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Articles

Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts

*David E. Seidelson**

Federal Rule of Evidence 801(c) defines hearsay as “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.”¹ Rule 801(a) defines a “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.”² It becomes apparent that the existence of a “statement” as defined in Rule 801(a) is a condition precedent to the existence of hearsay as defined in Rule 801(c). And under 801(a), an “assertion” is required for a “statement.” Thus, if there is no assertion, there is no hearsay. So far, so good. In fact, it’s nearly self-apparent. The Advisory Committee Note to 801(a), however, seems to go well beyond the apparent conclusions set forth in the Rule.

The Note provides that: “The effect of the definition of ‘statement’ is to exclude from the operation of the hearsay rule all evidence of conduct, *verbal or nonverbal, not intended as an asser-*

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1. FED. R. EVID. 801(c) (emphasis added). All of the Federal Rules of Evidence, and annotations thereto, may be found at FED. R. EVID., 28 U.S.C.A. (1975).

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

tion. The key to the definition is that nothing is an assertion unless intended to be one."³ The Note then identifies five categories of extrajudicial declarations or conduct: (1) verbal assertions, (2) nonverbal conduct intended to be assertive, (3) nonverbal conduct not intended to be assertive, (4) nonassertive verbal conduct, and (5) assertive verbal conduct.⁴

1. Verbal Assertions

With regard to verbal assertions, the Note states that "[i]t can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence, verbal assertions readily fall into the category of 'statement.'"⁵ If a witness offered to testify to another's extrajudicial declaration, "That red Buick was doing eighty," for the purpose of proving the speed of the vehicle, we would have a clear example of hearsay. Put category (1), verbal assertions, in the hearsay column.

2. Nonverbal Conduct Intended to be Assertive

With regard to nonverbal conduct intended to be assertive, the Note reads, "[s]ome nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement."⁶ Other examples might include an affirmative nod of the head, a negative rotation of the head, or an I-don't-know shrug of the shoulders. Put category (2), nonverbal conduct intended to be assertive, in the hearsay column.

3. Nonverbal Conduct not Intended to be Assertive

As to nonverbal conduct not intended to be assertive, the Note provides:

Other nonverbal 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 exis-

3. FED. R. EVID. 801(a) advisory committee note (emphasis added).

4. *Id.*

5. *Id.*

6. *Id.* It should be noted that the characterization of "pointing to identify a suspect in a lineup" as hearsay is limited by FED. R. EVID. 801(d)(1)(C): "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him" FED. R. EVID. 801(d)(1)(C).

tence of the condition and hence properly includable 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. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.⁷

The language used in this rather lengthy excerpt from the Note raises several questions.

First, why that long (forty-one word) and somewhat convoluted first sentence? Why didn't the Advisory Committee simply state, "Some nonverbal conduct may be equivalent to an implied assertion of the fact believed by the actor." I think I may know the answer. Given the Committee's desire to characterize such nonverbal conduct as nonhearsay, it might have been awkward to use the word "assertion." Still, if the shorter, more direct sentence would be accurately descriptive, its use would not necessarily conflict with the Committee's conclusion that such conduct should be treated as nonhearsay, *assuming the validity of the Committee's conclusion*.

The second question raised by the Note's language goes to the validity of that conclusion. After admitting that such evidence "is untested with respect to the perception, memory, and narration (or their equivalents) of the actor,"⁸ the Committee concluded "that these dangers are minimal in the absence of an intent to assert."⁹ That conclusion puzzles me. How does "the absence of an intent to assert"¹⁰ minimize the "dangers"¹¹ of faulty perception, faulty memory, or faulty narration "(or their equivalents)"¹² on the part "of the actor"?¹³ To attempt to answer that question, let's take a classic example¹⁴ of nonverbal conduct "offered as evidence that

7. FED. R. EVID. 801(a) advisory committee note.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. In *United States v. Zenni*, 492 F. Supp. 464 (E.D. Ky. 1980), the court observed: The classic case, which is discussed in virtually every textbook on evidence, is *Wright v. Tatham*, 7 Adolph. & E. 313, 386, 112 Eng. Rep. 488 (Exch. Ch. 1837), and 5 Cl. & F. 670, 739, 47 Rev. Rep. 136 (H.L. 1838). . . .

One of the illustrations advanced in the judicial opinions in *Wright v. Tatham* is perhaps even more famous than the case itself. This is Baron Parke's famous sea

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."¹⁵ A sea captain, after inspecting the vessel, placed his family on board and embarked. Subsequently, the sea captain's conduct is offered in evidence to prove the seaworthiness of the vessel. Is the evidence relevant for the purpose stated? Certainly.¹⁶ The captain's conduct is equivalent to an implied assertion by him that the ship was seaworthy. Is the evidence hearsay? A common law court might have said yes.¹⁷ What made the evidence relevant was the fact that the captain's conduct was the equivalent of an implied assertion by him that the ship was seaworthy. Since the evidence is being offered to prove the truth of the matter impliedly asserted, it is hearsay. The Advisory Committee Note, however, characterizes such evidence as nonhearsay. The Committee's reason is that, "in the absence of an intent to assert,"¹⁸ the "dangers"¹⁹ arising from the fact that the evidence "is untested with respect to the perception, memory, and narration (or their equivalents) of the actor"²⁰ "are minimal."²¹ How does the absence of an intent to assert indicate that the captain's inspection of the vessel (*perception*) was more careful and thorough than it would have been had the captain intended to assert that the vessel was seaworthy? How does the absence of an

captain example. Is it hearsay to offer as proof of the seaworthiness of a vessel that its captain, after thoroughly inspecting it, embarked on an ocean voyage upon it with his family? The court in *Wright v. Tatham* held that implied assertions of this kind were hearsay.

492 F. Supp. at 466.

In *Wright v. Tatham*, 112 Eng. Rep. 488 (Exch. Ch. 1837), *aff'd*, 47 Rev. Rep. 136 (H.L. 1838), the court stated:

To the latter class belong the supposed conduct of . . . a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family; all these, when deliberately considered, are . . . mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.

112 Eng. Rep. at 516.

15. FED. R. EVID. 801(a) advisory committee note.

16. That conclusion of relevancy would seem to be corroborated by the definition of relevancy contained in the Federal Rules of Evidence: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

17. *See supra* note 14.

18. FED. R. EVID. 801(a) advisory committee note.

19. *Id.*

20. *Id.*

21. *Id.*

intent to assert indicate that the captain's *memory* of what he observed during the inspection was more accurate than it would have been had the captain intended to assert that the vessel was seaworthy? And how does the absence of an intent to assert indicate that the implied assertion that the vessel was seaworthy (*narration or its equivalent*) is more precise than it would have been had the captain intended to assert that the vessel was seaworthy? I don't know. And the Advisory Committee Note doesn't say. The Note simply states what the Committee may have believed to be a self-apparent conclusion. Perhaps I'm just too obtuse to perceive the self-apparent. Or, perhaps, the Committee was unable to state a satisfactory rationale for its conclusion.

The third question raised by the Note's language also goes to the validity of the Committee's conclusion. After conceding that "[n]o class of evidence is free of the possibility of fabrication,"²² the Note states that "the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity."²³ Well, even I can understand that, if the sea captain never intended to assert that the vessel was seaworthy, he may not have been indulging in *fabrication or insincerity*. But diminishing the likelihood of fabrication or insincerity does not inherently enhance the accuracy of the actor's perception, memory, or implied narration, and those three factors are usually critical areas of inquiry on cross-examination. By characterizing category (3) as nonhearsay, the Advisory Committee provides for the admissibility of such evidence in the absence of the actor, thus precluding the opportunity for meaningful cross-examination. Moreover, there is underlying the Committee's conclusion that, in such circumstances, the likelihood of fabrication or insincerity is diminished, the tacit premise that conduct alone cannot influence the action of others or the alternative tacit premise that conduct alone cannot be intended to influence the action of others.²⁴ I think that either of those tacit premises may be faulty. Think of the platoon leader in front of his men in a combat assault. Rather clearly, his conduct can influence

22. *Id.*

23. *Id.*

24. I assume that the sharp distinction drawn by the Advisory Committee between intended assertions and unintended assertions, and the unlikelihood of fabrication or insincerity attaching to the latter, in the Committee's view, rests in part on the premise that only intended assertions can influence the conduct of others, therefore only with intended assertions would the actor have a motive to fabricate or be disingenuous.

his men and may even be intended to influence them. Our ship captain's conduct may have influenced, indeed, may have been intended to influence, the actions of prospective passengers and cargo shippers. That influence, even that intended influence, could exist solely as the result of the captain's conduct. Further, putting aside such influence on the actions of others, the captain's conduct, even absent an intent on his part to assert anything, could be viewed as ambiguous. It's possible that, after inspecting the vessel, the captain placed his family on board and embarked because, although he had serious doubts about the vessel's seaworthiness, he feared that he would lose a much needed commission if he acted otherwise. Neither the possibility of influencing the conduct of others, intentionally or unintentionally, nor the inherent ambiguity of the conduct can be explored adequately in the absence of the actor. Yet, given the Advisory Committee's nonhearsay characterization, the sea captain's conduct would be admissible notwithstanding the unavailability of the captain.

