Hearsay Evidence and the Federal Rules: Article VIII - I. Mapping Out the Borders of Hearsay

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HEARSAY EVIDENCE AND THE FEDERAL RULES:
ARTICLE VIII—
I. MAPPING OUT THE BORDERS OF HEARSAY

The hearsay rule reflects a basic tenet of Anglo-American evidence law: that the adversary system should make available to the trier of fact the most reliable evidence possible. Accordingly, traditional evidence law generally requires that, whenever possible, testimonial evidence should be given by witnesses under oath, present before the fact-finder, and subject to cross-examination. The hearsay problem arises whenever an adversary expects the trier of fact to treat ex-


Out of court assertions not subject to cross-examination are excluded not because they are inherently unreliable. Rather, "the standard presentation of narrative is of supposedly superior quality by witnesses on hand in person to establish solely such matters as they have themselves observed." Maguire, The Hearsay System: Around and Through the Thicket, 14 VAND. L. REV. 741, 743 (1961) [hereinafter cited as Maguire].

2. The oath requirement stems from the notion that the witness under oath fears supernatural retribution if his testimony is deliberately false, and, more commonly today, that he will be subject to prosecution for perjury if his falsehood is discovered. Morgan: Hearsay Dangers at 182-83. The present efficacy of the oath as a significant safeguard is doubtful. E. MORGAN, MODEL CODE OF EVIDENCE—Foreward 36 (1942); Morgan: Hearsay Dangers at 186. Oath alone is an insufficient safeguard, since even sworn hearsay is excluded. Morgan, Hearsay, 25 Miss. L.J. 1, 3 (1953) [hereinafter cited as Morgan: Hearsay].

3. The witness's demeanor on the stand furnishes the trier of fact valuable clues for evaluating his credibility. E.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

4. Cross-examination, which Wigmore described as "the greatest legal engine ever invented for the discovery of truth," aids the adversary in exposing both the witness's deliberate falsification and his unintentional errors in perception, memory, and narration. 5 J. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974) [hereinafter cited as WIGMORE]; Morgan: Hearsay Dangers at 185.
trajudicial acts or utterances testimonially when they were done or made without these safeguards. To accept an out-of-court statement as true, the trier of fact must conclude that the person out of court and not under oath or subject to cross-examination accurately perceived and remembered the external event which prompted his act or utterance, and that he attempted to make his action or statement reflect that event as accurately as possible. For these reasons, under the traditional hearsay rule, admissibility of any extrajudicial act or utterance depends on whether it constitutes hearsay, and if so, whether it is somehow exempt from the rule or fits within an exception to the general rule excluding hearsay.

The Rule 801 Definition of Hearsay

Whether proffered evidence is hearsay is not as simple a determination as it might appear, since a disagreement exists as to the precise definition of hearsay. Rule 801(c) of the Federal Rules of Evidence 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." To constitute hearsay under Rule 801(c), the act or utterance in question must first be a "statement,"


8. FED. R. EVID. 801(c) (1975). In so defining hearsay, Rule 801 corresponds closely to the definition of hearsay in Rule 63 of the Uniform Rules of Evidence (1953). "If an out-of-court statement, though offered for substantive use, is not within the definition of hearsay, obviously, under the draft, the 'hearsay rule,' as such, would present no obstacle to admissibility, although of course there may be other objections, constitutional or otherwise." Falknor, Hearsay, 1969 LAW AND THE SOCIAL ORDER 591, 594 [hereinafter cited as Falknor: Hearsay].

9. FED. R. EVID. 801(c).
which the Rule defines as either "an oral or written assertion," or "non-verbal conduct" if intended as an assertion. Thus, non-verbal conduct that is not intended as an assertion by the actor is not hearsay under Rule 801. The Rule reflects the view of Professors Falknor and McCormick, and of the Uniform Rules of Evidence that so long as the actor has no assertive intent, the danger of deliberate insincerity is sufficiently lessened to justify leaving evidence of his act outside the scope of the hearsay definition. In this regard, Rule 801 is the same as what appears to be Louisiana law.

