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Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence

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COMMENTS

SUBSTANTIVE USE OF EXTRAJUDICIAL STATEMENTS OF WITNESSES UNDER THE PROPOSED FEDERAL RULES OF EVIDENCE

With the publication last March of the preliminary draft of the rules of evidence for the lower federal courts,[1] the possibility of implementation of reforms in the law of evidence on a national level is opened for the first time.[2] Although all aspects of the proposed rules will doubtless stimulate discussion, the committee's treatment of the hearsay rule is likely to provoke the most comment.

I. The Hearsay Rule and Approaches to Reform

The hearsay rule, long a storm center of evidence reform, today accounts for approximately one-third of all evidence problems in the courts.[3] Developed as case law in England between 1675 and 1690, the rule was analytically structured in its present dimensions by Wigmore in his comprehensive *Treatise on Evidence* in 1904. Wigmore discerned a general rule excluding all statements made outside the courtroom as proof of the matter stated. This rule was qualified by admitting statements falling within class exceptions based on the necessity for, and trustworthiness of, the evidence.[4]

At the time a brilliant synthesis of existing case law, the long-term effect of Wigmore's treatment has been to rigidify the hearsay rule. Statements falling within a class exception have been admitted without regard to their probative force; statements of high probative force have been automatically excluded. Reform has been achieved by squeezing new situations into old exceptions or by legislative creation of

[1] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (1969) [hereinafter cited as Committee on Rules of Practice].

[2] The implementation of the American Law Institute's Model Code of Evidence and the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws has been determined by state legislative action, and few states have approved them. *See, e.g.*, Utah, Supreme Court, Committee on Uniform Rules of Evidence, Final Draft of the Rules of Evidence (1959).

[3] *See* Note, *Erosion of the Hearsay Rule*, 3 U. Rich. L. Rev. 89, 92 (1968).

[4] 5 J. Wigmore, Evidence § 1362 (3d ed. 1940) [hereinafter cited as Wigmore].

new class exceptions.[5] The contemporary rule emerges as "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." [6]

Critics of the hearsay rule have not generally denied, however, the basic premise that such evidence is, as a rule, of less probative value than testimony given in open court. This judgment is founded upon the necessity of considering evidence as part of the adversary system, with its emphasis on cross-examination. Wigmore described cross-examination as

> beyond any doubt the greatest legal engine ever invented for the discovery of truth . . . the great and permanent contribution of the Anglo-American system of law to improve methods of trial procedure.[7]

He based the hearsay rule almost exclusively on the lack of opportunity for cross-examination. Morgan has stated that

> the principle ground for rejecting hearsay is an idea basic to our entire system of litigation: the adversary has a right that the trier shall not be influenced by testimony which the adversary has had no opportunity to cross-examine.[8]

Other scholars have mentioned additional factors which may decrease the trustworthiness of hearsay: the fact that the declarant was not under oath at the time the statement was made, the absence of demeanor evidence, and sometimes the diminished reliability of the human memory in dealing with spoken words as opposed to physical events.[9] Acknowledging that these factors decrease the weight of hearsay, evidence commentators have nevertheless been disturbed by the exclusion of any evidence which has some incremental value. Jeremy Bentham took a strong position:

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[5] *See* Note, *supra* note 3, at 124; Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 342 (1960).

[6] Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

[7] 5 WIGMORE § 1367, at 29.

[8] Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 4 (1937).

[9] C. MCCORMICK, EVIDENCE § 223 at 455, 456 (1954) [hereinafter cited as MCCORMICK]; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 182 (1948); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484 (1937); Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 747 (1961).

> . . . the danger of "misdecision" for want of the information contained in the extrajudicial statement is "preponderant over the danger of misdecision *by reason* of information rendered deceptitious for want of such explanation as, had the party been forthcoming, it might have received." [10]

Various solutions to this dilemma have been suggested by scholars.[11] Few would support blanket exclusion or unrestrained admissions of all hearsay statements;[12] controversy centers on the method of defining exceptions. United States District Judge Jack B. Weinstein has listed five proposed alternative solutions:

(1) *Admission of all hearsay with discretion in the trial judge to exclude statements whose probative value is outweighed by such dangers as surprise, deliberate creation of evidence, or undue extension of the trial.* In addition to exercise of judicial discretion, dangers are minimized to some extent by requiring notice before trial of intention to use a hearsay statement, different treatment of evidence created for the purposes of the trial, exclusion of cumulative evidence and inference of spoliation.[13] Despite these safeguards, this rule is apparently unacceptable to the trial bar because it entails extensive judicial discretion.[14]

(2) *Liberalization and codification of the existing rules.* This is the approach taken by the Model Code and Uniform Rules. While described as the most accepted method and the modern trend, it retains the rigid character of the system of class exceptions and thus may sometimes exclude evidence of high probative value and include some with little.[15]

(3) *Judicial nullification through appellate refusal to reverse when hearsay has been admitted.* Weinstein suggests that the federal courts are presently following this course.[16] This alternative seems most open

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[10] Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63 (4) (c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 939 (1962).