Does all of that mean that I would exclude evidence of the captain's conduct as hearsay if offered to prove that the vessel was seaworthy? Not necessarily. Let's assume that the court were to characterize the captain's conduct as being the equivalent of an implied assertion by him that the vessel was seaworthy. That would make the evidence clearly relevant for the purpose stated. Let's assume, too, that for that very reason the court characterizes the evidence as hearsay: an implied extrajudicial declaration offered to prove the truth of the matter impliedly asserted therein. I would think that the court might very well fashion an ad hoc exception to the hearsay rule to accommodate the evidence. The unavailability of the captain would demonstrate the necessity for receiving the evidence. The fact that the captain apparently bet his life and the lives of his family on the seaworthiness of the vessel would tend to bespeak trustworthiness. And, as a further condition precedent to admissibility, the court could require proponent to negate or diminish the likelihood either that the captain's conduct had been intended to influence the action of others or that the conduct had been the product of economic necessity, rather than a firm belief in the seaworthiness of the vessel. Since it is proponent who wishes to avail himself of the evidence, it would seem more appropriate to impose that onus on him as a condition precedent to admissibility, than to impose on opponent the extraordinarily difficult onus of "impeaching" the credibility of the unavailable captain. Given the necessity arising from the captain's unavailabil-

ity and the trustworthiness arising from his conduct, complicated by proponent's diminishing the likelihood of disingenuousness and ulterior motive, I think such an ad hoc hearsay exception would be entirely appropriate.

Would it be possible under Rule 804(b)(5)?²⁵ That Rule provides that

[a] statement not specifically covered by any of the foregoing exceptions [in 804(b)(1)-(4)] but having equivalent circumstantial guarantees of trustworthiness [shall be admissible], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.²⁶

Of the four preceding hearsay exceptions in Rule 804, the captain's conduct and implied assertion would seem to bear the closest relationship to 804(b)(3).²⁷ Of course, the captain's conduct is the reverse side of that coin. By placing himself and his family on board, the captain bet their lives that the vessel was seaworthy. Were he wrong in that belief, the lives of all would be in jeopardy. Does that bespeak "equivalent circumstantial guarantees of trustworthiness"²⁸ compared with a statement which is "so far contrary"²⁹ to a declarant's "pecuniary or proprietary interest"³⁰ or "so far tend[s] to subject [declarant] to civil or criminal liability,"³¹ or so far tends "to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true"?³² No statement contrary to a declarant's pecuniary or proprietary interest and no statement contrary to his possible civil litigation posture could place declarant's life in jeop-

25. FED. R. EVID. 804(b)(5).

26. *Id.*

27. FED. R. EVID. 804(b)(3):

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
Id.

28. FED. R. EVID. 804(b)(5).

29. FED. R. EVID. 804(b)(3).

30. *Id.*

31. *Id.*

32. *Id.*

ardy. Only the most flagrant statement contrary to a declarant's penal interest could place his life in jeopardy; and even such a flagrant declaration would not place the lives of declarant's family in jeopardy. It would seem that the captain's conduct and the implied assertion arising therefrom do possess "equivalent circumstantial guarantees of trustworthiness,"³³ still assuming that proponent diminishes the likelihood of disingenuousness or ulterior motive. By hypothesis, the conduct and implied assertion are being "offered as evidence of a material fact,"³⁴ the seaworthiness of the vessel. Given the necessity, trustworthiness, and materiality attaching to the evidence, its admissibility would seem to serve "the general purposes of these rules and the interests of justice."³⁵ The remaining requirement, that "the statement [be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,"³⁶ would seem to pose the most serious sticking point.

The language of that requirement is somewhat ambiguous on its face. It could be read as requiring a judicial determination that the offered evidence was more probative than any other evidence, singly or in toto, which proponent could reasonably procure. That very demanding reading would require the court to weigh the offered evidence against the totality of proponent's other evidence on the same point and admit the challenged evidence only if the court concluded that the challenged evidence was the more probative. Alternatively, it could be read as requiring a judicial determination only that the offered evidence was more probative than any other evidence concerning the same general circumstances (in our hypothetical, the condition of the vessel as known by one uniquely competent to have made such a determination) which proponent could reasonably procure. That less demanding reading would seem to point toward admissibility in our hypothetical situation. Given that apparent ambiguity, recourse to legislative history would seem appropriate. In explaining the requirement that the statement be "more probative on the point for which it is offered than any other evidence which proponent can procure through reasonable efforts," the Senate Judiciary Committee stated that "[t]his requirement is intended to insure that only statements which have high probative value and necessity may qualify for ad-

33. FED. R. EVID. 804(b)(5).

34. FED. R. EVID. 804(b)(5)(A).

35. FED. R. EVID. 804(b)(5)(C).

36. FED. R. EVID. 804(b)(5)(B).

mission under the residual exceptions."³⁷ The Conference Report "adopt[ed] the Senate amendment."³⁸ While the language of the Senate Judiciary Committee does not clearly resolve the ambiguity of the Rule's language, it tends to suggest the less demanding reading of that language. "High probative value,"³⁹ while demanding, seems less demanding than a higher probative value than all of the rest of proponent's evidence on the same point. Consequently, I am inclined to conclude that the captain's conduct and the implied assertion it generates, even if characterized as hearsay, would be admissible under Rule 804(b)(5), once proponent diminishes the likelihood of disingenuousness or ulterior motive.

Why then did the Advisory Committee in its Note to 801(a) characterize such evidence as nonhearsay? If the evidence probably would be admissible under 804(b)(5), even if characterized as hearsay, there would seem to be little point in devoting the major part of the Note to 801(a) to "proving" that such evidence was nonhearsay. Frankly, I don't know the answer. There are, I think, several possible explanations. First, the Advisory Committee may have been attempting to spare the courts the chore of determining whether such evidence should be treated as an exception to the hearsay rule under 804(b)(5). Characterizing the evidence as nonhearsay would, indeed, eliminate that judicial task. Second, the Advisory Committee may have felt strongly that such evidence should be characterized as nonhearsay and be admissible, whether or not covered by 804(b)(5); therefore, the Committee so characterized it. The third possible reason is a bit less obvious.

In its preliminary form, Rule 804(a) read:

General Provisions. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness.⁴⁰

In its preliminary form, Rule 804(b) read:

Illustrations. By way of illustration only, *and not by way of limitation*, the following are examples of statements conforming with the requirements

37. S. REP. No. 1277, 93d Cong., 2d Sess. 19, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066.

38. COMM. OF CONF. REP. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7106.

39. S. REP. No. 1277, 93d Cong., 2d Sess. 19, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066.

40. Proposed Rules of Evidence for the United States District Courts & Magistrates PROP. R. EVID. 804(a) (Prelim. Draft 1969), *reprinted in* 46 F.R.D. 161 (1969) (hereinafter cited as PROP. R. EVID., with reference to a specific rule).

of this rule⁴¹

There then followed five such "examples."⁴²

Congress rejected the proposed Rule. The House Judiciary Committee "deleted [the provision] as injecting 'too much uncertainty' into the law of evidence and impairing the ability of practitioners to prepare for trial."⁴³ The Senate Judiciary Committee, too, discarded the "example only" rule and supplanted it with the current "residual exception." The Conference Committee "adopt[ed] the Senate amendment."⁴⁴ Thus, the Advisory Committee's original concept that trial courts were to have broad discretion in fashioning hearsay exceptions, guided by an "illustrative only" rule, was replaced by a series of specific hearsay exceptions and a limited residual exception.

The Advisory Committee Note to Rule 801(a) existed in its present form in the preliminary draft of the proposed rules.⁴⁵ It was fashioned by the Committee at a time when the Committee contemplated that the federal courts would have broad discretion to fashion a hearsay exception for any statement "if its nature and the special circumstances under which it was made offer[ed] strong assurances of accuracy and the declarant [was] unavailable as a witness."⁴⁶ Of course, after Congress dramatically amended Rule 804 (as well as a number of the other proposed rules), the Advisory Committee had the opportunity to amend its notes to bring them into conformity with the congressional amendments. Sometimes the notes were assiduously amended by the Advisory Committee; sometimes they were not.⁴⁷ Consequently, it's impossible to deter-

41. PROP. R. EVID. 804(b) (emphasis added).

42. The examples were (1) former testimony, (2) statement of recent perception, (3) statement under belief of impending death, (4) statement against interest, and (5) statement of personal or family history. PROP. R. EVID. 804(b).