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

11. The judge, in ruling on admissibility, must determine whether the conduct was intended as an assertion. FED. R. EVID. 104(a); FED. R. EVID. 801(a), Adv. Comm. Note. The party seeking to introduce evidence of non-verbal conduct bears the burden of proof as to its non-assertive character. FED. R. EVID. 801(a), Adv. Comm. Note. Louisiana courts have not always recognized assertive conduct as hearsay. E.g., State v. St. Amand, 274 So. 2d 179 (La. 1973) (detective allowed to testify that victim picked out and handed him defendant's photo).


13. C. MCCORMICK, EVIDENCE § 250 (2d ed. 1972) [hereinafter cited as MCCORMICK].


16. The writer found no Louisiana cases excluding evidence of non-verbal non-assertive conduct on the basis that it is hearsay. State v. Winstead, 204 La. 366, 15 So. 2d 793 (1943) (evidence of non-verbal non-assertive conduct not hearsay where used to infer the actor's intent); Dungan v. Hayes, 26 So. 2d 710 (La. App. 2d Cir. 1946) (defendant's conduct in going to a repair shop admitted as evidence that he had promised to pay for damages to the plaintiff's car, since no other reason would have prompted defendant's visit to the shop; no hearsay objection was raised). In State v. Roach, 256 La. 407, 427, 236 So. 2d 782, 788 (1970), the Louisiana Supreme Court stated that "[w]hen a witness describes what a person did (not what he said) that is evidence of what the witness saw and is clearly not hearsay." Comment, Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases, 14 LA. L. REV. 611 (1954). For a general discussion of Louisiana hearsay law, see Comment, The Hearsay Rule: The Law of Evidence's Swiss Cheese, 21 LOYOLA L. REV. 279 (1975).
Statements Impliedly Excluded by the Rule 801 Definition

Non-Assertive Use

Even though an extrajudicial act or utterance is a "statement" within Rule 801(a)(1), it still does not fall within the definition of hearsay in the Federal Rules unless offered to prove the truth of the matter asserted. For example, when the issue is not whether the assertion was true but simply whether it was made, evidence of the statement is not hearsay. Non-assertive, therefore non-hearsay, uses of extrajudicial statements include use of prior inconsistent statements to impeach witnesses, use of prior statements to infer that the speaker or hearer possessed a given state of mind.

17. Fed. R. Evid. 801(c); Maguire at 748; Rucker, The Twilight Zone of Hearsay, 9 Vand. L. Rev. 453, 454 (1956). But see Morgan: Hearsay Dangers at 218: "[S]hould we not recognize that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception?"

18. Whether the statement was made might be an issue in libel or slander actions, or where contract negotiations are disputed. Louisiana courts recognize that such a use is non-hearsay. E.g., State v. Thomas, 159 La. 1076, 1078, 106 So. 570, 571 (1925); Comment, Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases, 14 La. L. Rev. 611 (1954).

19. Fed. R. Evid. 613 governs use of prior inconsistent statements to impeach the witness's credibility. Fed. R. Evid. 607 provides that even the party calling a witness may impeach his credibility. Comment, Article VI of the Federal Rules of Evidence: Witnesses, 36 La. L. Rev. 99, 110 (1975). Fed. R. Evid. 806 provides that "[w]here a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." In Louisiana, impeachment use of prior inconsistent statements is clearly non-hearsay. E.g., State v. Ray, 259 La. 105, 249 So. 2d 540 (1971).

20. Under the Federal Rules of Evidence, use of an extrajudicial statement to show inferentially that the speaker possessed a given state of mind is not hearsay, since his statement is admitted not to show that what he stated was true, but that the one making such a statement probably possessed a given state of mind. Direct assertions of state of mind, such as "I intend to kill X," would be hearsay if offered to show that the declarant did in fact possess that state of mind, while the same declarant's statement, "One day X will be sorry for what he's done to me," would not be hearsay if offered to show the declarant's intent to harm X. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

21. If the statement is offered to show that one who heard it possessed certain knowledge or motive, it is not hearsay, since it is not introduced to show that the matter asserted was true.
mind, or simply to show what occurred in a given transaction when the words spoken formed an inextricable part of the event. In such instances, the adversary does not offer the statement testimonially, and opposing counsel may cross-examine the in-court witness testifying to the statement as to whether the statement was in fact made. When the proper relevance of an extrajudicial statement is to show the fact that it was made, Louisiana courts admit it either because it has "independent relevance" and is therefore non-hearsay, or because it forms part of the res gestae because it was made close in time to the event in question with sufficient guarantees of trustworthiness, and thus constitutes an exception to the hearsay rule.