[11] Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375 (1968).

[12] Moreover, an arbitrary rule of exclusion would not entirely avoid the problems in rulings on the admissibility of extrajudicial statements, since hearsay cannot be defined without reference to the general fact situations and evidentiary use of the statements. The admission, for instance, of extrajudicial statements for purposes of impeachment or as proof that the statements were made may involve subtle distinctions and attempts to squeeze hearsay statements into non-hearsay classifications.

[13] Weinstein, *supra* note 11, at 378. *See also* UNIFORM RULE OF EVIDENCE 45 and proposed FEDERAL RULE 4-03.

[14] *See* Fillman, *Inadmissible Hearsay as Evidence to Impeach a Witness Other than the Declarant*, 57 NEV. U. L. REV. 499, 507 (1962).

[15] Weinstein, *supra* note 11, at 378.

[16] *Id.* at 386-87.

to criticism because it effectively gives the trial court unlimited discretion, based not on articulated standards such as those of proposed rule 4-03, but on personal feelings regarding the hearsay rule.

(4) *Selective application.* This is not actually a separate solution but works in combination with other approaches, applying different standards to hearsay use in jury and non-jury, and criminal and civil trials.[17]

(5) *Restatement of the present exceptions to the hearsay rule in general terms, excepting any statement which has a substantial guarantee of trustworthiness and cannot be duplicated satisfactorily in another form.*[18] The present class exceptions would not be discarded but rather included as examples of statements falling within the general exception. This approach, in effect, accepts the analysis underlying the Wigmore synthesis but cuts away the artificial engraftment of subsequent case law. It recognizes that the dangers in admitting hearsay can be largely avoided by limiting admission to cases falling within the analytical basis of the old exceptions.[19] This is the position accepted by the proposed federal rules.[20] As the drafters pointed out,

> The design of this rule and of the rule which follows is calculated to take full advantage of the accumulated wisdom and experience of the past. The common law exceptions are resorted to, however, not as a basis for formulating an extensive series of minute categories into some one of which a proffered hearsay statement must be fitted under a penalty of exclusion, but rather as furnishing examples of appropriate application of one or the other of the two rules. Thus counsel may prepare for trial with ample predictability of result, while at the same time room is left for growth and development of the law of evidence in the hearsay area consistently with the broad purposes expressed in Rule 1-02.[21]

But despite the clear intention not to limit admissibility to hearsay within the old class exceptions, their retention as examples will probably exercise a conservative influence on the courts. Judicial excursions out-

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[17] *Id.* at 380.

[18] *Id.* at 379.

[19] *See* Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 MINN. L. REV. 506, 507 (1934), making this point with respect to the jury's treatment of existing testimony.

[20] COMMITTEE ON RULES OF PRACTICE, *supra* note 1. The rules generally admit statements when the circumstances under which they were made offer assurances of accuracy.

[21] *Id.* at 179.

side the mapped area of admissibility are likely to be cautious. It should also be noted that the rules are stated permissively in terms of non-application of the hearsay rule rather than positive admissibility, thus allowing other grounds of exclusion.[22] These factors will necessarily limit judicial development of the rule. And yet the rules will still be subject to criticism insofar as judicial discretion is increased and, thus, trial preparation made less certain.[23]

Despite the drawbacks inherent in any compromise, however, the proposed rules seem to represent an optimum balancing of the conflicting problems. Not only do they permit evidence of high probative value to come in but, theoretically at least, they exclude evidence of little value presently admissible under class exceptions.

II. Extrajudicial Statements of Witnesses

The admissibility of extrajudicial statements of witnesses testifying at the trial has been among the sharpest thorns in the hearsay thicket. Controversy has centered on the substantive use of statements admitted for purposes of impeachment or corroboration. Though these statements are excluded in nearly all jurisdictions, scholars almost unanimously agree that they should be admitted.[24]

A. Admissibility of Extrajudicial Statements Under the Proposed Federal Rules

Proposed rule 8-03 (b)(5) retains the traditional hearsay exception, past recollection recorded. Proposed rule 8-01 (c)(2) excludes the following from the traditional definition of hearsay:

> PRIOR STATEMENT BY WITNESS. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him, or (iv) a transcript of testimony given under oath at a trial or hearing or before a grand jury . . .[25]

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[22] *Id.* at 178.

