22 SWULR 1039
(Cite as: 22 Sw. U. L. Rev. 1039)

Southwestern University Law Review
1993

***1039** AN OVERVIEW OF RELEVANCE AND HEARSAY: A NINE STEP ANALYTICAL GUIDE

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

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

The nine steps (questions) are: (1) What is the evidence? (2) What is the evidence offered to prove? (3) Does the evidence help? This third question may, for ease of analysis, be broken into two subdivisions: (a) Does the evidence offered tend to make some assertion of fact at issue in the case more or less likely to be true, than if the evidence is not admitted?; (b) How does the evidence tend to prove that for which it is offered? (4) Even if the evidence helps, is its probative value (i.e., its ability to prove an assertion of fact at issue) substantially outweighed by the danger ***1040** of unfair prejudice, confusion of the issues, possibility of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? This question, presented in Federal Rule of Evidence 403, requires a balancing of the costs and benefits of logically

relevant evidence (this balancing concept will be referred to herein as the Rule 403 balancing test). These first four questions constitute the analysis for logical relevance and the Rule 403 balancing test.

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

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

1. What is the evidence?

Although it seems self-evident, this question must be answered before the next steps in the analytical process may be pursued. Do not skip this step or go on to the subsequent questions without first articulating what the evidence is. If more than one item of evidence in question exists, be sure to isolate each piece, each component. The best approach is to make a list of each item of evidence (i.e., is it a statement, a document, or a piece of physical evidence?).

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

***1041** 2. What is the evidence offered to prove?

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

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

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

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

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

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

***1042** A. Logical Relevance Defined

The modern approach to relevance breaks the definition into two components: logical relevance [FN3] and the Rule 403 balancing test. [FN4] Moreover, the modern view is that all relevant evidence is admissible, unless excludible for some reason other than irrelevancy, and all evidence that is irrelevant is inadmissible. [FN5] So, " 'relevant evidence' [logically relevant] means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [FN6] Evidence is logically relevant if it makes the fact of consequence more likely or less likely. So, the evidence may tend to prove or disprove the fact for which it is to be considered.

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

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

A few points are worth noting here. First, the evidence will be logically relevant if it has any tendency (even the slightest) to make the fact of consequence more or less likely. [FN9] Thus, the evidence does not have to ***1043** conclusively prove the fact. The evidence does not even have to prove the fact clearly, beyond a reasonable doubt, or to a certainty. Perhaps the best exposition of this legal reality is McCormick's observation that: "A brick is not a wall." [FN10] Whether the evidence is quantitatively enough to sustain the proponent's burden of proof goes to the sufficiency or the weight of the evidence, and is an altogether different question from whether the evidence is relevant. [FN11] Thus, if insufficient admissible and relevant evidence (a brick) is introduced on a point on which the proponent of the evidence bears the burden of proof, the proponent will lose that point and

the case (the wall) even though all the evidence tended to prove that point.

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

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

Now, considering all the various factors subsumed under the rubric, "logical relevance," (i.e., (1) the evidence need only make the fact more or less likely; (2) "A brick is not a wall"; and (3) how the evidence "tips the scales,") the result is that one need only be able to show that some ***1044** likelihood is evident that the fact exists or does not exist from the evidence offered. This determination is all that the law requires by its definition of logical relevance.

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

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

The crucial point here is that unless the premise is articulated, one cannot focus on why the evidence has some tendency to prove or disprove the fact for which it is offered. Thus, the question, "does the evidence help?" must be answered with an analysis of how the evidence helps, put in a syllogistic

form, or at least in some form that articulates the otherwise unarticulated premise. For example, one who is seen running away from a building where a burglar alarm is ringing (and that building has been broken into), is more likely to be the burglar than if one had not been seen running from the building. [FN14] The premise will usually begin with a generalization, such as, "one who ..." or "people ***1045** who...." Actually, in this example, the underlying, unarticulated premise is "people who flee from the scene of a crime are more likely guilty than if they did not flee."

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

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

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

***1046** Another example will help. [FN17] The evidence is that after P's injury at D's machinery, D repaired the machinery. The evidence is offered to prove that D was conscious of negligence. The unarticulated premise is: People who make repairs of machinery after an accident show a consciousness of negligence. [FN18] D made such repairs. Therefore D was conscious of negligence, which tends to prove D's negligence. [FN19]

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

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

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

Rule 403 is, by its terms, a balancing test for the admissibility of ***1047** evidence. The cost of admission of otherwise relevant evidence is to be balanced against its probative worth, or benefit. Accordingly, the analysis is one of cost-benefit. If photographs of the victim of a murder are offered to prove the fact of death or even its cause, the court would have to balance the probative value against the potential for unfair emotional appeal to the jury that the pictures might have.

Some types of evidence recur in enough cases to warrant the creation of a special rule for this type of problem. [FN23] In such cases, rules have been established that predetermine the policy balance and state how such evidence should be treated.