**Implied Assertions**

Just as assertions not used to establish the truth of the matter asserted are excluded from the definition of hearsay in the Federal Rules, neither does it include non-assertive conduct used assertively. Even though non-hearsay, evi-

22. Fed. R. Evid. 801(c), Adv. Comm. Note. The Louisiana position appears identical. E.g., State v. Richey, 258 La. 1094, 249 So. 2d 143 (1971) (victim's testimony that robber said, "Give me your money," was not hearsay because it was an act that occurred during the incident); Mancuso v. Hurwitz-Mintz Furniture Co., 183 So. 461, 462 (La. App. Orl. 1938) (statement which was "the immediate and almost spontaneous utterance of the principal actor in the affair to such an extent as to actually constitute a part of the occurrence itself").

23. Some commentators have argued, however, that where "a person's state of mind of belief in the truth of his assertion is proved by evidence of the assertion and sought to be made a basis for an inference to the objective event or condition which created that state of mind . . . [the] greater effectiveness of cross-examination in guarding against errors of perception would argue for inclusion of this kind of evidence within the borders of hearsay." Morgan: **Hearsay Dangers** at 206. Stewart at 24.


25. LA. R.S. 15:447, 448 (1950). E.g., Shipman v. Tardó, 304 So. 2d 381 (La. App. 4th Cir. 1974); Audubon Ins. Co. v. Guidry, 289 So. 2d 311 (La. App. 1st Cir. 1973). Although Louisiana courts use the term broadly, encompassing non-hearsay, excited utterances, and present sense impressions, its use should be restricted to instances in which evidence is non-hearsay because the statement is inextricably linked to the event. Comment, **Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana**, 29 LA. L. REV. 661, 667 (1969).


27. The Federal Rule reaches the same result as **UNIFORM RULES OF**
dence may be objectionable under Rule 403, which excludes otherwise relevant evidence if its probative value is "substantially outweighed" by the danger of unfair prejudice or of misleading a jury.28 For example, Rule 403 may exclude non-hearsay evidence when the inferential chain becomes extended, as in implied assertions, in which the inference to be drawn from an actor's extrajudicial verbal or written communication or from his non-verbal conduct is that he possessed an inferred belief or state of mind, and from that belief or state of mind that a past event in question did in fact occur.29 The thrust of the Rule 801 hearsay definition is to guard against mendacity;30 implied assertions are not hearsay definitionally because lack of assertive intent virtually eliminates the danger of deliberate falsification.31 Presumably the drafters intended that other dangers involved in implied assertions should be dealt with under Rule 403.32

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28. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

29. For example, if a surgeon's general competence were at issue, evidence of a well-respected fellow doctor's request that the surgeon perform a delicate operation on him would constitute an implied assertion that the fellow doctor thought him competent. Professor Morgan asked, "[Is] this not essentially a case in which the actor makes an assertion to himself and his conduct is used as if it were such an assertion?" Morgan: *Hearsay Dangers* at 214; Morgan: *Hearsay & Non-Hearsay* at 1142. See Wright v. Tatham, 112 Eng. Rep. 488 (Ex. 1837), aff'd 7 Eng. Rep. 559 (H.L. 1838). Implied assertions do not fall within the "present state of mind" exception to the hearsay rule sanctioned in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), because implied assertions are not used to show the probability that a future event did in fact occur, but that a past event occurred to create the declarant's state of mind as reflected in his act or utterance.

30. The drafters believed that "evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but . . . these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds." FED. R. EVID. 801(a), Adv. Comm. Note.