[23] Weinstein, *supra* note 11, at 380.

[24] *See, e.g.*, United States v. Rainwater, 283 F.2d 386, 388 (8th Cir. 1960); Ellis v. United States, 138 F.2d 612, 617 (8th Cir. 1943); State v. Saporen, 205 Minn. 358, 361, 285 N.W. 898, 900 (1939); 3 Wigmore §§ 1018, at 1132.

[25] Committee on Rules of Practice, *supra* note 1, at 159.

This rule represents a deviation from the general approach of the proposed rules. From the viewpoint of the traditional definition of hearsay, it has, in effect, created a new class exception to the traditional rule by means of definition.[26] This apparent inconsistency can be justified on a number of grounds.

1. Prior Consistent and Inconsistent Statements — With respect to prior consistent and inconsistent statements, the approach of the proposed rules is supported by Wigmore's and Maguire's analyses of the rule. Such evidence is not hearsay because the declarant is present and subject to cross-examination.

> [A]n extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination. . . . Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay [*sic*] rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of court-rooms is in accord.[27]

Two objections have been made to this analysis. First, for those scholars who include the danger of faulty reproduction in the definition of hearsay, these statements fall at least within the fringes of the rule. Thus, both McCormick and Strahorn would distinguish situations in which the witness declarant was unable to remember or denied making the statement.[28] Strahorn would admit prior consistent statements only in certain situations where the error of reproduction was low (such as prior identification of the accused or complaint of rape), and prior inconsistent statements only when admitted by the declarant.[29]

His position with respect to prior consistent statements seems to be based on an imprecise definition of this category as an exception to the hearsay rule; he apparently would include statements previously made by the witness but not repeated at the trial. The statements which concern him are now admissible under other exceptions to the hearsay

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[26] *See* UNIFORM RULE OF EVIDENCE 63 (1) and MODEL CODE OF EVIDENCE rule 503 (1942), which create a class exception for all extrajudicial statements of witnesses.

[27] 3 WIGMORE § 1018, at 687-88. *See also* Maguire, *supra* note 9, at 768.

[28] McCORMICK §§ 39, 224; Strahorn, *supra* note 9, at 498.

[29] Strahorn, *supra* note 9, at 498.

rule. Thus, while prior identification is a prior consistent statement, it is admitted in some jurisdictions when the witness can no longer identify the accused under an exception to the hearsay rule based on the probative weight of a contemporaneous identification.[30]

If the definition of prior consistent statements is properly limited to those repeated at the trial, there seems to be no reason to limit admission to cases where the error of reproduction is small. Since the evidence is being used as proof of the matter rather than the words stated, the only concern is that the substance of the statement be correct. But by definition the substance is confirmed by the declarant's testimony at the trial. Requirement of precise reproduction of his words is irrelevant.

This is not true, however, of prior inconsistent statements. Here Strahorn's reservations are shared by McCormick, who would exclude statements unless proved to have been written or signed by the declarant or unless he admitted having made them.[31] The danger of faulty reproduction becomes relevant since the declarant has not confirmed the substance of the statement. Under this theory of the hearsay rule, some prior inconsistent statement cannot be excluded from the definition of hearsay.

In addition, judicial critics of the Wigmore view have emphasized the importance of the presence of the conditioning devices of cross-examination, the oath and the sanction of prosecution for perjury at the time the statement was made.[32] This position is taken in a much quoted opinion by Judge Stone.

> The rule is well settled that the only office of impeaching testimony of this kind is to negative or neutralize the testimony to which it is directed. . . . The oath of the witness solemnizes his former extrajudicial statement not at all. It goes only to his testimony which is occasion for and target of the impeachment. The previous statement was when made and remains an ex parte affair, given without oath and test of cross examination. Important also is the fact that, however much it may have mangled the truth, there was assurance of freedom from prosecution for perjury.

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[30] *See* text p. 123 *infra.*

[31] McCormick § 39, at 82. As McCormick points out, his position is taken by the English Evidence Act of 1938 which admitted previous *written* statements of witnesses. The new 1968 act, however, admits oral statements as well, moving from the McCormick to the Wigmore position. Civil Evidence Act of 1968, § 3, ch. 64.

[32] *See* cases cited note 24 *supra.*

> The chief merit of cross examination is not that at some future time it gives the party opponent right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.[33]

For courts accepting this view, prior statements fall within the hearsay rule defined in terms of hearsay dangers.