43. S. REP. NO. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7065.

44. COMM. OF CONF. REP. NO. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7105.

45. PROP. R. EVID. 801(a) advisory committee note.

46. PROP. R. EVID. 804(a).

47. *E.g.*, the Advisory Committee Note to Fed. R. Evid. 607, which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him," states in part: "if the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1)." FED. R. EVID. 607 advisory committee note (emphasis added). Although under PROP. R. EVID. 801(c)(2) all inconsistent statements of a witness were characterized as nonhearsay, the rule ultimately enacted by Congress treats as nonhearsay only those prior inconsistent statements which were "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition . . ." FED. R. EVID. 801(d)(1)(A).

mine to a certainty if the Advisory Committee Note to Rule 801(a),

The Advisory Committee Note to FED. R. EVID. 601 (emphasis added), which provides that:

Every person is competent to be a witness except as otherwise provide in these rules. *However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision the competency of a witness shall be determined in accordance with state law,*

reads in part: "The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind." FED. R. EVID. 601 advisory committee note. That language in the Note was drafted when PROP. R. EVID. 601 provided in toto that "[e]very person is competent to be a witness except as otherwise provided in these rules," with the intention that the Federal Rules of Evidence would govern all issues of competency in state law claims as well as in federal causes of action. Once the congressional decision was made that state law should determine competency in regard to state law claims or defenses (including the state's Dead Man's Act, if one exists), the Advisory Committee Note's reference to the undesirability of Dead Man's Acts became largely superfluous and perhaps even misleading. Its only applicability today would be to federal causes of action, where, clearly, a Dead Man's Act is to have no applicability. *Longoria v. Wilson*, 730 F.2d 300, 304 (5th Cir. 1984).

PROP. R. EVID. 804(b)(1), dealing with the admissibility of former testimony, permitted the receipt of such evidence in a subsequent civil action against a party who had not been a litigant in the earlier action so long as there existed a similar opportunity, motive, and interest to develop the testimony as between earlier litigant and present litigant. There was no requirement that the earlier litigant be a predecessor in interest to the present litigant. The Advisory Committee Note to that proposed rule noted a change from the common law requirement of "privity" between earlier litigant and present litigant. PROP. R. EVID. 804(b)(1) advisory committee note. In enacting FED. R. EVID. 804(b)(1), Congress explicitly required that the earlier litigant be "a predecessor in interest" to the subsequent litigant. That requirement grew out of the conclusion of the House Judiciary Committee that:

it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this . . . is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

HOUSE COMM. ON THE JUDICIARY REP. NO. 93-650, 93d Cong., 1st Sess. 15 (1973). The Advisory Committee Note to FED. R. EVID. 804(b)(1) was amended to read in part: "The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered." FED. R. EVID. 804(b)(1) advisory committee note. It seems to me that the language of the amended Note suggests a grudging reluctance to acquiesce in a congressional determination different from the Committee's original preference. *But cf. Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978) (giving the phrase "predecessor in interest" an interpretation so broad as to make it nearly synonymous with any prior party having a similar motive and interest in examining the now unavailable witness), and *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir. 1983) ("[W]e adopt the position taken by the *Lloyd* court . . ."). However, "[t]hus far most courts—the *Lloyd* majority [opinion] being the exception—have attempted to make the term ["predecessor in interest"] mean something more than the similar motive approach rejected by the Congress." E. EPSTEIN, G. JOSEPH & S. SALTZBURG, *EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE* 302-03 (1983). See Seidelson, *The Federal Rules of Evidence and the Discriminating Selection of Forum*, 23 DUQ. L. REV. 558, 582 (1985).

left intact after the dramatic congressional changes in Rule 804, indicates a decision by the Committee that no change in its Note to 801(a) was required by the congressional amendments to 804.

Well, what's the significance of all that legislative and pre-legislative history? To me, it suggests some uncertainty with regard to the significance to be attached to the Advisory Committee Note to Rule 801(a). Bearing in mind that the Note was written when the Advisory Committee contemplated that the federal courts would have broad discretion in fashioning ad hoc hearsay exceptions, two disparate conclusions suggest themselves. First, the Committee's decision to characterize nonassertive nonverbal conduct as nonhearsay could take on an *a fortiori* significance. If the Committee saw fit to fashion that nonhearsay characterization, notwithstanding the contemplated broad judicial discretion to fashion hearsay exceptions, the Committee must have felt very strongly about the urgent propriety of imposing the nonhearsay characterization.⁴⁸ Alternatively, the Committee, contemplating that broad judicial discretion to fashion hearsay exceptions, may have felt that it would, therefore, be no "big deal" to characterize nonassertive nonverbal conduct as nonhearsay; after all, the courts proba-

The Advisory Committee Note to FED. R. EVID. 803(18), the learned treatise exception to the hearsay rule, reads: "Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. *The parallel to the treatment of prior inconsistent statements will be apparent.* See Rules 613(b) and 801(d)(1)." FED. R. EVID. 803(18) advisory committee note (emphasis added). As was noted earlier on in this note in connection with the Advisory Committee Note to FED. R. EVID. 607, Rule 801(d)(1) requires as a condition precedent to substantive admissibility that the prior inconsistent statement have been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . ." FED. R. EVID. 613(b), dealing with extrinsic evidence of a prior inconsistent statement by a witness, makes no reference to the substantive admissibility of such a statement. Apparently, in drafting the Note to FED. R. EVID. 803(18), the Advisory Committee's "parallel" between that Rule and Rules 613(b) and 801(d)(1) rested on the language of PROP. R. EVID. 801(c)(2)(i) which was significantly amended by Congress in FED. R. EVID. 801(d)(1)(A).

48. This alternative explanation finds some support in the Rule and in the Advisory Committee Note. Under the language of the Rule, "nonverbal conduct of a person" is a "statement" only "if it is intended by him as an assertion." FED. R. EVID. 801(a)(2). Under the language of the Note:

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

The rule 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 and in favor of admissibility.

FED. R. EVID. 801(a) advisory committee note. That placing of the burden on opponent rather than on proponent implies a strong urge on the part of the Committee to achieve the nonhearsay characterization. For a discussion of the limited scope of the language excerpted from the Rule and the Note, see *infra* notes 86, 89 and 91 and accompanying text.

bly would receive such evidence as an ad hoc exception anyway. Which is the more likely explanation? I don't know.

There are, however, two things I do know. First, the Committee's rationale for its characterization of nonassertive nonverbal conduct as nonhearsay is, as already noted, not very persuasive. Second, however, that characterization seems compelled by the explicit language of Rule 801(a) in defining a "statement"⁴⁹ as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."⁵⁰ The sea captain's conduct involved neither an oral nor a written assertion. Moreover, his conduct, let us assume, was not intended by him as an assertion. Therefore, the conduct was not a "statement." Since 801(c)'s definition of hearsay requires a "statement," the sea captain's conduct was not hearsay. Consequently, despite my own discomfiture over the Advisory Committee Note's rationale for that conclusion, and despite the absence of any legislative history indicating such a congressional intent,⁵¹ I feel compelled to conclude from the language of Rule 801(a) and (c) that the sea captain's conduct is not hearsay. Put category (3), nonverbal conduct not intended to be assertive, in the nonhearsay column. But do recall the weaknesses in the Committee's rationale for that conclusion; those same weaknesses (as well as some others) seem to exist with regard to the Committee's treatment of category (5).⁵² And with category (5), I do not believe the language of the Rule compels the Advisory Committee's conclusion.

4. Nonassertive Verbal Conduct

With regard to nonassertive verbal conduct, and category (5), assertive verbal conduct, the Advisory Committee Note is considerably more succinct: "Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivi-

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

50. *Id.*

51. Neither the House nor Senate Judiciary Committee Report makes any reference to the meaning to be attributed to the language of FED. R. EVID. 801(a) or (c). The House Report contains comments on Rule 801 commencing with 801(d)(1). H.R. REP. NO. 650, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7076, and the Senate Report contains comments on Rule 801 commencing with 801(d)(1)(A). S. REP. NO. 1277, 93d Cong., 2d Sess. 15, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7062.

52. See *infra* text accompanying note 54.

sion (c)."⁵³ What constitutes an example of category (4)? Declarant, believing himself to be alone, hears a radio or television news bulletin which elicits from him a surprised, "Son-of-a-gun!" Subsequently, a witness offers to testify to declarant's surprised exclamation as evidence that declarant had no previous knowledge of the matter reported in the bulletin. Opposing counsel's hearsay objection would be overruled. Although declarant's reaction had been verbal, that verbalization had not been intended as an assertion of anything to anyone. Or, declarant, believing himself to be alone, sobs, "I don't want to live to see another day." Subsequently, a witness offers to testify to declarant's mournful utterance as a means of proving that declarant then had a mind bent on suicide. Opposing counsel's hearsay objection would be overruled. Again, although declarant's conduct had been verbal, that verbalization had not been intended as an assertion of anything to anyone. Neither of those examples of category (4), nor the Committee's characterization of them as nonhearsay, gives me any difficulty. Put category (4), nonassertive verbal conduct, in the nonhearsay column.