Although lack of assertive intent minimizes the danger of deliberate insincerity, implied assertions might still mislead the trier of fact. First, non-assertive conduct may be ambiguous, and may not actually reflect the state of mind of the actor; the state of mind inferred may not have been produced by the particular past event or condition in question. Second, if an appreciable period of time lapsed between the event and the act, the non-assertive conduct may have been based on the actor's incorrect recollection. Third, the speaker or actor may have inaccurately perceived the event, and his state of mind may be a product of that erroneous perception. When the inferential chain is from the actor's non-assertive conduct to his state of mind to the past external event precipitating his mental state, the dangers other than mendacity traditionally associated with hearsay evidence are present; the trial judge confronted with an objection based on Rule 403 should determine whether the trier of fact can properly evaluate the evidence, considering whether the circumstances indicate that the actor's perception and memory were reliable, whether the event in question is the most probable explanation for his state of mind and ensuing act, and whether the trier of fact is a jury of laymen or the judge himself.

33. Maguire at 761. The danger of ambiguity should be overcome if the party through his original offer and corroborative detail builds up "sufficient strength of inference so that the jurors might reasonably find his proposed conclusion as to X's motive not only acceptable, but more acceptable than [his opponent's] opposing conclusion ..." as to the actor's motive. Id. at 761.
34. Morgan: Hearsay Dangers at 204.
35. Maguire at 764-65; Morgan, Hearsay & Non-Hearsay at 1142.
36. Maguire at 763-64; Morgan: Hearsay & Non-Hearsay at 1142; Stewart at 37. Finally, the actor may have intended by his conduct to deceive onlookers. Finman at 682, Tribe at 972.
37. Falknor, "Hearsay" Rule as "See-do" Rule at 137; Morgan: Hearsay Dangers at 214; Tribe at 958.
38. Accurate memory and perception depend upon abilities to perceive and remember, and their careful exercise. The degree of care exercised might be a function of the importance of the conduct involved to the perceiver. Finman at 691. Perhaps the danger of inaccurate perception could be somewhat lessened if the trial judge made a judicial finding that the actor had "adequate opportunity for personal perception of the matters which the behavior tends to establish as having occurred or existed." Maguire at 764.
40. Since a jury may be more easily misled than a trained and experienced trial judge, implied assertions likely to mislead a jury may nonetheless be admissible where the judge is the fact-finder. In Quebec, for example, "the
The Rule 801 definition of hearsay aims primarily at minimizing the danger of deliberate falsehood.\textsuperscript{41} Since the rationale for the hearsay rule is that cross-examination is the best method available to expose defects in testimony,\textsuperscript{42} some commentators have argued that a definition of hearsay should encompass evidence with those testimonial defects cross-examination is effective in uncovering.\textsuperscript{43} Although cross-examination is the best method available to expose deliberate falsification,\textsuperscript{44} instances in which it is so used successfully are relatively rare.\textsuperscript{45} By contrast, cross-examination is often successful in uncovering inaccuracies in a witness’s memory and perception of the event and in clarifying the meaning he ascribes to the language he uses while testifying.\textsuperscript{46} Since inaccuracy of both perception and memory apparently are present more often than deliberate falsification, evidence presenting substantial danger of defective perception, inaccurate memory, and ambiguity should be classified as hearsay, according to some commentators.\textsuperscript{47} However, such a broad definition of hearsay would exclude much evidence that is reliable.\textsuperscript{48} Since evidence may be inadmissible under Rule 403 even though non-hearsay under Rule 801,\textsuperscript{49}
that the Rule 801 definition of hearsay aims primarily at eliminating evidence presenting a danger of mendacity should not prevent adoption in Louisiana of the definition of hearsay found in the Federal Rules of Evidence.

Hearsay Which Escapes the Exclusionary Rule

Any definition of hearsay excludes some needed evidence which is reliable. For this reason, almost from the inception of the hearsay rule, courts began to formulate exceptions to its exclusionary ban. Wigmore classified these exceptions according to the justifications given for excluding certain hearsay from the application of the exclusionary rule. First, he noted that extrajudicial statements made by the parties and those in privity with them, traditionally deemed admissions, and prior statements by non-party witnesses escape the rule excluding hearsay because adequate substitutes for cross-examination render them less likely to mislead the trier of fact than most out-of-court statements. Although at one time commentators justified admitting such evidence as an exception to the hearsay rule because it was inherently trustworthy, Wigmore noted that since a party and those in privity with him could take the stand to explain his prior statements, and a non-party witness could be cross-examined both as to his statement on the stand and his prior extrajudicial statement, the adversary system provided sufficient substitutes for contemporaneous cross-examination to “satisfy” the reasons underlying the hearsay rule.