Examples of such rules are those dealing with evidence of character, [FN24] habit (or routine practice), [FN25] subsequent remedial measures, [FN26] compromise and offers to compromise, [FN27] payment of medical and similar expenses, [FN28] withdrawn pleas of guilty (or nolo contendere) and related discussions, [FN29] evidence related to liability insurance, [FN30] and rules determining the admissibility of evidence of a rape victim's past behavior. [FN31] All of these specific rules are particularized applications of the balancing test notion of Rule 403.

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

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

***1048** 5. Is the evidence a statement?

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

The first step in our inquiry is to determine whether the evidence is a statement. Of concern here is the legal definition from the Federal Rules of Evidence, [FN34] not the lay concepts of what a statement might be. By inquiring whether the evidence is a statement, the first element of the definition of hearsay is considered. If the conclusion is that the evidence is not a statement, then the evidence is not hearsay for that reason. Said another way, the evidence is definitionally excluded from the

hearsay rule. The hearsay inquiry in that event is thus terminated. If the conclusion is that the evidence is a statement, the analysis must further continue on to determine whether the statement fits within other aspects of the definition of hearsay. Not all evidence in the form of a statement is hearsay evidence, as shall be seen. When the conclusion is that the evidence is not hearsay because it is not a statement, such conclusion was reached under the definition of what is a statement in the hearsay rule.

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

The definition talks about intent to assert on the part of the declarant when acting, speaking or writing. Such assertions constitute statements within the definition of a statement of the hearsay rule. As the drafters of the Federal Rules noted, "the key to the definition is that nothing is an assertion unless intended to be one." [FN36] Most verbal evidence ***1049** is easily determined to be a statement within the definition. However, sometimes people say or do something without intending to assert. Perhaps they ask a question, or give a direction, or just act in a way that communicates a belief, but is not a direct assertion. [FN37] In such an instance, if the action was not intended as an assertion, then the conduct is not a statement within the definition of hearsay. Such "nonassertive conduct" as a matter of definition is not hearsay; it is not a statement, because it is not intended as a statement.

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

Evidence, [FN40] because the ship captain's conduct constitutes what is known as nonassertive conduct. [FN41]

***1050** Actually, the form of such nonassertiveness on the part of the actor (or declarant) need not be conduct. It may be words and conduct together, or words alone. [FN42] Nonetheless, this category of nonstatement/nonhearsay is widely known as nonassertive conduct. [FN43]

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

That such conduct or utterances are not hearsay is the result intended by the Federal Rules of Evidence. But, that result is not without controversy. In fact, there has been a debate on this point ever since the earliest discussions of the decision in Wright v. Doe dem. Tatham. [FN44] However, the drafters of the Federal Rules have adopted the conclusion of McCormick that

> conduct (other than assertions) when offered to show the actor's beliefs and hence the truth of the facts so believed, being merely analogous to and not identical with typical hearsay, ought to be admissible whenever ***1051** the trial judge in his discretion finds that the action so vouched the belief as to give reasonable assurance of trustworthiness. [FN45]

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

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

Moreover, because the preliminary question of fact (intent) is one determining the admissibility of evidence, not merely a question of conditional relevancy, it is a question for the judge

under Federal Rule of Evidence 104(a), not for the jury under Federal Rule 104(b). [FN47]

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

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

The next step, or question, in the process is simply an application of the heart of the definition of hearsay using the language of Rule 801(c) of the Federal Rules of Evidence. [FN49] Rule 801(c) provides that "a statement [as defined in Rule 801(a)], other than one made by the declarant while ***1052** testifying, is hearsay if it is offered to prove the truth of the matter asserted." [FN50] The inquiry requires a determination whether the words contained in the statement (or the import of the conduct which is assertive) are only relevant if they are true. Actually, the analysis for this step is the same as the analysis of relevance in the first three. All that is necessary now is to adapt the relevance analysis to the definition of hearsay! [FN51]

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

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

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

***1053** The hearsay rule is designed to eliminate the repetition in court of statements by out-of-court declarants without the opportunity for cross- examination [FN53] and observation by the jury. The testimony of every witness involves elements for the jury's review relating to perception, memory, narration and sincerity. [FN54] The hearsay rule seeks to eliminate or overcome the risks involved when a jury hears evidence of such statements without the opportunity to observe the declarant's demeanor, evaluate the declarant's ability to perceive, remember, narrate and be sincere, and to consider the effect of cross-examination. In short, the hearsay rule seeks to overcome these hearsay risks by either excluding such evidence or only letting it in if the risks are balanced by other factors. [FN55]

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

Another category of statements that are exempted from the hearsay rule under the Federal Rules of Evidence are witnesses' prior statements and admissions by a party opponent. [FN56] The first exclusion category, of ***1054** course, includes evidence that is not a statement, either because no statement was involved or because the evidence constituted nonassertive conduct or words. By contrast, in the following examples, the evidence excluded from the hearsay rule are statements, but they are not offered for the truth of the matter asserted (NOTMA). They fall into the following subcategories: (a) operative legal facts; (b) state of mind of the auditor; (c) state of mind of the declarant (circumstantial state of mind); (d) state of mind (knowledge) of the declarant on the "traces of the mind" theory; and (e) evidence that is otherwise not offered for the truth of the matter asserted (NOTMA), but to prove something else.