5. Assertive Verbal Conduct

Assertive verbal conduct, and the Advisory Committee's characterization of it as nonhearsay presents me with great difficulties. Let's begin by using the Committee's description of category (5) verbatim: "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted."⁵⁴ Perhaps the best known example of category (5) occurred in *Wright v. Tatham*.⁵⁵ Testator, Marsden, left his estate to Wright, a former employee. Testator's heir at law, Admiral Tatham, challenged the will, asserting that Marsden had lacked testamentary capacity. Counsel for Wright offered in evidence six letters which had been written to Marsden. Two of the letters were from a "some time solicitor to Mr. Marsden before 1789, when the letters were supposed to have been written."⁵⁶ Those letters requested that Mars-

53. FED. R. EVID. 801(a) advisory committee note.

54. *Id.*

55. 112 Eng. Rep. 488 (Exch. Ch. 1837), *aff'd*, 47 Rev. Rep. 136 (H.L. 1838).

56. 112 Eng. Rep. at 491. Of the six letters considered by the Exchequer Chamber, only three were considered by the House of Lords: the letter from Charles Tatham, the letter from the Vicar of Lancaster, and the letter from the Rev. Henry Ellershaw. 47 Rev. Rep. at 138-39, 141, 142. The tortuous litigation history of *Wright v. Tatham* is set out at 47 Rev. Rep. at 136-37.

den attend a meeting for the purpose of determining a common position to be taken at a "Public Meeting."⁵⁷ One of the letters was from the "Vicar of Lancaster"⁵⁸ suggesting that a "[c]ase should be settled . . . and laid before Council to whose opinion both sides should submit"⁵⁹ Another letter, from "Mr. Bickersmith, Surgeon,"⁶⁰ requested Marsden, in his role of "Trustee,"⁶¹ to attend and provide support for a "Mr. Dobson"⁶² at a meeting. The fifth letter was from "the Rev. Henry Ellershaw,"⁶³ who, upon his resignation from "the perpetual curacy of Hornby,"⁶⁴ expressed his gratitude to Marsden who "had appointed him."⁶⁵ The sixth letter was from "Charles Tatham, Mr. Marsden's cousin."⁶⁶ It recounted the writer's trip to "the Cape of Verginia,"⁶⁷ the "Most Shocking Condition the People dieing from 5 to 10 per day,"⁶⁸ and the writer's anticipated travel to Philadelphia. The authors of the letters were dead at the time of trial. Each, presumably, had known Marsden well enough to have formed some opinion of his mental capacity.

Let's begin with competence. Had each of the authors been available as a witness, each would have been competent to offer an opinion as to Marsden's mental capacity. Federal Rule of Evidence 701 would suggest a similar result; it permits a lay witness to offer an opinion which is "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or the determination of a fact in issue."⁶⁹ How about relevancy? Obviously, the testimony of each such witness as to Marsden's mental capacity would have been relevant. But what made the letters relevant? I guess each letter was equivalent to an implied assertion by its author that Marsden was mentally competent. Then weren't the letters hearsay, that is, wasn't each letter an extrajudicial declaration offered in evidence to prove the truth of the matter impliedly

57. 112 Eng. Rep. at 492.

58. *Id.* at 491.

59. *Id.*

60. *Id.* at 492.

61. *Id.*

62. *Id.*

63. *Id.* at 491.

64. *Id.*

65. *Id.*

66. *Id.* at 490.

67. *Id.* at 491.

68. *Id.*

69. FED. R. EVID. 701.

asserted therein? Ultimately, the House of Lords said yes.⁷⁰ Apparently, the Advisory Committee Note to Rule 801(a) says no. Why the change?

The Note states that "similar considerations"⁷¹ apply to "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted,"⁷² category (5), as applied to "nonverbal conduct,"⁷³ category (3). Those considerations were that (1) the "dangers"⁷⁴ of "untested . . . perception, memory, and narration (or their equivalents) of the actor"⁷⁵ were "minimal in the absence of an intent to assert,"⁷⁶ and (2) the "likelihood"⁷⁷ of "fabrication"⁷⁸ "is less"⁷⁹ and "questions of sincerity"⁸⁰ are "virtually . . . eliminate[d]"⁸¹ "in the absence of an intent to assert."⁸² Do those "considerations" apply to the letters in *Wright*? Each author made an implied assertion that Marsden was mentally competent. How would the *perception* of each author have been adversely affected had he intended to assert that Marsden was competent? Presumably, with or without an intent to so assert, each author's knowledge of and familiarity with Marsden and his mental condition would have been precisely the same. How would *memory* of each author have been adversely affected had he intended to assert that Marsden was competent? Presumably, with or without an intent to so assert, each author's memory of his perceptions would have been precisely the same. How would the narration (or its equivalent) of each author have been adversely affected had he intended to assert that Marsden was competent? Assuming that each letter was written *ante litem motam*, as seems to have been the case, presumably the implied assertion that Marsden was competent would have been no more precise than it would have been had the author intended to assert the same conclusion. In fact, an intention to assert that conclusion, or an explicit assertion of that conclusion, would, if anything, tend to strengthen the

70. 47 Rev. Rep. 136 (H.L. 1838).

71. FED. R. EVID. 801(a) advisory committee note.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

precision of the narration.

How about *fabrication* and *sincerity*? Since the letters were written *ante litem motam*, there would appear to be little likelihood that the authors were fabricating or being insincere. Such disingenuousness is possible, of course. It's possible that each author, believing Marsden to be incompetent, wrote as he did in a desire to act kindly toward one lacking mental capacity. How would that possibility of disingenuousness be enhanced if each author had explicitly expressed his (false) belief that Marsden was competent? The actual letters, absent such an explicit expression, clearly connote such a belief by their writers. The desire to act kindly toward one thought to be incompetent would hardly have been better served by an explicit assertion that the intended reader was competent. It would seem that the sincerity of each author would be pretty much the same whether or not each had intended to assert a belief in Marsden's competence.

In sum, perception, memory, narration "(or their equivalents)"⁸³ and sincerity on the part of the declarants would appear to be of the same level with or without an intention to assert. Certainly, the absence of such an intention had no significant beneficial effect on any of those factors. The distinction drawn by the Advisory Committee Note between the level of each of those factors absent an intention to assert and with an intention to assert simply doesn't hold up. Since that asserted distinction is the principal reason for the Committee's characterization of category (5), "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted,"⁸⁴ as nonhearsay, the characterization becomes suspect.

With category (3), nonverbal conduct, although I found the rationale for the Committee's nonhearsay characterization questionable, I felt impelled to accept its conclusion because that conclusion was compelled by the language of the Rule: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."⁸⁵ Since, by hypothesis, the nonverbal conduct of the sea captain involved no assertion, it did not constitute a "statement," therefore, under the Rule could not be hearsay.

Is the same true of the Committee's characterization of category

83. *Id.*

84. *Id.*

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

(5) (and the letters in *Wright*) as nonhearsay? I think not. Here, by definition, we are dealing with "verbal conduct which is assertive."⁸⁶ Consequently, category (5) could easily satisfy the Rule's requirement that a statement be an oral or written assertion. Moreover, there is nothing in the legislative history of the Rule to indicate that Congress affirmatively acquiesced in the Advisory Committee's conclusion that category (5) should be treated as nonhearsay.⁸⁷ With regard to category (5), the Advisory Committee's conclusion must stand or fall on its own merits. As we have seen, the principal reason for that conclusion is suspect.

I feel compelled to reveal to the reader a personal bias that may well have influenced my own adverse reaction to the Committee's conclusion and to the suspect rationale for that conclusion. I believe rather strongly in the efficacy of cross-examination. Consequently, I am not inclined to embrace quickly a relatively new category of nonhearsay with its concomitant effect of receiving extrajudicial declarations absent any meaningful opportunity to cross-examine the declarants. It's true that I am inclined to believe that most of us attempt to be honest and accurate in most of our extrajudicial declarations. It's also true that I believe that the honesty and accuracy of the declarant will be approximately the same whether or not he had the intention to assert. But those two beliefs combined do not destroy the possible efficacy of cross-examination. Even the most honest declarant may have been unaware of some fact that would have changed the nature of his declaration. Even the most honest declarant may have been unaware of some subconscious influence that may have colored his declaration. And even the most honest declarant, even lacking the specific intention to assert fact A, made aware of some unknown to him fact or some unrealized subconscious influence, may have been unlikely to assert fact B, from which the existence of A could be inferred. Finally, and sadly, though it does, I believe, tend to be the exception and not the rule, not every declarant in every case will have at-

86. FED. R. EVID. 801(a) advisory committee note. After all, each of the written declarations in *Wright* asserted something. Just what the Advisory Committee may have intended by that quoted phrase, and whether that intention is corroborated by the language of the Rule itself, is discussed in the text following note 88 *infra*, at note 89 *infra*, note 91 *infra*, and following note 93 *infra*. It should be emphasized that the Advisory Committee, itself, described category (5) as "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted . . ." FED. R. EVID. 801 advisory committee note (emphasis added). That language of the Committee strongly implies that category (5) consists of "an oral or written *assertion*." FED. R. EVID. 801(a) (emphasis added).

87. See *supra* note 51.

tempted to be as honest and accurate as possible in making his extrajudicial declaration. Those shortcomings, ignorance of a significant fact, unawareness of a subconscious influence, and, occasionally, disingenuousness, are the very things cross-examination is intended to reveal. Because each of those shortcomings may exist with regard to any extrajudicial declaration, irrespective of the declarant's intention or lack of intention to assert a specific fact, I think the Committee's apparent conclusion that verbal conduct which is impliedly assertive should be treated as nonhearsay is unfortunate.