52. 4 J. Wigmore, Evidence §§ 1048-87 (Chadbourn ed. 1972) [hereinafter cited as 4 Wigmore]. Admissions are “the words or acts of a party-opponent, or of his predecessor or representative, offered as evidence against him.” McCormick § 262. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 Pa. L. Rev. 484 (1937).
53. 3A J. Wigmore, Evidence § 1018 (Chadbourn rev. 1970). Admissions escape the hearsay rule not because they are inherently more trustworthy than most hearsay, but because of the adversary system. Morgan: Hearsay & Non-Hearsay at 1149; Tribe at 961-63.
54. McCormick, for example, felt that a party would inform himself more fully than most, hence his statements were more reliable than most hearsay. See McCormick § 240. Contra, Falknor: Hearsay at 599-600.
55. 4 Wigmore § 1048. Wigmore stated that “the party’s testimonial utterances do not pass the gauntlet of the hearsay rule when they are offered for him . . . ; . . . they do pass the gauntlet when they are offered
In addition to evidence which escapes the hearsay prohibition because of the adversary system, Wigmore observed that some evidence, although hearsay, is considered more reliable than hearsay generally, since the circumstances under which some assertions are made offer reasonable guarantees of trustworthiness.\(^5\) Although courts consider some hearsay so inherently trustworthy that it escapes the hearsay ban regardless of the availability of the declarant at trial,\(^5\)\(^7\) other hearsay evidence, perhaps less reliable, is admissible only if the declarant is unavailable,\(^5\)\(^8\) so that if it is not admitted, no statement by the declarant will be available to the trier of fact.\(^5\)\(^9\) In developing exceptions to the hearsay rule based on trustworthiness, courts often limited their inquiry to whether the circumstances indicated a likelihood that the declarant intentionally falsified his assertion,\(^5\)\(^6\) without considering the other factors bearing on reliability, such as whether the declarant accurately perceived and remembered the event or condition.\(^5\)\(^1\) Courts often deemed lack of motive or opportunity to deliberately falsify a sufficient guarantee of trustworthiness to make evidence admissible under an exception to the hearsay rule.\(^5\)\(^2\) Today, in applying well-established exceptions and in formulating new ones, 

\(^5\) See Stewart at 33.

\(^6\) For example, statements made by a declarant under excitement regarding a startling event which precipitated his nervous excitement, so-called "excited utterances," are an exception to the hearsay rule even though the declarant is available at trial. See generally Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229 (1922); Comment, Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana, 29 LA. L. REV. 661 (1969).

\(^7\) For example, statements made by a declarant under excitement regarding a startling event which precipitated his nervous excitement, so-called "excited utterances," are an exception to the hearsay rule even though the declarant is available at trial. See generally Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229 (1922); Comment, Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana, 29 LA. L. REV. 661 (1969).


\(^9\) McCORMICK § 253; Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 HARV. L. REV. 932, 939 (1962); Morgan: Hearsay at 1.

\(^5\) See Stewart at 1; Tribe at 957.


\(^7\) H. BURTT, LEGAL PSYCHOLOGY 14-16 (1931); Morgan: Hearsay Dangers at 186.
courts often simply reiterate earlier dogma that certain circumstances induce reliable statements, without investigating, through means developed by the modern behavioral sciences, the validity of these traditional assumptions and without questioning whether the emphasis traditionally placed on veracity as the primary factor in determining trustworthiness is borne out by the actual behavior of human beings. As noted above, Rule 403 may preclude admissibility even where the hearsay rule does not. Privileged statements are inadmissible even though they fall within an