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

A. Operative Legal Fact

Statements that are legally operative "create or extinguish legal rights, powers, or duties." [FN58] This category, known as operative legal facts, is also sometimes known as "verbal acts"

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

One example of an operative legal fact that is easy to understand is ***1055** an offer in a contract of sale. If A says to B, "I offer to sell you 20 widgets for $50," the words uttered by A are significant merely because they were uttered. The words create in B the power to form a contract and constitute an element of a contract for sale. The statement need not be true to be probative of the fact of the formation of a contract. It is true that the words need to have been uttered, but this requirement may be proven by any witness who heard A speak. Such a witness could testify about hearing A utter the words, and then the witness could be cross-examined as to perception, memory, sincerity and clarity of communication. [FN63] If the witness was believed, an element of the contractual relationship would be proven by the mere fact that the words were uttered.

Some other examples also demonstrate that words of operative legal effect need only be uttered to be relevant: e.g., words of donative intent accompanying the delivery of a gift; [FN64] solicitation of a bribe; solicitation for prostitution; [FN65] the utterances that constitute a slander; and the speaking of marriage vows. [FN66] Note that often, though not always, the operative legal fact utterance is an element of a crime, tort or contract.

B. State of Mind of the Auditor [FN67]

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

***1056** Basically, a state of mind is, as the words suggest, what is in a person's head. Since we cannot see what is in a person's mind, we can only know their state of mind by what they say and do. This exclusion is the evidentiary application of the maxim "actions speak louder than words." Thus, it makes sense that we should consider evidence (words, conduct, or both) reflecting an individual's state of mind to be statements.

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

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

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

Other examples include being put on notice or having knowledge; [FN75] showing motive; [FN76] or showing how the information that one possessed ***1057** had a bearing on the reasonableness, good faith or voluntariness of that person's subsequent conduct. [FN77] For example, this information includes claimed grounds for fear of the victim asserted by the accused in a homicide case to support a claim of self-defense based on reasonable apprehension of danger. [FN78]

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

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

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

If a woman were to tell her husband that she has been having an affair with another man, the utterance, by the mere fact it was made, shows that the woman has lost affection for her husband. If offered for that purpose, then the utterance would not be hearsay. The words spoken need not be true to prove that affection is lacking. She need not in fact be having an affair; saying such a thing to one's spouse demonstrates a lack of affection. [FN80] On the other hand, if the wife said, "I have lost my ***1058** affection for you," that utterance is a direct assertion of her state of mind. Such an assertion is a statement, and thus hearsay.

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

This subcategory of exclusion from the hearsay definition as a statement not offered for the truth of the matter asserted (NOTMA) is probably no different from nonassertive conduct discussed previously. [FN84] In fact, analytically this category

is not offered for the truth of the matter asserted because the mere fact of the words having been uttered is circumstantial proof of a fact, just like the situation with nonassertive conduct. Also, just as with nonassertive conduct, the reason the utterance tends to prove the fact for which it is offered is that the utterance illustrates the declarant's belief in a condition necessary to support the inference that proves the point. [FN85] But, for the sake of ease of identification, it ***1059** is wise to note this subcategory of exclusion and to carve it out.

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

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

First, McCormick refers to "evidence that a person made statements indicating knowledge of matters likely to have been known only to X" to prove that the declarant was in fact X. [FN86] Another example is the oft-cited case of Bridges v. State, [FN87] discussed at length in McCormick when stating the "trace" of the mind or "knowledge" theory. [FN88] In Bridges, the defendant was charged with child molestation. [FN89] At his trial, the state sought to introduce evidence of statements of the victim, a child of seven, describing to her mother and a police officer several exterior and interior details of the house in which she was allegedly assaulted. [FN90] Other evidence showed that this description perfectly matched the house and room ***1060** where the defendant lived. [FN91] Therefore, the utterances were held not within the hearsay ban, but rather as a " 'trace,' as it were, on her mind of her visit at the time of the crime." [FN92] Said another way, the evidence is offered to show the

impression that some alleged external reality made upon the mind of the declarant, to prove that declarant perceived (or experienced) the external reality.

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

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

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

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

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

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

***1061** One must remember that all of the subcategories discussed in this section are particularized instances of utterances that are not offered for the truth of the matter asserted. They may be conveniently classified into subgroups because the type of circumstance in which they arise recurs with enough frequency to warrant separate treatment. However, they are merely examples, or

instances of evidence in the form of words or conduct, or a combination of words and conduct, which is relevant without being offered for the truth of the content.

