. FED. R. EVID. 1004, Adv. Comm. Note.

28. MCCORMICK § 241, at 576 (2d ed. 1972).

29. FED. R. EVID. 1004, Adv. Comm. Note.

## APPENDIX

### ARTICLE IV. RELEVANCY AND ITS LIMITS

#### RULE 401.

##### *Definition of "Relevant Evidence"*

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### RULE 402.

##### *Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible*

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

#### RULE 403.

##### *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time*

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### 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 purpose 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 character 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 or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. 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 character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct.

#### RULE 406.

##### *Habit; Routine Practice*

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

#### RULE 407.

##### *Subsequent Remedial Measures*

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

#### RULE 408.

##### *Compromise and Offers to Compromise*

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented

in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

#### RULE 409.

##### *Payment of Medical and Similar Expenses*

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

#### RULE 410.

##### *Inadmissibility of Pleas, Offers of Pleas and Related Statements*

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

#### RULE 411.

##### *Liability Insurance*

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

## ARTICLE V. PRIVILEGES

#### RULE 501.

##### *General Rule*

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of

reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

## ARTICLE VIII. HEARSAY

### RULE 801.

#### *Definitions*

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if—

(1) *Prior statement by witness.* 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 the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) 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 (C) one of identification of a person made after perceiving him; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

### RULE 802.

#### *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.

## RULE 803.

*Hearsay Exceptions; Availability of Declarant Immaterial*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

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

(5) *Recorded collection.* 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.

(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 to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(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.

(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 matters 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.

(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.

(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 publication.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises.* 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 testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(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 the community, and reputation as to vents 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.

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

(24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent cir-

cumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

#### RULE 804.

##### *Hearsay Exceptions; Declarant Unavailable*

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

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

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, 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.

(b) *Hearsay exceptions.* 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.

(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.

(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 civil or criminal liability, or to render invalid a claim by him against another, 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.

(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) 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.

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

#### 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.

## RULE 806.

*Attacking and Supporting Credibility Declarant*

When a hearsay statement, or a statement defined in Rule 801 (d) (2), (C), (D), or (E), 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.

## ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

## RULE 901.

*Requirement of Authentication or Identification*

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including

self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

#### RULE 902.

##### *Self-Authentication*

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness or signature and official position re-

lating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions under Acts of Congress.* Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

#### RULE 903.

##### *Subscribing Witness' Testimony Unnecessary*

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

## ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

#### RULE 1001.

##### *Definitions*

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

#### RULE 1002.

##### *Requirement of Original*

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

#### RULE 1003.

##### *Admissibility of Duplicates*

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

#### RULE 1004.

##### *Admissibility of Other Evidence of Contents*

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise,

that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) *Collateral matters*. The writing, recording, or photograph is not closely related to a controlling issue.

#### RULE 1005.

##### *Public Records*

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

#### RULE 1006.

##### *Summaries*

The contents of voluminous writing, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

#### RULE 1007.

##### *Testimony or Written Admission of Party*

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

#### RULE 1008.

##### *Functions of Court and Jury*

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.