Thus, while most prior inconsistent and consistent statements are outside the definition of hearsay employed by all scholars, a certain few fall within that used by a minority of writers and by most courts. Exclusion on the basis of these criteria alone, however, seems excessively academic and, in fact, inconsistent with a practical definition of hearsay, which implies consideration of the weight of the evidence. This consideration can be best determined by balancing the extent of the existing dangers against the intrinsic trustworthiness of the evidence and the safeguards available in its evaluation. Applying a realistic test, the approach of the proposed rules can be defended even with respect to substantive use of many prior statements forgotten or denied by the declarant because their accuracy can be adequately examined.

Assuming arguendo, however, the correctness of Judge Stone's suggestion that the impact of the conditioning devices is greater when immediate, it would seem to be outweighed by other considerations, at least when the rule is limited, as are the proposed rules, to statements already admitted into evidence.[33a] The substance of the prior consistent statements will be given under oath and subject to immediate cross-examination. The declarant's demeanor will be subject to evaluation. If additional weight is given the contents of these statements, it is due to the fact of repetition, not to the substance of the statement. This is the traditionally accepted basis for admission of prior consistent statements.

Thus, Judge Stone's evaluation is only relevant in the case of a prior inconsistent statement. But in this case the initial fact of contradiction in itself will lower the weight of the evidence in the estimation of the

[33] State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 900, 901 (1939).

[33a] *See* text p. 124 *infra*.

jury. For all practical purposes the statement will already be impeached when it is introduced. In fact, cross-examination may be more effective than in the usual situation, where opposing counsel can fail because he has no indication of possible weaknesses in the testimony.

The same considerations concerning efficacy of cross-examination and presence of other conditioning devices would apply to McCormick's position with respect to prior inconsistent statements denied or claimed to be forgotten by the witness when he has testified to the substance of the events concerned on direct. A line of federal cases, starting with Learned Hand's decision in *Di Carlo v. United States*,[34] supports the view that the jury is able to evaluate prior inconsistent statements which the defendant has refused to admit. In *Di Carlo*, Hand pointed out that

> [i]f, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.[35]

Thirty-five years later in *United States v. Allied Stevedoring Corp.*, reaffirmed the position taken in *Di Carlo:*

> . . . [L]ogically at any rate there is at times no reason to deny their competency. It is one thing to put in a statement of a person not before the jury: that is indeed hearsay bare and unredeemed. But it is quite a different matter to use them when the witness is before the jury, as part of the evidence derived from him of what is the truth, for it may be highly probative to observe and mark the manner of his denial, which is as much a part of his conduct on the stand as the words he utters. Again and again in all sorts of situations, we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is the opposite. . . This is not to rely upon the statement as a ground of inference taken apart from

[34] 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). *See also* United States v. Allied Stevedoring Corp., 241 F.2d 925, 933 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957) (Hand's opinion); United States v. Block, 88 F.2d 618, 620 (2d Cir.), *cert. denied*, 301 U. S. 690 (1937) (Hand's opinion). Federal cases following this line are Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 1019 (1954); United States *ex rel.* Ng Kee Wong v. Corsi, 65 F.2d 564 (2d Cir. 1933). This position has been accepted in Alaska. Hobbs v. State, 359 P.2d 956, 966 (Alaska 1961).

[35] Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

> the sum of all that appears in court; it is to allow the jury to use the whole congeries of all that they see and hear to tell where the truth lies . . . [O]ut of the whole nexus of his conduct before the jury, they may treat those words alone as affirmatively relevant.[36]

More difficult is the case where the witness denies not only making the statement, but all knowledge of the event described. In this situation there is no adequate opportunity for cross-examination,[37] although the jury is at least able to evaluate the witness' demeanor.[38] Moreover, as critics of Uniform Rule 63(1) and Model Code rule 503 have pointed out, prior inconsistent statements may be the only evidence on one side of the case. When this is true, substantive use of the statements will determine whether the case goes to the jury.[39] This problem, not troublesome when there is adequate opportunity for cross-examination, becomes more so when there is none. The problem will probably not arise, however, under the proposed federal rules because the federal courts apparently follow the majority rule limiting the admission of prior inconsistent statements to impeachment of the actual testimony of the witness in court.[40]

In summary, the exclusion under the proposed federal rules of prior consistent and inconsistent statements (as defined in the federal courts) from the definition of hearsay is well supported under the draftmen's theory of exclusion; analytically they do not fall within the definition.

The proposed rules can also be supported under the general terms of proposed rules 8-03 and 8-04, which except from the hearsay rule statements made under circumstances which offer assurances of accuracy. Some proponents of the use of prior statements of witnesses have stressed the fact that the accuracy of statements concerning an event is likely to decrease with lapse of time.[41] Not only does memory

[36] United States v. Allied Stevedoring Corp., 241 F.2d 925, 933 (2d Cir. 1957).