64. Brown, An Experience in Identification Testimony, 25 J. of CRIM. L. & C. 621 (1934); Morgan, A Study in the Psychology of Testimony, 8 J. of CRIM. L. & C. 222 (1917). Brown relates an experiment at Dartmouth, in which a workman entered a classroom, walked between the instructor and the students to a radiator, murmured something about the heat, and left as he came. Sixteen days later he returned with five other men similar in dress and appearance. About 65.6% of the students identified the correct man. One group was shown only the five new men. Twenty-five percent correctly stated that the real man was not there, but 62.5% identified one of the five. A group of students who did not in fact witness the occurrence were treated by the examiner as though they had been present. Seventy percent stated that they did not recall the incident, but 29.5% said they recalled the incident and identified one of the men. Because “trustworthy” connotes veracity, perhaps use of the word “reliable” would have been preferable in the Federal Rules to insure that all factors bearing on the accuracy of hearsay statements are considered in applying and formulating exceptions to the hearsay rule. See Proposed Rules of Evidence, Committee on the Law on Evidence, Civil Code Revision Office of Quebec (1975), art. 37: “By leave of the judge, a statement made by a person who does not appear as a witness, concerning any facts to which such person could legally have testified, may be proven and offered in evidence, provided: 1. application therefor has been made in accordance with the Code of Civil Procedure after notice to the opposite party; 2. the circumstances surrounding the statement provide sound reason to judge it reliable; 3. it is impossible, in all the circumstances of the case, for such person to appear as a witness.”


66. See text at note 29, supra.
exception to the hearsay rule. Additionally, although the Federal Rules of Evidence do not explicitly incorporate constitutional principles, rights guaranteed an accused by the Constitution would of course prevail, excluding evidence otherwise admissible under Article VIII.

**Prior Inconsistent Statements**

Although traditionally considered exceptions to the hearsay rule, admissions and some prior statements by non-party witnesses are not hearsay under Rule 801(d) because they are specifically exempted from the Rule 801 definition of hearsay. Rule 801(d)(1) exempts from the definition of hearsay a witness's prior inconsistent statements made under oath and subject to the penalty of perjury at a trial, hearing, deposition, or other proceeding. Since under Rule 801 these prior statements are not hearsay, they may be used substantively to show the truth of the matter asserted, and are not limited, as traditionally was the case, to impeachment use.

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68. See authorities in note 127, infra.
69. E. Morgan, Some Problems of Proof 130-40 & 156 (1956); Tribe at 961.
70. FED. R. EVID. 801(d)(2) provides: "A statement is not hearsay if ... [t]he statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."
71. FED. R. EVID. 801(d)(1) provides: "A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . ."
73. Courts traditionally limited use of prior inconsistent statements to impeachment because they felt "[t]he chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion
Louisiana courts do not recognize prior inconsistent statements by a witness as an exception to the hearsay rule, and follow the traditional limitation to impeachment use.\textsuperscript{74} The primary justification the Advisory Committee advanced for admitting some prior inconsistent statements substantively is that since the witness is on the stand and can be cross-examined as to his prior inconsistent statement and his present statement, and since the trier of fact, who must decide which of his statements is more accurate, can observe his demeanor, the purpose of the hearsay rule, to curtail the use of uncross-examined testimonial evidence by the trier of fact, is satisfied.\textsuperscript{75} In addition, the prior statement was made closer in time to the actual event than the testimony at trial, and may have been based upon a more accurate recollection of the event in question. Lapse of time increases the likelihood that the testimony will be inaccurate, and may increase the opportunity for corruption of a witness's testimony by undue influence.\textsuperscript{76} Finally, the distinction between substantive and

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impeachment uses of prior inconsistent statements is one the trier of fact may find difficult to follow.77

Under Rule 801, the exemption for prior inconsistent statements made at a deposition is not limited to depositions taken in contemplation of the particular suit in question.78 Further, Rule 801(d) does not require that the parties at the deposition be given prior notice that the witness's statements may be offered substantively at trial if his statements at that time are inconsistent with his deposition.79

Although Rule 801 also exempts from hearsay prior inconsistent statements made under oath subject to penalty of perjury at an "other proceeding,"80 it gives no explication as to the type of proceeding contemplated. A preliminary hearing in a criminal case would presumably be an "other proceeding,"81 and Congress clearly intended that a grand jury qualify,82 even though no opportunity for cross-examination is available to the accused when the witness is before a grand jury.83 In Louisiana a witness may testify pursuant to a district attorney's subpoena,84 and statements made at that