That conclusion is unfortunate for another reason, I believe. The conclusion itself is somewhat ambiguous. The Committee defines category (5) as "verbal conduct which is assertive but offered as a basis for inferring something *other than the matter asserted*."⁸⁸ Do those italicized words mean something other than the matter explicitly asserted or something other than the matter explicitly or impliedly asserted? If the first interpretation is accepted, the language marks a very dramatic change from pre-existing law; that interpretation would lead to the conclusion that an extrajudicial declaration offered in evidence to prove the truth of the matter impliedly asserted therein was not hearsay. It's difficult (at least for me) to imagine that, in enacting Rule 801(a) and (c), Congress intended to effect such a dramatic change in evidence law when the change is not clearly reflected in the language of the Rule, is nowhere reflected in the legislative history of the Rule, and, therefore, rests exclusively on the second half of a single sentence in the Advisory Committee Note. If the second interpretation is accepted, the extrajudicial declaration would be nonhearsay only if the fact to be inferred therefrom was clearly different from the fact explicitly *or* impliedly asserted therein. While that interpretation would effect a considerably less dramatic change in evidence law, thus straining credulity less because the change rested only on a half-sentence in the Advisory Committee Note, it would impose on the courts an ongoing difficult task: determining if the disparity between the fact to be inferred and the fact explicitly or impliedly asserted was sufficiently great to justify characterizing the declaration as nonhearsay. And as the disparity between the fact to be inferred and the fact explicitly or impliedly asserted becomes greater, the relevancy of the declaration is likely to become more remote. Consequently, neither interpretation of those italicized

88. FED. R. EVID. 801(a) advisory committee note (emphasis added).

words in that half-sentence is without difficulty.

Let's try each interpretation in a hypothetical setting. A wrongful death action is brought against defendant Dean. His car struck and killed plaintiff's decedent. The theory of liability asserted is that defendant was driving his car while intoxicated. In his case-in-chief, plaintiff presents evidence that, prior to the fatal impact, defendant had been at a party, booze was served at the party and defendant had ingested some of the booze. In addition, plaintiff presents evidence that Dean had driven Jones to the party. Then plaintiff calls Williams to the stand. Williams offers to testify that, shortly before Dean left the party, Dean said to Williams, "Tell Jones I'm ready to leave and I'll drive him home." When Williams gave Jones the message, Jones replied, "I'd rather walk home than ride with anyone as drunk as Dean." Opposing counsel's hearsay objection is almost certain to be sustained. Williams is offering to testify to Jones' extrajudicial declaration for the purpose of proving the truth of the matter asserted therein, i.e., Dean was too drunk to drive. A fairly straightforward instance of category (1): "verbal assertions." But suppose Williams offers to testify that Jones' response was, "I'd rather crawl home on my hands and knees." Is that extrajudicial declaration hearsay?

Let's examine a preliminary matter. Suppose that defendant's counsel objects to the offered testimony as being irrelevant. Plaintiff's counsel is almost certain to argue that Jones' declaration was an implied assertion that Dean was too drunk to drive, and is therefore relevant. Let's assume that the court would agree with plaintiff's counsel and overrule defendant's irrelevancy objection. Then defendant objects to the offered testimony as hearsay. How should the court rule?

If the first and more dramatic interpretation of the half-sentence in the Advisory Committee Note were accepted, the court might overrule the objection. After all, the extrajudicial declaration isn't being offered to prove the truth of the matter *explicitly* asserted therein, "I'd rather crawl home on my hands and knees"; it's being offered to prove the truth of the matter *impliedly* asserted therein, Dean was too drunk to drive. It would be a little bit troubling (at least to me) that the very implied assertion that made the declaration relevant would simultaneously make the declaration nonhearsay because the assertion was "only" implied. On the other hand, if the second interpretation of that half-sentence were accepted, the court might sustain the hearsay objection. There is no significant disparity between (1) the matter explicitly *and* impliedly asserted

in the declaration and (2) the fact sought to be proved. The inference sought to be proved is precisely the same as the matter impliedly asserted in the extrajudicial declaration: Dean was too drunk to drive. What's a poor judge to do?

Well, the Advisory Committee Note does say: "[t]he effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. *The key to the definition is that nothing is an assertion unless intended to be one.*"⁸⁹ Let's use that magic "key." Did Jones intend his declaration to be an assertion? Certainly he intended to assert to Williams that he (Jones) did not want to ride with Dean. But did Jones mean to assert to Williams that Dean was drunk? I don't know. I'm not sure that Jones would know, were he available. Most of us are rather thoughtless of the legal nuances of most of our extrajudicial declarations. How is the court to make that determination? I suppose the court could reason that, given the rather dramatic nature of the response ("I'd rather crawl home on my hands and knees"), Jones did intend to assert impliedly that Dean was drunk. If the court did so conclude, presumably it would sustain defendant's hearsay objection. And presumably the court would so react irrespective of the ambiguity of the Note's half-sentence. Whether that language is read as referring to verbal conduct which is assertive but offered as a basis for inferring something other than the matter *explicitly* asserted (the more dramatic reading), or as referring to verbal conduct which is assertive but offered as a basis for inferring something other than the matter *explicitly or impliedly* asserted (the less dramatic reading), the Note itself says that "[t]he key to the definition is that nothing is an assertion unless intended to be one."⁹⁰ Consequently, should the court conclude that Jones had intended to assert even impliedly that Dean was drunk, the Note's "key to the definition" would indicate that Jones' extrajudicial declaration was hearsay.

Let's tinker with Jones' response. Suppose he had said to Williams, "Tell Dean 'no thanks.' I'll call a cab," and that he did immediately phone for a cab. Suppose, too, that defendant objects to Williams' offered testimony of Jones' declaration and conduct as being irrelevant. Plaintiff's counsel argues to the court that Jones' declaration and conduct constituted an implied assertion that Dean was drunk. I suspect the court would be inclined toward the

89. *Id.* (emphasis added).

90. *Id.*

conclusion that this less emphatic response was not even an implied assertion that Dean was drunk, and would, therefore, be inclined to sustain defendant's objection that the evidence was irrelevant. But suppose that plaintiff's counsel enlarged his offer of proof by asserting to the court that other evidence would indicate that the cab fare from the site of the party to Jones' home was forty-five dollars. Doesn't that make Jones' response at least as emphatic as "I'd rather crawl home on my hands and knees"? That latter declaration is more rhetoric than fact, but forty-five dollars is forty-five dollars. Assuming that the "cab" response is as emphatic as the "crawl" response, the court could conclude that the former, as well as the latter, was intended as an implied assertion that Dean was drunk. In that case, the court might overrule defendant's irrelevancy objection, in which case, defendant would certainly raise the hearsay objection. How should the court rule?

If the court embraced the more dramatic interpretation of the half-sentence in the Advisory Committee Note, the court might be inclined to overrule defendant's objection. The fact that the relevant declaration and conduct constituted merely an implied assertion of Dean's intoxication would seem to point toward that result. And again we would be confronted with the anomaly that the very implied assertion that made the declaration and conduct relevant would compel the judicial determination that the declaration and conduct were not hearsay. If the court embraced the less dramatic interpretation of the language in the Advisory Committee Note, the court would ask if there was a significant disparity between the fact sought to be proved (Dean's intoxication) and the matter explicitly *and* impliedly asserted in the declaration and conduct. Since the matter impliedly asserted (the very matter that made the declaration and conduct relevant), is precisely the same as the fact sought to be proved, no such disparity would exist and the court would be inclined to sustain defendant's hearsay objection.

But before converting inclination into decision, the court should apply the Advisory Committee Note's magic "key": When Jones made the "cab" declaration and, in fact, called a cab, did Jones intend his declaration and conduct to be an assertion? Certainly Jones intended to assert that he did not want to ride with Dean. But did Jones intend to assert that Dean was drunk? I still don't know. I'm still not sure that Jones would know, were he available. But the court, using the magic "key," would be required to answer that question, and its answer would be critical to admissibility. I suppose the court might reason that, if Jones were sufficiently mo-

tivated to pay forty-five dollars for a cab ride home rather than ride with Dean, Jones did intend to assert impliedly that Dean was drunk. In that case, the court might sustain defendant's objection. Suppose, however, that at side-bar counsel for the plaintiff says to the court that, notwithstanding Jones' strong motivation, the court cannot rationally conclude that the basis of that motivation was Dean's alleged intoxication. After all, when Dean drove Jones to the party, Dean may (unknowingly) have done or said something that so offended Jones that he would not again ride with Dean. Or, after the two arrived at the party, Dean (unknowingly) may have done or said something that so offended Jones that he would not again ride with Dean. Given Jones' unavailability, how is the court to determine the real basis for Jones' motivation for taking an expensive cab ride home and, therefore, his likely intention in saying and doing what he did? And if the court cannot do so, doesn't that make the court's determination of whether to sustain or overrule defendant's objection a practical impossibility? And does it not also suggest that the court's earlier determination of relevancy, based on the emphatic motive of Jones' response, may have lacked a rational basis? In fact, the very side-bar assertions made by plaintiff's counsel in an effort to persuade the court that declarant had not intended to assert that defendant was drunk, cast significant doubt on the relevancy of the extrajudicial declaration and conduct. And just to make the apparent disorder complete, wouldn't each of those assertions be equally applicable to the court's earlier rulings on relevancy and hearsay with regard to the "crawl" declaration?