[37] Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954); 31 N.Y.U. L. REV. 1100, 1105 (1956).

[38] MODEL CODE OF EVIDENCE rule 503 at 234 (1942).

[39] Falknor, *supra* note 37, at 55; Wright, *Uniform Rules and Hearsay*, 26 U. CIN. L. REV. 575 (1957); 14 Okla. L. REV. 72, 74 (1961); 31 N.Y.U. L. REV. 1101, 1105 (1956).

[40] *See* text p. 122 *infra*. *See also* 3 WIGMORE § 1043 and cases therein cited. Westinghouse Electric Corp. v. Wray Equipment Corp., 286 F.2d 491, 493 (1st Cir.), *cert. denied*, 366 U.S. 929 (1961). The restriction is not explicitly stated in either proposed rule 6-13 concerning prior statements or proposed rule 8-01, but it is strongly implied in the discussion following proposed rule 8-01.

[41] *See* COMMITTEE ON RULES OF PROCEDURE, *supra* note 1, at 173, 205; Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69, 85 (1936);

often progressively fail, but the intervening period permits time for such influences as persuasion, bribery, sympathy and guilt to work on the witness.[42]

A recent case in Wisconsin,[43] overruling previous law limiting the use of prior inconsistent statements to impeachment, vividly illustrates this point. *Gelhaar v. State* was a prosecution of a wife for the murder of her husband in the kitchen of their home. The crucial witnesses for the state were a son and daughter who had been upstairs in the house at the time of the alleged murder. On the night of the incident the police took separate statements from both children out of each other's hearing. These statements were substantially similar; both testified to hearing the mother threaten the father just before he called to his daughter for an ambulance. In addition, the daughter claimed to have heard her father groan and say, "She did it." At the trial the son denied any memory of these facts and testified that his father had referred to the accused as a "whore"; the daughter also claimed not to remember her prior statement, supported her brother's testimony, and further claimed that she had heard her father threaten to kill her mother.[44] The court, relying heavily upon McCormick, pointed out the obvious under these facts: prior statements involve less hazards of inaccuracy due to distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy.[45]

Of course, all cases involving prior statements will not entail facts suggestive of a motive to falsify at the trial. Even in the usual case, as Hand indicated in *Di Carlo*, there is often no reason to assume that statements made on the stand are more likely to be true than those made previously out of the courtroom.[46]

Under proposed federal rule 8-01 (b)(2) the evidence in *Gelhaar* would be admissible. However, if the children had denied any memory of the event, the evidence would be excluded. There may be particular reason, however, to admit prior written statements in a case where the

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McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559, 562 (1955).

[42] This is pointed out by the draftsmen. COMMITTEE ON RULES OF PRACTICE, *supra* note 1, at 165.

[43] Gelhaar v. State, 4 Wis.2d 230, 163 N.W.2d 609 (1969). The court limited its holding to statements made by a declarant having an opportunity to observe the facts stated and introduced for purposes of impeachment.

[44] 163 N.W.2d at 611.

[45] *Id.* at 613.

[46] Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

witness claims not to remember the events involved and is unwilling to verify the truth of his former statement.[47] Here the inference of a subsequent decision not to testify under the influence of intervening events is strongest. Protection against unfair surprise of the defendant could be provided by requiring notice and judicial discretion to exclude when circumstances make the evidence untrustworthy or prejudicial.[48] The trial bar, however, is unlikely to support such a rule. The compromise expressed in the proposed rule seems more likely to receive approval at this time.

Apart from theoretical considerations justifying the substantive use of prior statements, criticisms of the change are blunted by the limited effect which the proposed rule will have on existing law. The statements are already admissible; they merely may not be used as substantive evidence. McCormick, among others, has called the rule a "verbal ritual" which requires juries to make a subtle distinction difficult even for the judicial mind.[49] But, as has already been noted, in some cases the new rule may determine whether the case gets to the jury. Since this result will necessarily be limited to the few cases when a turncoat witness' testimony constitutes the entire case, and because the opportunity to cross-examine, coupled with the tendency to doubt the testimony of an impeached witness in the absence of any supporting evidence, offer adequate safeguards, this objection seems weak.

A more effective limitation on the impact of the proposed rules is the exclusion of prior consistent or inconsistent statements not initially admitted for purposes of impeachment or corroboration. According to the draftsmen, this limitation is designed to discourage preparation of prior statements contrived for use at the trial, a prospect which has alarmed some commentators.[50]

The effect of this approach is to apply the traditional common law restrictions on admission of prior statements. While the latitude allowed opposing counseling in cross-examination is generally broad, the federal courts have not allowed impeachment by prior inconsistent statements unless the witness has testified concerning the substance of the event described.