78. FED. R. EVID. 801(d)(1); Evans, Article Eight of the Federal Rules of Evidence: The Hearsay Rule, 8 VALPARAISO L. REV. 261, 270 (1974). In this respect, the exemption from the rule excluding hearsay is broader than the former testimony exception in Rule 804(b)(1).
79. A New Jersey rule allows substantive use of deposition testimony where the witness is unavailable, but the judge may exclude it at trial "if it appears that the proponent's intention to offer [it] in evidence was not made known to the adverse party at such a time as to provide him with a fair opportunity to prepare to meet it." N.J.S.Ct. Evid. R. 63(8), 64.
80. FED. R. EVID. 801(d)(1).
83. In federal courts, the accused may gain access to the grand jury transcript or minutes, upon motion to the court, in the court's discretion. FED. R. CRIM. PROC. 6(e). In Louisiana, however, the accused cannot gain access to grand jury minutes, so to allow substantive use of prior inconsistent statements before the grand jury in Louisiana would benefit only the state. LA. CODE CRIM. P. arts. 433-34; State v. Terrebonne, 256 La. 385, 236 So. 2d 773 (1970).
84. LA. CODE CRIM. P. art. 66 (1950), as amended by La. Acts 1972, No. 408 § 1. Although the statute does not explicitly authorize the district attorney to take testimony pursuant to such a subpoena under oath, such authority
time which are inconsistent with the witness's testimony at trial might be non-hearsay under Rule 801(d)(1) and thus available for substantive use against an accused. Even though substantive use of prior inconsistent statements under oath is not constitutionally infirm, in criminal cases policy reasons might forbid their use, even when made under oath, as substantive evidence against an accused. For example, the witness's trial testimony may be favorable to the accused, while his prior inconsistent statement is favorable to the state. The accused may be denied a meaningful right of confrontation and cross-examination as to both statements, since he cannot effectively cross-examine one whose testimony is favorable to him, and would not wish to emphasize the prior inconsistent statement by cross-examining the witness as to it. Additionally, the witness at trial may deny all knowledge of the prior event. If his prior statement was favorable to the state and it is introduced as substantive evidence, the accused will have no meaningful opportunity to cross-examine him as to the prior statement. If the trier of fact uses the prior inconsistent statement substantively in either situation, the accused has no meaningful opportunity to cross-examine the witness at all.

**Prior Consistent Statements**

Rule 801 provides that a witness's prior consistent statements are not hearsay where offered to rebut "an express or
implied charge against him of recent fabrication or improper influence or motive."
However, Rule 801 does not spell out the meaning of "express or implied charge" or how an express or implied charge of recent fabrication is made. Although it does not explicitly state that the charge of recent fabrication or improper motive must be made at trial, presumably it must. Unlike prior inconsistent statements, prior consistent statements need not have been made under oath to be non-hearsay under Rule 801(d). Under existing Louisiana law, evidence of prior consistent statements may be used only when it has a non-hearsay use to rehabilitate the witness after the opposing party introduces his prior inconsistent statement.

Admissions

Rule 801(d) also exempts from the definition of hearsay, and thus from its exclusionary rule, admissions by a party-opponent. Since the opposing party is in court and can generally take the stand to explain any apparent inconsistencies in his prior statement or action and his posture at trial, he cannot be heard to object to substantive use of his statements on the basis that he has had inadequate opportunity for cross-examination, and was not under oath at the time the statement was made. Use of admissions against a criminal defendant is of course subject to his fifth and sixth amendment rights.