The Advisory Committee Note purports to offer a solution to these problems. The Note provides:

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 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 and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact.⁹¹

How is "[t]he rule . . . so worded as to place the burden upon the party claiming that the intention [to assert] existed"?⁹² Rule 801(a) reads: "A 'statement' is (1) an oral or written assertion or

91. *Id.*

92. *Id.*

(2) nonverbal conduct of a person, *if it is intended by him as an assertion.*"⁹³ Do those italicized words, following and clearly modifying (2), modify (1) as well? Generally, the rule of grammar is that a pronoun refers to the last antecedent noun, and that grammatical rule is especially critical where the possibility of confusion exists in the interpretation of a statute.⁹⁴ Under that general rule, "it" in the italicized phrase would refer to "nonverbal conduct," not to "an oral or written assertion." That grammatical conclusion would seem to be corroborated by the fact that the two prior nouns are separately numbered as (1) and (2). Moreover, had Congress intended the italicized phrase to modify (1) as well as (2), Congress easily could have stated: "if either is intended by him as an assertion." Consequently, I am inclined to read the phrase actually used by Congress as referring to "nonverbal conduct" only and not to "an oral or written assertion." As a result, I don't think the "rule is so worded as to place the burden upon the party claiming that the intention existed"⁹⁵ with regard to the problem we are considering: an extrajudicial declaration which consists of an oral assertion.

93. FED. R. EVID. 801(a) (emphasis added).

94. *Davis v. Gibbs*, 39 Wash. 2d 481, 236 P.2d 545 (1951). "Where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent The last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence" *Id.* at 482, 236 P.2d at 546 (citations omitted).

2[A] N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 47.33 (4th ed. 1984):

Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of a sentence."

Thus a proviso usually is construed to apply to the provision or clause immediately preceding it.

Id. at 245 (footnotes omitted).

E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 196 (1940). "[I]n case of doubt, the rules of grammar may justify the acceptance of a particular construction. And besides, such rules may also operate to corroborate a certain construction and thereby confirm it as the intent of the legislature, especially where the statute seems to be carefully constructed grammatically." *Id.* at 338 (footnotes omitted).

L. SQUIRES & M. ROMBAUER, *LEGAL WRITING IN A NUTSHELL* (1982). "The use of 'it' in legal writing causes more confusion than any other pronoun reference." *Id.* at 231.

G. PECK, *WRITING PERSUASIVE BRIEFS* (1984). "Pronouns are necessary as a means of avoiding wearisome repetition, but they also invite awkwardness and error. The person or thing to which a pronoun refers must be clear, otherwise the pronoun will become a major source of ambiguity." *Id.* at 28.

R. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* (1965). "Another common form of ambiguity is uncertainty of pronominal reference. Much of this can be avoided by putting the pronoun as close as possible to the word or phrase to which it refers, making certain that the two agree in number." *Id.* at 74.

95. FED. R. EVID. 801(a) advisory committee note (emphasis added).

Perhaps not surprisingly, I find the Advisory Committee's "solution" a bit ambiguous for a couple of other reasons. Is "evidence of conduct" intended to refer only to category (3), nonverbal conduct, or is it intended to refer as well to category (5), verbal conduct, the matter at issue here? Does the phrase "whether an assertion is intended" refer only to the intention to make an explicit assertion of the matter sought to be proved, or does it refer as well to the intention to make an implied assertion of the matter sought to be proved? In order to give the Advisory Committee's "solution" at least potential applicability to category (5) and the problem we are considering, let's assume that the committee intended the broader application of both phrases. Then, applying the "solution" to the "cab" and "crawl" declarations, the court would assume that neither declaration had been made with the intention, explicit or implied, of asserting that Dean was intoxicated, unless and until defense counsel meets the burden of persuading the court to the contrary. Let's assume, too, that defense counsel candidly concedes that he has no idea of the unavailable Jones' intention at the time he made the declaration. In those circumstances, the Committee's solution would point toward a nonhearsay characterization and admission of the declaration.

Does that solution, in fact, "involve no greater difficulty than many other preliminary questions of fact"?⁹⁶ I'm inclined to think otherwise. In these circumstances, the very same considerations (including the solution's assumption) that point toward the conclusion that Jones had not intended to assert, explicitly or impliedly, that Dean was intoxicated, simultaneously point toward a lack of relevancy of the declaration. The strain between the assumption of a lack of intention to assert anything with regard to Dean's condition, the condition precedent to a nonhearsay characterization and admissibility, and the relevancy of the declaration to evidence Dean's condition is apparent and inherent.

In view of (1) the dubiousness of the Advisory Committee's conclusions that the absence of an intention to assert somehow enhances the declarant's perception, memory and narration "(or their equivalents)"; (2) the fact that the Rule does not expressly exclude from the definition of hearsay verbal conduct which is assertive, but offered to prove something other than the matter asserted; (3) the fact that the legislative history of the Rule offers no evidence of a congressional intent to exclude such assertions from the defi-

96. FED. R. EVID. 801(a) advisory committee note.

inition of hearsay; and (4) the fact that the Committee's solution creates an inherent strain between the nonhearsay characterization and the relevancy of the extrajudicial declaration; I believe the federal courts should not read Rule 801(a) and (c) as excluding from the definition of hearsay such assertive verbal conduct.

How have the federal courts reacted to such extrajudicial declarations? In *United States v. Zenni*,⁹⁷ the court's opinion begins with these words: "This prosecution for illegal bookmaking activities presents a classic problem in the law of evidence, namely, whether implied assertions are hearsay."⁹⁸ The court, relying on Rule 801(a) and (c) and the Advisory Committee Note thereto,⁹⁹ concluded that implied assertions were no longer hearsay.¹⁰⁰ These were the facts of *Zenni*:

While conducting a search of the premises of [one of] the defendant[s] . . . pursuant to a lawful search warrant which authorized a search for evidence of bookmaking activities, government agents answered the telephone several times. The unknown callers stated directions for the placing of bets on various sporting events. The government proposes to introduce this evidence to show that the callers believed that the premises were used in betting operations. The existence of such belief tends to prove that they were so used. The defendants object on the ground of hearsay.¹⁰¹

The court offered this (real or hypothetical) example of the extrajudicial declarations: "Put \$2 to win on Paul Revere in the third at Pimlico."¹⁰² The court characterized that "utterance"¹⁰³ as "a direction and not an assertion of any kind, and therefore [it] can be neither true nor false."¹⁰⁴ Surely, that declaration is an assertion of declarant's belief that (1) a horse named Paul Revere (2) is entered in the third race (3) at Pimlico (4) on (or after) the day of the call. Were the declaration offered to prove the existence of any of those facts, it would almost certainly be characterized as hearsay, and, almost as certainly, be excluded.¹⁰⁵ Why? Because cross-examina-

97. 492 F. Supp. 464 (E.D. Ky. 1980).

98. *Id.* at 465.

99. *Id.* at 468-69.

100. *Id.* at 469.

101. *Id.* at 465.

102. *Id.* at 466 n.7.

103. *Id.*

104. *Id.*

105. FED. R. EVID. 803(3) defines and limits the state of mind exception to the hearsay rule as follows: "A statement of the declarant's then existing state of mind . . . but not including a statement of memory or belief to prove the fact remembered or believed" While each of us may be the world's foremost authority as to our own present state of mind, each of us can be mistaken as to those facts remembered or believed which contribute to our

tion of the declarant, were he available as a witness, could reveal that declarant was mistaken as to any one or all of the matters impliedly asserted by him. Consequently, the court cannot have been correct in concluding that the extrajudicial declaration was "not an assertion of any kind"¹⁰⁶ or that implied assertions are not hearsay under Rule 801(a) and (c) and the Advisory Committee Note thereto.

Of course, in *Zenni*, the extrajudicial declaration was not offered to prove any of the four numbered facts in the preceding paragraph. Rather, it and the other similar extrajudicial declarations were offered to prove that the anticipated auditor was a bookmaker. What made those extrajudicial declarations relevant for that purpose? Presumably, each such declaration constituted an implied assertion by the declarant that the auditor of the declaration was a bookmaker. Could each of the "several" declarants have been mistaken with regard to that implied assertion? Of course. Each could have dialed incorrectly.¹⁰⁷ Each could have been acting on the basis of incorrect (extrajudicial) declarations made to him by someone else. Each could have been an acquaintance of the expected auditor who, alone or with the other callers, engaged in "friendly" no-money-changes-hands betting with the anticipated auditor. Might cross-examination of the several declarants have revealed any one of those benign explanations? Certainly. That's what cross-examination is all about.