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[47] McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573 (1947).

[48] Weinstein, *supra* note 5, at 338.

[49] *See* MCCORMICK § 39, at 77.

[50] *See* COMMITTEE ON RULES OF PRACTICE, *supra* note 1, at 164; Dow, *KLM v. Tuller: A New Approach to Admissibility of Prior Statements of a Witness*, 41 NEB. L. REV. 598, 607 (1961); Morgan, *supra* note 9, at 193.

Admission of prior consistent statements is subject to even further limitations. Under the common law, admission of prior consistent statements is limited not only to corroboration of an impeached witness, but also to corroboration only after certain kinds of impeachment. Most courts admit prior statements after impeachment by suggestion of bias or motive to fabricate when they were made before the motive or bias arose.[51] Similarly, such statements are admitted to rebut a suggestion of recent fabrication.[52] But the majority of courts exclude prior consistent statements after impeachment by prior inconsistent statements on the theory that the fact of contradiction remains, regardless of how many times the witness has told one story or the other.[53] Wigmore supported a variation of the minority view, which admitted prior consistent statements when the prior inconsistent statement had been denied as proof that the latter had never been made.[54] In situations where the prior inconsistent statement had been admitted by the witness, it was excluded on the basis of irrelevancy (not for lack of probative force); it did not refute the inference created by the prior inconsistent statement that the declarant was capable of either confusion or prevarication.[55]

The position of the federal courts has varied. The Supreme Court has refused to admit prior consistent statements made before trial but after prior inconsistent statements.[56] With respect to statements made before the prior inconsistent statement, some federal courts have accepted the Wigmore view; others have allowed the trial judge to exercise discretion.[57] But the proposed federal rule takes the more

[51] *See* Boykin v. United States, 11 F.2d 484 (5th Cir. 1926); United States v. Keller, 145 F. Supp. 692 (D. N.J. 1956); People v. Feld, 305 N.Y. 322, 113 N.E.2d 440, 443 (1953); 4 WIGMORE § 1128.

[52] This includes such situations as rape when immediate complaint is natural and plaintiff is allowed to introduce evidence of complaint to rebut the inference of fabrication which arises from silence. Ellicot v. Pearl, 35 U.S. (10 Pet.) 412, 434 (1836); United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957).

[53] 4 WIGMORE § 1126, at 197; 45 CALIF. L. REV. 202, 205 (1957).

[54] 4 WIGMORE § 1126, at 198 (Michigan Rule). *See* Thomas, *Rehabilitating the Impeached Witness with Consistent Statements*, 32 Mo. L. REV. 472 (1967); Stewart v. People, 23 Mich. 63 (1871).

[55] Thomas, *supra* note 54, at 484. But Hand has pointed out that prior consistent statements always have some probative force: "[M]ost persons would probably consider any earlier consistent account, in some measure at least, confirmatory of a witness' testimony." United States v. Sherman, 171 F.2d 619, 622 (2d Cir. 1948).

[56] Conrad v. Griffey, 53 U.S. (11 How.) 480 (1850); Ellicot v. Pearl, 35 U.S. (10 Pet.) 412 (1839).

[57] Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965); United States

restrictive majority position.[58] Thus, admission of prior consistent statements will be limited by the form of impeachment utilized by opposing counsel.

As indicated above, the retention of these common law limitations on the admissibility of prior consistent statements under the proposed rule is based primarily on a desire to discourage the use of statements prepared especially for trial. Had the draftsmen been influenced by the common law theory, the restriction would probably appear in proposed rule 6-13, where it logically belongs. Their concern seems misplaced. Under existing law statements can be prepared and used to refresh the witness' memory either before or during the trial, thus achieving the same result.[59] Moreover, juries probably react more favorably to the drama of live testimony than to the reading of a long detailed statement, thus pressuring attorneys to use this approach. The proposed rule can be criticized as overly cautious in this respect.

As a whole, however, the draftsmen's decision to admit prior consistent and inconsistent statements for impeachment and corroboration is a welcome recognition of reality, supported by the opportunity for evaluating the evidence, and, in many cases, by its probative force.

2. *Prior Identification*—Proposed rule 8-01(b) 2(iii) excludes from the definition of hearsay prior identifications by witnesses testifying at the trial. In many cases a prior identification is admitted as consistent or inconsistent with an identification made at the trial, and therefore is indistinguishable from other statements in these categories. Because rule 8-01 (c) (2)(iii) is not limited to statements admitted on other grounds, however, testimony of prior identification by a witness present at the trial is admissible even when the declarant denies all memory of the statement or the event.