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

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

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

The Federal Rules of Evidence create two categories of exceptions to the hearsay rules in Rules 803 and 804(b). [FN97] The exceptions in Rule 803 apply whether the declarant is available or not; those listed in Rule 804 only apply if the declarant is unavailable. [FN98] Twenty-three specific exceptions listed in Rule 803 and four specific exceptions listed in Rule 804(b) exist. [FN99] In addition, Rules 803(24) and 804(b)(5) provide for a ***1062** category of "other exceptions," sometimes known as the "equivalency," "catch-all," or "residual" exceptions. [FN100] Essentially, these "other exceptions" categories apply in unusual cases where the evidence does not quite fit into one of the traditional exceptions; yet, the evidence is very probative and necessary and has substantial guarantees of trustworthiness. Whether these "catch-all" exceptions should be liberally or strictly construed has been the subject of wide variation in the federal courts. [FN101]

In addition, the Federal Rules of Evidence Rule 801(d) exempts from the definition of hearsay two major categories of evidence

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

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

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

As discussed previously, [FN104] the hearsay rule and its exceptions and ***1063** exemptions are based on this rationale: Out-of-court statements are of suspect trustworthiness and probative value because the declarant was not under oath at the time the statement was made, and the declarant's perception, demeanor and veracity are not subject to cross-examination in front of a jury that can judge the credibility and weight to be given to the statement. The exceptions are based on the theory that some types of statements, because of the circumstances under which they are made, are sufficiently trustworthy and of such probative value that the risks of using hearsay are outweighed by the trier of fact's need to consider the evidence if a just and reliable result is to be obtained. [FN105] Rules 803(24) and 804(b)(5) are expressions of these theories.

The controversy over these residual exceptions centers mainly on how narrowly Congress intended them to be construed, since Rules 803(24) and 804(b)(5) were innovative when enacted and the parameters still are not known. The legislative history suggests they should be given a narrow scope. The House originally

rejected these exceptions. [FN106] The Senate adopted them and its views prevailed in Conference. [FN107] But the Senate Judiciary Committee's notes contain this caveat: "It is intended that the residual exceptions will be used very rarely and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions in rule 803 and 804(b)." [FN108]

The language of Rules 803(24) and 804(b)(5) lays out five requirements for admission of a hearsay statement that does not fall within a traditional exception. These requirements are: (1) "circumstantial guarantees of trustworthiness" that are "equivalent" to those underlying the other exceptions; (2) the statement is offered as evidence of a material fact (apparently, this excludes its use on collateral matters such as impeachment); (3) the statement is more probative on the issue for which it ***1064** is offered than other reasonably available evidence; (4) the general purposes of [the] rules and the interests of justice will be served; and (5) sufficient advance notice, including the declarant's name and address, of the intention to use the statement is given the adverse party to allow that party "a fair opportunity to meet it" [FN109] (presumably, this statement means an opportunity both to oppose the admission of the statement and to counteract its effects if admitted).

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

The appellate court held that admission was nonetheless proper because it was highly improbable that a small-town newspaper

reporter would fabricate such a story. [FN117] This result constitutes the "equivalent circumstantial guarantee of trustworthiness" required by the present rules. [FN118] The evidence was highly probative of a material fact--the cause of the damage to the courthouse--and was likely more probative than calling witnesses to testify about their memories of a relatively unremarkable fire that occurred more than fifty years before. [FN119] Finally, it was in "the interests of justice" [FN120] that the jury should hear the statement (the ***1065** account in the paper) and evaluate its weight because the story would not likely inflame or confuse the jury.

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

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

A major issue surrounding the use of the residual exceptions is whether statements that just miss falling within a traditional exception can nonetheless be admitted under Rules 803(24) or 804(b)(5). In a leading federal trial court decision, Zenith Radio Corp. v. Matsushita Electric Industrial Co., [FN129] the judge decided that Congress intended the residual exceptions to be used only in "exceptional and unanticipated" situations, and therefore should not be used in most "near miss" cases. [FN130] The Zenith court drew a distinction between "well-defined" traditional exceptions and "amorphous" ones, however, and opined

that "near misses" in the latter situations could be admissible. [FN131] The Third Circuit rejected ***1066** this formulation because it "puts the federal evidence rules back into the straitjacket from which the residual exceptions were intended to free them." [FN132] The status of the near miss doctrine was recently summarized by Professor Myrna Raeder: "Although many judges cannot recognize a near miss when they see it, those who can do not hesitate to apply the residual clauses to evidence that the drafters specifically considered and rejected. The rare language supporting the near miss theory is either in dicta [FN133] or has been overruled." [FN134]

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

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

First, focus on the circumstances surrounding the declarant when the statement was made. Look for "circumstantial guarantees of trustworthiness." Does the situation lend peculiar reliability to the statement? Does any bias or vested interest exist that would undermine the declarant's veracity? Please note that the United States Supreme Court's recent decision in Idaho v. Wright specifically held that corroboration is not a factor to be considered when evaluating trustworthiness for confrontation clause challenges. [FN137] Thus, even if the federal courts were to consider corroboration in deciding trustworthiness under the catch-alls, the courts would be in awkward position if the same evidence could not be introduced in a criminal case when the same court eliminates corroboration from its trustworthiness evaluation for confrontation clause ***1067** purposes. [FN138]

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

proposition)? What other evidence is available to the proponent?