But given the court's conclusion that the extrajudicial declarations were nonhearsay, the declarations were deemed admissible to inculcate the accused in circumstances in which the accused would have no opportunity to confront or cross-examine the declarants. That, in turn, implicates the confrontation clause of the sixth amendment.¹⁰⁸ The confrontation clause assures the accused the

state of mind. Consequently, Rule 803(3) explicitly excludes receipt of state of mind declarations when offered to prove the existence of the facts remembered or believed. Therefore, the "facts" asserted and identified in the text would not be provable by the quoted declaration.

106. 492 F. Supp. at 466 n.7.

107. To the reader who may be skeptical about the likelihood of several callers dialing the same incorrect number, I offer a personal anecdote. Some years ago, I received a number of late-night and very-early-morning calls from different men who thought they were calling a house of assignation. Upon complaining to the phone company, I was told that the company had very recently installed a phone for a new customer and that phone number was but one digit different from mine. Given the apparent use being made of the phone by the new customer, the phone company terminated the service. Almost immediately thereafter, I stopped receiving the late-night and very-early-morning calls.

108. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the

right "to be confronted with the witnesses against him."¹⁰⁹ In its most definitive application of the confrontation clause, *Ohio v. Roberts*,¹¹⁰ the Supreme Court concluded that hearsay declarations would be admissible against the accused only if (1) the declarant was unavailable and such unavailability was not attributable to prosecutorial misconduct or neglect,¹¹¹ and (2) the extrajudicial declaration was shown to possess "adequate indicia of reliability."¹¹² With regard to those "adequate indicia of reliability," the Court wrote: "[r]eliability 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."¹¹³

In *Zenni*, let's assume that the telephone declarants were unavailable to the government because of an inability to identify them. Then, under *Roberts*, the next question to be asked is did the declarations fall within a firmly rooted hearsay exception. Even the *Zenni* court noted that "the prevailing common law view"¹¹⁴ would have treated the declarations as hearsay and excluded them. It was only under the more recent Federal Rules of Evidence (and the Advisory Committee Note to Rule 801(a)) that the court found the declarations to be admissible. Then, under *Roberts*, the question becomes whether there were particularized guarantees of trustworthiness. Given that the declarations were not made under oath, or subject to the penalty of perjury, or in contemplation of cross-examination,¹¹⁵ and that they were not against any interest of

right . . . to be confronted with the witnesses against him. . . ." *Id.*

109. *Id.*

110. 448 U.S. 56 (1980). For a critical view of the narrow application of the confrontation clause in *Roberts*, see Seidelson, *The Confrontation Clause, the Right Against Self-Incrimination and the Supreme Court: A Critique and Some Modest Proposals*, 20 Duq. L. Rev. 429, 430 (1982).

111. 448 U.S. at 65, 74.

112. *Id.* at 66.

113. *Id.* (footnote omitted).

114. 492 F. Supp. at 467.

115. In *Roberts*, the extrajudicial declarations had been made at the preliminary hearing where declarant was under oath, subject to the penalty of perjury, and should have contemplated the possibility of examination by both prosecution and defense counsel. 448 U.S. at 58. Subsequent applications of *Roberts* have made it clear that the requirement of reliability may be satisfied in other circumstances without the declarations having been made under oath, subject to the penalty of perjury, or in contemplation of cross-examination. See, e.g., *United States v. Regilia*, 669 F.2d 1169 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982) (coconspirator's declaration admissible against defendant as firmly rooted hearsay exception, irrespective of any prior opportunity to examine declarant); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981) (declarations of unavailable coconspirators admissible

the declarants, and that each could have been the product of incorrect dialing, misinformation, or wholly friendly "betting," the required particularized guarantees of trustworthiness would seem to have been lacking. Thus, under *Roberts*, the *Zenni* court's conclusion may have violated the right of confrontation of the accused. That, too, it seems to me, is a persuasive reason for rejecting the Advisory Committee Note's apparent desire to have such implied assertions treated as nonhearsay. That characterization seems destined to generate decisions which may be in contravention of the sixth amendment.

But the Advisory Committee Note and the *Zenni* opinion would have such assertions characterized as nonhearsay. Does that characterization make the confrontation clause inapplicable? I think not. Even the Advisory Committee recognized that those categories it would have labeled nonhearsay were, "arguably, in effect . . . assertion[s] of the existence of the condition [sought to be proved] and hence properly includable within the hearsay concept."¹¹⁶ The nonhearsay characterization was a judgment call or arbitrary determination made by the Committee. Such a determination cannot negate the constitutional guarantee of the confrontation clause when the evils to be met by the clause in fact exist. To put it more broadly, the Advisory Committee lacked the capacity to diminish or amend the sixth amendment. Yet the *Zenni* court, in holding that the telephone declarations were admissible, never considered the confrontation right of the accused. Apparently, having characterized the declarations as nonhearsay, the court failed to recognize the applicability of that basic constitutional right. That judicial oversight, seemingly arising from the nonhearsay characterization propounded by the Advisory Committee Note, is, I believe, a significant additional reason for rejecting that characterization.

Nor is *Zenni* unique in failing to appreciate the significance of the confrontation clause, once having embraced the Advisory Committee's characterization of nonhearsay. In *United States v. Jackson*,¹¹⁷ the defendants, Jackson and Porter, were convicted of conspiracy to distribute heroin and possession of heroin with intent to distribute. A government witness, Linda Johnson, testified that she

against defendant as firmly rooted hearsay exceptions, irrespective of any prior opportunity to examine declarants); *Lenza v. Wyrick*, 665 F.2d 804 (8th Cir. 1981) (state of mind declarations admissible against defendant as firmly rooted hearsay exceptions, irrespective of any prior opportunity to examine declarant).

116. FED. R. EVID. 801(a) advisory committee note.

117. 588 F.2d 1046 (5th Cir. 1979).

had met Porter in Los Angeles in 1977. Johnson testified that, at that time, Porter invited her to his family reunion in Birmingham, Alabama. According to Johnson's testimony, on July 6, 1977, a woman she did not know visited Johnson at her apartment. The woman gave Johnson \$130 for air fare to Birmingham and handed Johnson a small canvas bag which the woman asked Johnson to pack with her other things. The woman told Johnson that Porter would meet her at the airport in Birmingham.¹¹⁸ When narcotics agents seized the canvas bag at the Birmingham airport, they found that the bag contained heroin.

On appeal, the defendants argued that Johnson's testimony as to what the unidentified woman had said to her should have been excluded as hearsay and in contravention of their sixth amendment right to confront the witnesses against them. With regard to the hearsay argument, this was the court's response:

We disagree. The Federal Rules of Evidence exclude from the operation of the hearsay rule any oral statement not intended as an assertion. Federal Rule of Evidence 801(a). Furthermore an out-of-court statement that is not offered as proof of the matter asserted therein is not hearsay. Federal Rule of Evidence 801(c). We think that the out-of-court statements fall within that class of "cases in which the utterance is contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it." *United States v. Annunziato*, 293 F.2d 373, 377 (2d Cir. 1961) (quoting Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 239 (1922)).¹¹⁹

With regard to the confrontation clause argument, the court's response was perfunctory: "[s]ince the unidentified woman in Los Angeles was not a witness against the appellants, there was no Confrontation Clause violation in this case."¹²⁰

Let's begin with the court's characterization of the unidentified woman's extrajudicial declarations as *res gestae*. In support of that characterization, the court cited a pre-Rules case and a 1922 article. Why nothing more recent? Well, *res gestae* has always been a little bit suspect as a loose evidentiary grab-bag,¹²¹ and, arguably,

118. *Id.* at 1049 n.4.

119. *Id.*

120. *Id.*

121. See, e.g., *Watts v. Smith*, 226 A.2d 160, 162 (D.C. 1967): "*Res gestae* is a loose evidentiary term encompassing several hearsay exceptions: verbal acts, statements indicating the mental condition of the declarant, and spontaneous declarations. JONES, EVIDENCE §§ 318-319 (1958);" E. CLEARY, *McCORMICK ON EVIDENCE* 836 (3d ed. 1984) (footnotes omitted): "Commentators and, less frequently, courts, have criticized use of the phrase *res gestae*. Its vagueness and imprecision are, of course, apparent."

has no place under the Federal Rules of Evidence, with their specific hearsay exceptions and circumspetive residual exceptions.¹²² How about the court's characterization of the extrajudicial declarations as oral statements "not intended as an assertion" and "not offered as proof of the matter asserted therein" and, therefore, not hearsay under Rule 801(a) and (c)? The unidentified woman told Johnson, among other things, that Porter would meet Johnson at the Birmingham airport. Surely, that was intended as an assertion. It would seem to have served no nonassertive function. And, just as surely, the government wanted the jury to hear that assertion for the very purpose of proving the truth of the matter asserted therein, that Porter intended to meet Johnson in Birmingham, thus demonstrating Porter's connivance in transporting the heroin from Los Angeles to Birmingham.