This exception[60] to the hearsay rule has been accepted not only by scholars[61] but by many courts[62] and by a number of state legislatures[63]

v. Leggett, 312 F.2d 566 (4th Cir. 1962); Affronti v. United States, 145 F.2d 3, 8 (8th Cir. 1944).

[58] *See* text p. 115 *supra.*

[59] Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712 (1927).

[60] Because the opportunity to cross-examine may be limited under some circumstances, some prior identifications fall within the traditional hearsay definition.

[61] *See* 4 WIGMORE § 1130 (Supp. 1964); Morgan, *supra* note 59, at 726; 30 ROCKY MT. L. REV. 332 (1955); 36 TEXAS L. REV. 666 (1958).

[62] *See* United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964); United States v. Barbati, 284 F. Supp. 409 (E.D. N.Y. 1968); Howard v. State, 4 Md. App. 74, 241 A.2d 192, 193 (1968); Judy v. State, 218 Md. 168, 146 A.2d 29, 31 (1958); State v.

on the basis of its probative force and reliability. Justice Traynor pointed out in *People v. Gould*[64] that

> [e]vidence of an extra-judicial identification is admissible . . . because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind.[65]

In these cases the diminished ability to cross-examine is counterbalanced not only by the higher reliability of the first statement but also by the absence of the hearsay danger of faulty reproduction,[66] as the fact repeated is simple and is often conveyed by a non-verbal assertion. The witness testifying to the declarant's identification is present at the trial and subject to cross-examination concerning his opportunity to observe the event. Even when the identifying witness denies knowledge of the event, his veracity and general ability to observe are subject to examination both by opposing counsel and by the jury. Accompanying the substantial guarantee of trustworthiness is the necessity for the evidence. Prior identification thus meets the requirements both of Wigmore and of the draftsmen for exceptions to the hearsay rule.

The only criticism that can be made of the rule is that it is limited to situations where the declarant is present in court. Presumably, however, where the probability of accuracy of the statement is high, any prior identification can come in under the general rule of 8-04. It is unfortunate that acceptance of prior identification was not encouraged by including such testimony as an example under this rule.

3. *Prior Testimony*—Proposed rule 8-01 (c)(2)(iv) excludes from the hearsay definition the prior testimony of a witness testifying at the trial. Unlike the other statements excluded from the definition of hearsay under rule 8-01, prior testimony has generally been treated as an exception to the hearsay rule.[67] The main innovation of the proposed rule is to relieve prior testimony from the common law restrictions of privity of issues and parties.[68] (The restrictions, of course, exclude all

Wilson, 38 Wash.2d 593, 231 P.2d 288, 301 (1951).

[63] N. Y. CODE OF CRIM. P. § 393-b (McKinney 1958); N. J. EVIDENCE RULE 63(1)(c).

[64] 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960).

[65] People v. Gould, 7 Cal. Rptr. 273, 275, 354 P.2d 865, 867 (1960).

[66] Morgan, *supra* note 59, at 726.

[67] 5 WIGMORE § 1370.

[68] *Id.* at §§ 1366-368.

prior testimony before a grand jury.) The basic reason for these requirements, insurance of the opponent's opportunity to cross-examine, is met by the declarant's presence at the trial. Although this opportunity may be diminished (as in the case of prior identification by the declarant's failure of memory), this problem is again offset by the elimination, in this case complete, of the hearsay danger of reproduction. In addition, accuracy is increased by the presence of the oath and formality of judicial proceedings on the prior occasion.[69] Again, the rule would be subject to criticism only in its limitation to witnesses testifying at the trial. This is avoided by its inclusion in rule 8-04(b)(1).

4. *Past Recollection Recorded*—The final category of prior statements of witnesses considered by the draftsmen, past recollection recorded, is treated as an exception to the rule rather than an exclusion from the definition.[69a] This exception admits statements written by the witnesses or written statements signed by him when the events recorded were fresh in his memory, but have been since forgotten, and when he can assert that the statements were true when made.[70]

The difference in treatment, while probably grounded more on tradition than theory, is not without logical basis. Statements admitted as past recollection recorded are distinguishable from the statements covered by rule 8-01(b)(2) in that under both the traditional[71] and proposed federal rule,[72] they are admitted only when the witness fails to remember the substance of the events recorded. They thus fall within the hearsay rule because cross-examination is largely ineffective, but are admitted as exceptions to the rule because of their accuracy. The danger of faulty reproduction is absent; they were made soon after the event when memory was fresh; and the witness' demeanor can be assessed by the jury.