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

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

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

In June, 1990, the United States Supreme Court held that Idaho's residual hearsay exception--nearly identical to Federal Rule 803(24)--was not a firmly rooted exception for Confrontation Clause purposes. In Idaho v. Wright, [FN139] the Court held that hearsay statements of a child allegedly molested by the defendant could not be admitted within the state's residual hearsay exception without violating defendant's Confrontation Clause rights. [FN140] This ruling underscores the necessity of coordinating ***1068** the analysis under the catch-alls with the confrontation clause analysis in a criminal case.

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

A. Confrontation Clause

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

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

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

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

***1069** However, the rule laid down in Roberts [FN145] appeared to have added a requirement that the prosecution must show that the declarant was unavailable before a hearsay statement was admissible. [FN146] In Roberts, the Ohio prosecution had introduced preliminary hearing testimony of the witness against the accused. [FN147] The United States Supreme Court found sufficient indica of reliability in that testimony to satisfy its newly fashioned Confrontation Clause test, but with the required showing of unavailability satisfied. [FN148] However, Rule 803

exceptions and Rule 801(d)(2) exemptions apply without regard to declarant's availability to testify at trial.

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

A number of important questions were left unanswered by Inadi. First, when, if ever, does the Confrontation Clause require a showing of ***1070** unavailability before an out-of-court declarant's statement, (other than those of co-conspirators) may be admitted at trial? Further, what is the relationship, if any, between the finding of reliability for satisfaction of the hearsay exceptions or exemptions and the finding of reliability for Confrontation Clause purposes? The Inadi Court used a reliability standard [FN157] to decide whether an unavailability rule for Confrontation Clause purposes should exist, while the Roberts Court utilized a reliability standard to answer Confrontation Clause questions, assuming a showing of unavailability.

In Bourjaily v. United States, [FN158] decided the year after Inadi, the Supreme Court again considered the admissibility of co-conspirators' statements over a claim of confrontation clause violation. Bourjaily argued that the "bootstrapping" [FN159] effect of considering the questioned co-conspirators' statements in order to decide whether to admit the same statements, caused the modern co-conspirators' exemption under the Federal Rules of

Evidence not to be a "firmly rooted" exception to the hearsay rule. [FN160] The result would be to require a finding of indicia of reliability in the questioned statement independent of the statement being qualified under the Federal Rules exemption. In Bourjaily, the Court held that the second prong of Roberts, independent indicia of reliability, was "not mandated by the Constitution," [FN161] since the "co-conspirator exception [sic] to the hearsay rule is firmly enough rooted in our jurisprudence ... [to meet the test] under this Court's ruling in Roberts...." [FN162]

Most recently, the United States Supreme Court considered the rules laid down in Roberts and Inadi as they relate to other "firmly rooted" exceptions to the hearsay rule. In White v. Illinois, [FN163] the Court rejected the appellant's assertion that Roberts required a declarant be produced at trial or be found unavailable before his out of court statement is admissible, unless the testimony was being introduced under the co-conspirator exception under Inadi. The White Court stated that the ***1071** testimony, which had been admitted at trial under both the spontaneous declarations and statements made for medical treatments exceptions, was admissible because it had sufficient guarantees of reliability and trustworthiness to satisfy the Confrontation Clause. [FN164] As in Inadi, the statements at issue were made in a context that could not be replicated in court. [FN165] Further, little benefit was to be gained by requiring availability. [FN166] Because the testimony was considered admissible under "firmly rooted" hearsay exceptions, the statements satisfied the Inadi criteria. [FN167]

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

In the recent case of Idaho v. Wright, [FN169] the United States Supreme Court considered questions relating to catch-all exceptions, unavailability requirements and Confrontation Clause complaints, in relation to hearsay evidence admitted against a defendant in a child molestation case. The Wright Court reaffirmed the principles set forth in Roberts and Inadi, and elucidated in Bourjaily. [FN170] Since the trial court had found

the child declarant in Wright incapable of communicating with the jury, no issue existed regarding the required showing of unavailability. [FN171] The Wright Court then considered whether the hearsay had been admitted under a firmly rooted hearsay exception. [FN172] The child's statements regarding ***1072** the molestation incident, made to a pediatrician, had been admitted under Idaho's residual exception that was identical to Federal Rule 803(24). [FN173] The Court specifically noted that "Idaho's residual hearsay exception ... is not a firmly rooted hearsay exception for Confrontation Clause purposes." [FN174]

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

Thus, under these rulings, if one determines that a statement is admissible under a traditional hearsay exception or exemption, then the constitutional rules may be satisfied, unless the evidence is admissible under the catch-alls. Notwithstanding the similar language of the residual exceptions, 803(24) and 804(b)(5), and the constitutional rules laid down in the Roberts-Inadi-Wright-White line of cases, no overlap arises between the two, so that a statement that satisfies the residual exceptions' admission standards will not necessarily satisfy the Roberts rule. [FN177] Moreover, although statements falling within traditional hearsay exceptions or exemptions, which could be deemed "firmly rooted," and would not require a showing of independent indicia of reliability (particularized***1073** guarantees of trustworthiness), it remains to be seen which such categories of statements have no required showing of unavailability.