It's a little bit difficult to know what to say about the court's language refuting the confrontation clause argument. The court's language seems to stand the clause on its head: because the government did not call declarant to the stand, defendants' confrontation rights were not violated. Of course, it was that very failure to present the declarant that was the gist of the confrontation clause assertion. The government inculcated Porter (and thereby his alleged coconspirator Jackson) with the extrajudicial declarations of the unidentified woman without affording the defendants any opportunity to confront and cross-examine her in the presence of the jury that was to decide the guilt or innocence of the defendants. As in *Zenni*, the court's conclusion that Rule 801(a) and (c) excluded the extrajudicial declarations from the hearsay rule seems to have contributed to the court's (here explicit) determination that the confrontation rights of the defendants had not been violated.

In *United States v. Perez*,¹²³ defendant Ruvalcaba appealed his conviction of conspiracy to distribute cocaine and distribution of

122. *Miller v. Keating*, 754 F.2d 507, 509, 509 n.1 (3d Cir. 1985). The court noted that "this terminology [*res gestae*] is inappropriate. . . . [T]here is no such exception to the prohibition against hearsay. . . . If admissible, the declarations must qualify under one of the genuine exceptions to the hearsay rule. The old catchall, '*res gestae*,' is no longer part of the law of evidence."

1. As Wigmore notes, "*res gestae*" literally means "the thing done" and properly applies only to words that accompany and aid in giving legal significance to the act. Such words are treated as "verbal acts." Before adoption of the Federal Rules of Evidence, courts applied "*res gestae*" with much confusion to hearsay statements of various sorts. 6 J. Wigmore, *Evidence* § 1745 (J. Chadbourn rev. 1976).

Id.

123. 658 F.2d 654 (9th Cir. 1981).

cocaine. Ruvalcaba argued that there had been inadequate evidence presented of the existence of a conspiracy and his connection with that conspiracy to justify receiving against him certain declarations of alleged coconspirators. At trial, a part of the evidence received tending to demonstrate the existence of a conspiracy and Ruvalcaba's connection with it consisted of extrajudicial declarations made by alleged conspirator Perez to Cazares, an undercover agent of the Drug Enforcement Agency.¹²⁴ Immediately after receiving a telephone call, Perez gave Ruvalcaba's name, address and phone number to Cazares for the purpose of contact in the event that a planned transaction would have to be made in Los Angeles. Over objection, Cazares was permitted to testify to Perez' declarations to Cazares after the phone call. The Ninth Circuit affirmed that ruling, concluding first that "Perez' verbal conduct acknowledging that the caller was Ruvalcaba, whether express or implied, was an implied assertion and admissible as nonassertive conduct under Federal Rule of Evidence 801(a), (c). Consequently, . . . Cazares . . . could properly testify to Perez' acknowledgement over a double-hearsay objection."¹²⁵ Then, as to the first level of hearsay, Ruvalcaba's alleged telephone conversation, the court concluded that the "call was admissible as either an admission under Federal Rule of Evidence 801(d)(2)(A) or as nonassertive conduct under Federal Rule of Evidence 801(a), (c)."¹²⁶

With regard to the court's first conclusion, it's difficult to understand how Perez' declarations to Cazares would implicate Ruvalcaba as a coconspirator if those declarations were not equivalent to implied assertions of that fact. To characterize those declarations as "implied" and therefore "nonassertive conduct," consequently admissible under "801(a), (c)," seems to overlook the practical considerations that (1) even an implied assertion may be assertive, and (2) these particular declarations would have been relevant to implicate Ruvalcaba as a conspirator only to the extent that they asserted, expressly or impliedly, that Ruvalcaba was a member of the conspiracy.

With regard to the court's second conclusion, and the italicized language "supporting" it, it's difficult to understand how Ruvalcaba's alleged telephone declarations would be relevant evidence of his participation in the conspiracy if those declarations were

124. *Id.* at 657.

125. *Id.* at 659.

126. *Id.* (footnote omitted and emphasis added).

“nonassertive conduct.” It would seem that those declarations would implicate Ruvalcaba in the conspiracy only if the declarations were equivalent to assertions of some degree of involvement therein.

A considerably more realistic judicial view was manifested in *United States v. Caro*.¹²⁷ The Fifth Circuit reversed defendant's conviction of conspiracy to possess heroin with intent to distribute. The basis of the reversal was the court's conclusion that the government had failed to present sufficient admissible evidence to justify a jury finding of guilt beyond a reasonable doubt. In an effort to sustain the conviction on appeal, the government pointed to the testimony of DEA Agent Baden¹²⁸ of his questioning of Casillas, an alleged coconspirator of the defendant, after Casillas' arrest and the termination of the alleged conspiracy,¹²⁹ and Baden's reaction to that questioning:

Q. (By Mr. Walker:) Did you ask Mr. Casillas any questions?

A. [By Agent Baden:] Yes, sir, I did.

Q. All right, what questions did you ask Mr. Casillas?

A. I asked Mr. Casillas to whom the heroin belonged. I asked him where he was supposed to take the money to after he received it from the undercover agents. I asked him to whom the automobile belonged to that he was driving.

Q. Okay.

A. I asked him if he would take us to the place and the person to whom he was to pay the money.

Q. Following this conversation that you had with Mr. Casillas, what did you do then, if anything?

A. I participated with the other agents, sir, and we went out to Moon City [where defendant apparently resided], about four or five vehicles, I believe altogether, sir.¹³⁰

The government apparently argued that (1) since Casillas' responses had not been testified to by Agent Baden, his testimony was nonhearsay and (2) from Baden's reaction to those (untestified to) responses, a reasonable jury could infer that Casillas had identified the defendant as the source of the heroin. The Fifth Circuit wasn't having any: “We are . . . unable to accord much weight on our review to other evidence which, while arguably outside the realm of technical hearsay, can only be taken as supporting the government's case on the basis of inferences too speculative for a

127. 569 F.2d 411 (5th Cir. 1978).

128. *Id.* at 415.

129. *Id.* at 415, 416, 417 n.10.

130. *Id.* at 417 n.10.

reasonable jury to have accorded them much weight."¹³¹ The underlying evil perceived by the court in the agent's artful testimony was precisely identified by the court:

[T]his court has been receptive to treating certain implied assertions as hearsay in order to prevent circumvention of the hearsay rule "through clever questioning and coaching of witnesses," *Park v. Huff*, 493 F.2d 923, 928 (5th Cir. 1974), *reversed on other grounds*, 506 F.2d 849 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 824 . . . (1975).

In the circumstances of this case, we need not decide whether this testimony was properly admissible; we note merely that no evidence was introduced to indicate how, if at all, Casillas responded to the agent's questions

. . . .

We view any inferences that might be drawn from this contested evidence as simply too speculative to be accorded weight on our review of the sufficiency of evidence against Caro.¹³²

The evil perceived by the court could just as easily exist in any testimony of "implied assertions" offered to prove something other than the matter asserted. Think of our earlier hypotheticals involving the "crawl" and "cab" declarations offered to prove that the wrongful death action defendant had been too drunk to drive. Selective recollection by the witness or "clever questioning and coaching"¹³³ of the witness could have resulted in the witness' testimony excluding any explicit assertion by declarant of the defendant's intoxication, in the hope of circumventing the hearsay rule, and including only the "implied assertion" of intoxication, in the hope of bringing into play the Advisory Committee's desire to have such assertions characterized as nonhearsay. While that evil may be especially pernicious in a criminal prosecution, where the defendant's liberty is at stake, it is hardly desirable in a civil action. Such artful testimony, perhaps the product of "clever questioning and coaching" of the witness, would seem to constitute another reason for rejecting the Advisory Committee Note's propounded characterization of such declarations as nonhearsay. Moreover, just as the *Caro* court found that the inferences the government would have had the jury draw from Agent Baden's testimony were "too speculative," we have seen that, as the disparity between the extrajudicial declaration and the inferred fact sought to be proved becomes greater, the relevancy of the declaration becomes more remote. That strain between the nonhearsay characterization and the

131. *Id.* at 416-17.

132. *Id.* at 417 n.10.

133. *Id.*

relevancy of the extrajudicial declaration is inherent in the Advisory Committee's proposed resolution.

The Advisory Committee Note's desire to have "verbal conduct which is assertive but offered as the basis for inferring something other than the matter asserted, . . . excluded from the definition of hearsay,"¹³⁴ is (1) not well supported by the Note's reasoning, (2) not compelled by the language of Rule 801, (3) not reflected in the legislative history of the Rule, (4) certain to generate an inherent and generally insoluble strain between the nonhearsay characterization and relevancy, (5) incompatible with the confrontation clause of the sixth amendment, and (6) calculated to encourage "clever questioning and coaching of witnesses" in an effort to generate testimony artfully fashioned to comply with the Note's desire. For all of those reasons, and to preserve the efficacy of cross-examination, I think the Committee's desire should be rejected by the courts and that such implied assertions should be deemed to retain their traditional characterization as hearsay.

134. FED. R. EVID. 801(a) advisory committee note.