B. *Prior Statements Not Explicitly Admissible Under the New Federal Rules*

As the preceding discussion indicates, the only statements not explicitly admissible under the proposed federal rules are those which the

[69] For federal decisions admitting prior testimony, *see* United States v. Borelli, 336 F.2d 376 (2d Cir. 1964); Tatum v. United States, 249 F.2d 129 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 943 (1958); Cali v. United States, 281 F. Supp. 411 (S. D. N.Y. 1968).

[69a] COMMITTEE ON RULES OF PRACTICE, *supra* note 1, at 174.

[70] 3 WIGMORE § 734.

[71] *Id.*, § 736.

[72] COMMITTEE ON RULES OF PRACTICE, *supra* note 1, at 174.

witness has forgotten or denied and prior statements not admitted for impeachment or corroboration of impeached testimony. While this writer would favor admission of the latter, many such statements would probably be excluded under proposed rule 4-03 (b) as merely cumulative. A more interesting question is whether a general exception should also be made for forgotten or denied unrecorded statements of witnesses present at the trial.

As in the case of prior identification, many of the hearsay dangers are present in admitting such statements. On the other hand, the general ability of the declarant to observe and remember his personal relationship to the parties and his veracity are subject to general examination at the trial. The accuracy of the statement is enhanced by its proximity in time to the events. The only factor distinguishing such statements from forgotten or denied prior identification is the presence of the hearsay danger of inaccurate reproduction. This distinction seems based on a general belief that the human memory is less able to retain recounted events than personal experience. While superficially acceptable to many people, this thesis has not been addressed by scientific experiment.[73] The inapplicability of the assumption has been noted by Wigmore[74] and apparently accepted by the draftsmen in connection with prior identification.

Morgan, among others, has suggested the possibility of extending the theory of past recollection recorded to simple oral statements where the possibility of error in reproduction is low.[75] On rare occasions such simple repetitions have been admitted by the courts.[76] Here, of course, not only is the danger of faulty reproduction reduced, but also there

[73] Personal communication from Dr. Frederick C. Rockett, psychologist, who examined the literature from 1955 to the present and discussed the matter with Dr. H. M. Parsons, President of the Human Factors Society.

[74] 3 WIGMORE § 744.

[75] Morgan, *supra* note 59, at 727.

[76] Shear v. Van Dyke, 10 Hun. 528 (1877). A witness in an action regarding an agreement to gather hay had counted the loads gathered and told the number to plaintiff but could no longer remember it at the trial. Plaintiff was allowed to testify to the number. It might be argued, of course, that the number spoken was part of the counting activity and thus *res gestae,* but the court did not base its decision on this theory. Instead it argued that the question did not involve the truth or falsity of the statement. This seems clearly wrong since a false statement of the number would have been irrelevant to the case. In situations where statements are admitted as proof only of the words, even false words are relevant. The court went on, moreover, to analogize the evidence offered to past recollection recorded and seemed to find no distinction between the two situations. *Cf.* Jackson, *ex dem.* v. Thompson, 6 Cow. 178, 179 (1826). There a witness to a will who could no longer see to vertify his signature was permitted to testify to a prior verification.

is the added safeguard of the declarant's courtroom verification of the truth of the statement. It can be argued that these statements should be admitted on the same basis as prior identification with no requirement of courtroom verification. The difficulty with this position is in defining the kind of simple statement which could qualify. Any definition would necessarily entail a certain amount of judicial discretion. However, discretion in very similar situations, for example, in determining whether a statement falls within the *res gestae* or spontaneous declaration exception, has long been accepted.[77] This position would probably not be acceptable at this time, however. Psychological research should be conducted with a view to a future liberalization of the rule in this area.

While the variety of situations possible and the hearsay dangers present are such that exclusion of verified oral statements from the hearsay definition would probably be difficult to support, rule 8-03(b)(5) could be augmented to include simple oral statements as exemplary exceptions to the rule. This would be a modest extension of the traditional exception. Theoretically such statements could come in under the general provisions of rule 8-03, but courts are likely to be more willing to admit them in the face of an articulated intention by the draftsmen.

III. Conclusion

The position taken by the draftsmen with respect to prior statements of witnesses basically adopts the position of Wigmore. It admits statements where effective cross-examination is assured or, in the case of prior testimony, where it has already taken place. Thus the new rules generally exclude forgotten or denied statements unless a minimum form of cross-examination is possible and the danger of inaccurate reproduction is greatly reduced.

The main criticism that can be made of the draftsmen's position is the exclusion of prior statements forgotten but not denied by the witness. In the case of prior consistent statements, this seems based on an excessive fear of encouraging statements prepared for trial. In the case of past recollection spoken, it is based on a more generally accepted view of human memory. However, even these minor areas can be corrected through liberal judicial application of the general rules of exception.

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[77] *See* McCormick § 53.

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