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

In Barber v. Page, [FN178] the Court found a Confrontation

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

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

The defendant must have a meaningful chance to develop the testimony, however. In Pointer v. Texas, [FN185] the Court held the defendant's rights were violated because he was not represented by counsel at the ***1074** prior hearing and therefore could not have effectively cross-examined the declarant. [FN186]

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

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

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

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

The defendant sought to prove that Gable McDonald had shot Officer Liberty. [FN193] McDonald had signed a sworn confession of his guilt; he later repudiated it, saying he had been influenced by promises that he ***1075** would not be prosecuted. [FN194] This evidence was admitted when McDonald testified at trial. [FN195]

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

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

The Supreme Court reversed on due process grounds:

> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with the traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers ***1076** of a fair trial. [FN202]

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

Conclusion

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

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I am indebted to: Jay A. Schmitz, Southwestern University School of Law, Class of 1989; Stephanie C. Yost, Southwestern University School of Law, Class of 1993; Raymond E. McKown, Southwestern University School of Law, Class of 1990; and Susan C. Keenberg, Southwestern University School of Law, SCALE, Class of 1992, for their insightful observations; and professors Myrna Raeder, Southwestern University School of Law, and David E. Aaronson, American University School of Law, for their helpful comments. This Article is the result of a summer research grant from Southwestern University School of Law.

FN1. The formulation of these questions, particularly questions two and three, are based upon an approach taken by the late John Kaplan in his teacher's manual for David W. Louisell et al., Cases and Materials on Evidence (1st ed.

1968).

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

FN3. Fed.R.Evid. 401.

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

FN5. Fed.R.Evid. 402.

FN6. Fed.R.Evid. 401.

FN7. Fed.R.Evid. 403 (emphasis added).

FN8. See Fed.R.Evid. 403 advisory committee's note.

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

FN10. Strong, supra note 9, § 185, at 339.

FN11. The question of the sufficiency of proof is interesting because it is not specifically covered by any of the rules of the Federal Rules of Evidence. Rather, the

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

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

FN13. Acceptance of a premise that cannot be proven absolutely, but is grounded in human experience, is a form of judicial notice, albeit judicial notice of nonevidentiary facts. More precisely, judicial notice of adjudicative facts, as governed by Fed.R.Evid. 201, is just the opposite of the unprovable premise; while judicial notice of legislative or evaluative facts, not governed by any rules of evidence or proof, are just like the unprovable premises discussed in the text accompanying this note. See Fed.R.Evid. 201 advisory committee's note (quoting Thayer, " '[i]n conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit."); see also Fed.R.Evid. 401 advisory committee's note ("Whether the relationship [relevancy of evidence to fact to be proven] exists depends upon principles evolved by experience or science, applied logically to the situation at hand.").

FN14. Wigmore argued that the inductive form is sufficient and that it is unnecessary to express the reasoning in deductive form. See George F. James, Relevancy, Probability and the Law, 29 Cal.L.Rev. 689, 694-99 (1941), for a discussion and criticism of Wigmore's view. The discussion in the text here is predicated upon James' analysis. The portion of James' article containing this discussion, although included in earier editions, (David W. Louisell et al., Cases and Materials on Evidence 12-16 (2d ed. 1972)),

is no longer included in John Kaplan et al., Cases and Materials on Evidence (7th ed. 1992).

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

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

FN17. James, supra note 14, at 694-99.

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

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

FN20. Fed.R.Evid. 403 advisory committee's note.

FN21. Fed.R.Evid. 403.

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

FN23. See Fed.R.Evid. 401 advisory committee's note ("[S]ome

situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rules 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.").

FN24. See Fed.R.Evid. 404, 405.

FN25. See Fed.R.Evid. 406.

FN26. See Fed.R.Evid. 407.

FN27. See Fed.R.Evid. 408.

FN28. See Fed.R.Evid. 409.

FN29. See Fed.R.Evid. 410.

FN30. See Fed.R.Evid. 411.

FN31. See Fed.R.Evid. 412.

FN32. Strong, supra note 9, § 185, at 341.

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

FN34. Fed.R.Evid. 801(a).

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

FN36. Fed.R.Evid. 801(a) advisory committee's note.

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

FN38. This hypothetical is an enhanced version of that used by Baron Parke in his opinion in Wright v. Doe dem. Tatham, 112 Eng.Rep. 488 (Exch.Ch.1837). See also Laurence H. Tribe,

Triangulating Hearsay, 87 Harv.L.Rev. 957, 960 (1974) (discussing a similar hypothetical and refering to Baron Parke's hypothetical).

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

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

Other non-verbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includible within the hearsay concept.... Admittedly evidence of this character is untested with respect to the perception, memory and narration (or their equivalents of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds.

Fed.R.Evid. 801(a) advisory committee's note (emphasis added).

FN41. See Fed.R.Evid. 801(a) advisory committee's note.

FN42. "[B]ut words not of assertion, but of action, such as the offer of a position (to show the offeree's skill) or the letters in Wright v. Tatham itself." McCormick, supra note 40, at 502-03. The example of the offer of a position to show the skill of the offeree means that the inherent belief of the offeror in the skill of the offeree is taken as evidence that the offeree has such skill. Thus, the president of a bank offered John a position as Chief Teller,

such offer is evidence that John is possessed of the skills and character traits, which a trusted Chief Teller would require, such as honesty. Under the Federal Rule definition, the words of the offer by the president of the bank would not be a statement since they were not intended by the president to assert that belief, but rather merely to extend the offer to John. Please note that Professor Park points out that this type of example is really a case of an assertion (statement) offered for something other than the matter asserted, and thus not hearsay within the definition of Fed.R.Evid. 801(c). Park, supra note 37, at 797-98.
In Wright v. Doe dem. Tatham, letters were sent to the testator treating the testator as though he were capable of making business and social decisions (thus evidencing a belief on the part of the writers of the letters that the testator had sufficient mental capacity as would equal testamentary capacity). These letters were offered as evidence that the testator was of sound mind and thus that his will was valid. The court held that the letters were inadmissible for this purpose. Under the Federal Rules, Wright would be decided differently--the letters would be admitted as nonassertive conduct (here verbal conduct).

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

FN44. Wellborn, supra note 43, at 55-64.

FN45. McCormick, supra note 40, at 504.

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

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

FN48. This use of the term "exclusion" in conjunction with the hearsay rule will be referred to again. "Exclusion" means that the evidence under consideration is excluded from the definition of hearsay, under the hearsay rule, by its terms; exclusions also exist from the hearsay definition. Exclusions are not to be confused with exceptions to the hearsay rule. Exceptions apply to statements that are hearsay but are nonetheless admissible in evidence because they are within certain categories of evidence that the law allows for various policy reasons.

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

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

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

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

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

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

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

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

FN56. The Federal Rules of Evidence also create categories of statements that are not hearsay. These categories are specified in Fed.R.Evid. 801(d). Two species of statements are defined: Prior statements by a witness and admissions by

a party-opponent. These species of statements were treated as hearsay at common law and were considered admissible as exceptions to the hearsay rule. See, e.g., Cal.Evid.Code § 1235 (prior inconsistent statements); Cal.Evid.Code § 1238 (statements of identification); Cal.Evid.Code § 1220 (a party's own admission); Cal.Evid.Code § 1223 (co-conspirator's admissions). For ease of understanding, this category of statements, defined as nonhearsay by the Federal Rules of Evidence shall be called exemptions from the hearsay rule.

FN57. See Fed.R.Evid. 801(c) advisory committee's note.

FN58. Park, supra note 37, at 794.

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

FN60. Id.

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

FN62. Strong, supra note 9, § 249, at 471-72.

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

FN64. Examples of this form of operative legal fact appear in Kaplan, supra note 2, at 126 in the reproduced examination of Professor Morgan's 1946 Summer Term Harvard

Law School Examination. Question 10 asks: "On the issue whether a transfer of a chattel from D to X was a sale or a gift, D's statement accompanying the transfer, 'I am giving you this chattel as a birthday present.' "
Question 11, on the same examination asks: "On the issue in 10, D's statement the day following the transfer, 'I gave you the chattel as a birthday present.' "

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

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

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

FN68. See discussion infra part 7.

FN69. Kaplan, supra note 2, at 93.

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

FN71. Id.

FN72. Id.

FN73. Id.

FN74. Id.

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

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

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

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

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

FN80. A wife saying such a thing to her husband at least satisfies the requirements of the definition of logical relevance on the issue of loss of affection. The fact of the utterance makes it more likely that the wife lacks affection for her husband than if the utterance had not been made. This hypothetical is used by Strong, supra note 9, § 269, at 462, and is based upon a case appearing in Kaplan, supra note 2, at 210 (appearing in the casebook under the section treating the state of mind exception to the hearsay rule; nonetheless it is an appropriate vehicle to demonstrate the distinction between the exclusion and the exception). In this case, Adkins v. Brett, 193 P. 251 (Cal.1920), an action for damages for alienation of affection, plaintiff sought to introduce evidence that his wife stated, among other things, that she had gone automobile riding with the defendant, had dined with him, had received flowers from him, and that he was able to give her a good time, and the plaintiff was not.

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

FN82. Morgan, supa note 81, at 248-50. McCormick notes that in this area (i.e., proof of mental condition) whether the utterance is assertive or nonassertive matters not, for the

evidence will come in to prove the speaker's mental state:

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

FN83. Id.

FN84. See supra notes 36-47 and accompanying text.

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

FN86. Id.

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

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

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

FN90. Id. at 534.

FN91. Id. at 536.

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

FN93. Id. § 250, at 436.

FN94. See supra note 79 and accompanying text.

FN95. Strong, supra note 9, § 250, at 435. Here, the author notes that in answering the question whether a person is alive at a particular time, it would not matter whether he said, "I am alive," or "Hi, Joe." No cases are cited to support this example. However, the authors include in the current edition of their casebook a "made-up case" (cited as 32 Muc. 352 (standing for made-up cases)). Kaplan, supra note 2, at 91.

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

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

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

FN99. Id.

FN100. Id.

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

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

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

FN104. See supra notes 53-55 and accompanying text.

FN105. The theory underlying the hearsay exemptions under the Federal Rules of Evidence is probably not a balance of

trustworthiness over hearsay risks. Rather, admissions by party opponents exempted from the hearsay rule under Fed.R.Evid. 801(d)(2) are grounded upon the nature of the adversary system. See Fed.R.Evid. 801(d)(2) advisory committee's note. The exemption for witnesses' prior inconsistent statements is based more on trustworthiness. See Fed.R.Evid. 801(d)(1)(A) advisory committee's note (citing and quoting a report from the California Law Revision Commission). Prior consistent statements are exempted largely due to the nature of the adversary system. It is mainly within the power of the opponent to determine the admissibility of such statements. See Fed.R.Evid. 801(d)(1)(B) advisory committee's note. The exemption for prior identification manifests a recognition of the need to examine all the surrounding circumstances of an in-court identification. See Fed.R.Evid. 801(d)(1)(C) advisory committee's note.

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

FN107. Id.

FN108. Id.

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

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

FN111. Id.

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

FN113. Id. at 390.

FN114. Id.

FN115. Id.

FN116. Id. at 391.

FN117. Id. at 397.

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

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

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

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

FN122. Id. at 287.

FN123. Id.

FN124. Id. at 289-90.

FN125. Id.

FN126. Id.

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

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

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

FN130. Id. at 1263.

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

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

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

FN134. Raeder, supra note 101, at 33.

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

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

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

FN138. See Raeder, supra note 101, at 36.

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

FN140. Id. at 818.

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

FN142. Roberts, 446 U.S. at 63.

FN143. Id. at 66 (citations omitted).

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

FN145. See supra notes 142-43 and accompanying text.

FN146. Roberts, 446 U.S. at 65.

FN147. Id. at 59.

FN148. Id. at 75.

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

FN150. Id. at 390.

FN151. Id. at 394.

FN152. Id.

FN153. Id.

FN154. Id. at 395-96.

FN155. Id. at 396.

FN156. Id. at 396-400.

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

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

FN159. Id. at 176. "Bootstrapping" in the context of the use

of co- conspirators' statements means finding the preliminary facts of existence of the conspiracy, the defendant's and declarant's participation in it, and the making of the questioned co-conspirators' statement in the course of and furtherance of the conspiracy, not by evidence independent of the statement itself, but taking into account the questioned statement.

FN160. Id. at 182-83.

FN161. Id. at 182.

FN162. Id. at 183.

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

FN164. Id. at 742-43.

FN165. Id. at 742.

FN166. Id.

FN167. Id. at 743.

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

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

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

FN171. The Wright Court stated "[f]or purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the

meaning of the Confrontation Clause." Id. at 816.

FN172. Id. at 817.

FN173. Id. at 811-12.

FN174. Id. at 817.

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

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

FN177. In fact, the Federal Rules of Evidence are, in at least one respect, more restrictive than the requirements of the Confrontation Clause. See, e.g., California v. Green, 399 U.S. 149 (1970) (noting in dictum that prior statements of a witness, subject to cross-examination at trial, were constitutionally admissible for the truth of the matter asserted even though the prior statements were not made under oath). The Federal Rules of Evidence allow a prior inconsistent statement not made under oath to be used only for the purpose of impeaching the credibility of a witness. Fed.R.Evid. 613. See also Dutton v. Evans, 400 U.S. 79 (1970) (Stewart, J., writing a rather elusive plurality opinion regarding the use of co-conspirators' statements).

FN178. 390 U.S. 719 (1968).

FN179. Id. at 720.

FN180. Fed.R.Evid. 804(a)(5).

FN181. 390 U.S. at 720.

FN182. Id. at 724-25.

FN183. Fed.R.Evid. 804(b)(1).

FN184. Ohio v. Roberts, 446 U.S. 56, 63 (1980).

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

FN186. Id. at 407.

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

FN188. Id. at 416-17.

FN189. Id. at 419-20.

FN190. 410 U.S. 284 (1973).

FN191. Id. at 302.

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

FN193. Chambers, 410 U.S. at 289.

FN194. Id. at 287-88.

FN195. Id. at 289.

FN196. Id. at 291.

FN197. Id. at 291-92.

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

FN199. Id. at 294.

FN200. Id. at 289.

FN201. Id. at 294.

FN202. Id. at 302-03.

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