90. See text of Rule 801(d) at note 71, supra.
92. Although Congressional debate as to the oath requirement for substantive use of prior inconsistent statements was extensive, the fact that no oath was required for substantive use of prior consistent statements received no attention.
94. FED. R. EVID. 801(d)(2), text at n.70, supra.
95. A party cannot take the stand and "explain" his statement to the fact-finder when the statement was one made by his agent regarding an event within the course and scope of his employment which the principal did not actually witness, when the statement was one made by a coconspirator in furtherance of an alleged conspiracy, or when the party's statement was not based upon firsthand knowledge.
96. 4 WIGMORE § 1048. "He himself is in that case the only one to invoke the hearsay rule and ... he does not need to cross-examine himself:" Id. at 4.
Although Louisiana,\textsuperscript{98} in accordance with the traditional view,\textsuperscript{99} allows an agent’s statement as an admission against his principal only where the principal authorized him to speak, Rule 801(d)(2)(D) allows substantive use of the agent’s statements concerning a matter within the scope of his agency or employment if it was made before the relationship terminated.\textsuperscript{100} Rule 801(d)(2)(D) is not expressly limited to statements made by a party’s agents or employees to persons outside the relationship, and is sufficiently broad to allow inter-office correspondence to be deemed an admission.\textsuperscript{101} Although the Rule draws no distinction between civil and criminal cases, perhaps when the principal has not authorized the agent to speak, substantive use of vicarious admissions should be limited to civil cases. The rationale for exempting admissions from hearsay, which is that the party may take the stand and explain his prior statement, may not apply, since the principal may have no knowledge of why his employee or agent made the statement, and may have no firsthand knowledge of the event.\textsuperscript{102}

\textsuperscript{98} Louisiana courts generally require that the agent be authorized to speak in behalf of the principal before his statement is admissible against the principal as an admission. Haas v. Dezauche, 214 La. 259, 266, 37 So. 2d 441, 445 (1948); Pacholik v. Gray, 187 So. 2d 480, 482 (La. App. 3d Cir. 1966). \textit{But see} Rooker v. Checker Cab Co., 145 So. 2d 631 (La. App. 4th Cir. 1962) (employee’s tacit admission admitted against his employer as an admission without discussion of whether the employee was authorized to speak on his employer’s behalf).

\textsuperscript{99} E.g., Cox v. Esso Shipping Co., 247 F.2d 629, 633 (5th Cir. 1957); Griffiths v. Big Bear Stores, Inc., 55 Wash. 2d 243, 347 P.2d 532 (1959); Falknor, \textit{Hearsay} at 591.

\textsuperscript{100} FED. R. EVID. 801(d)(2)(b). The statement may nonetheless be admissible as part of the res gestae, or as a declaration against interest. \textit{E.g.}, Joseph T. Ryerson & Son, Inc. v. H.A. Crane & Brother, Inc., 417 F.2d 1263, 1269-71 (3d Cir. 1969); Grayson v. Williams, 256 F.2d 61, 66 (10th Cir. 1958); \textit{CAL. EVID. CODE} § 1224 (1965); \textit{UNIFORM RULE OF EVIDENCE} 63(9)(a) (1953); \textit{MODEL CODE OF EVIDENCE} rule 508(a) (1942).

\textsuperscript{101} The writer found no Louisiana cases discussing the admissibility of interoffice correspondence as an admission by the employer.

\textsuperscript{102} For example, where an employer, P, is indicted for price-fixing, should his sales manager’s out-of-court statement that P had discussed
Rule 801(d)(2) also exempts from the hearsay exclusionary rule statements which a party has indicated he accepts as true or adopts as his own, and would allow the introduction of an out-of-court statement if a party were silent when it was made in his presence, and the nature of the statement and the circumstances make it reasonable to believe that, had he not thought it accurate, he would have denied it. Although again the federal rule makes no distinction between civil and criminal cases, and Louisiana courts apply the tacit admission exception in both civil and criminal cases when the admission occurs before arrest, constitutional and policy reasons should often require exclusion of tacit admissions by the accused. For example, where the tacit admission occurs while the accused is in custody, his fifth amendment privilege against self-incrimination may preclude admission of the statement. Although pre-custodial tacit admissions are less constitutionally suspect, they should perhaps be excluded for policy reasons, because prejudicial effect upon the accused may be great, even though his silence may be due to methods of restraining competition with a third party be admissible against P as an admission by him? Although in both criminal and civil cases the principal may not actually be able to explain his agent’s statement, and thus his need to cross-examine the declarant may not in fact be satisfied, the need for the evidence and its general reliability are sufficient to outweigh the danger of unfair prejudice to the principal in a civil case more readily than in a criminal case.

103. See text of Rule 801(d)(2)(B) at note 70, supra.

104. Louisiana law is unclear as to whether the statement made in the party’s presence may itself be admitted substantively, or whether the statement is admitted only to give significance to the party’s silence. See State v. McClain, 254 La. 56, 59-60, 222 So. 2d 855, 856-57 (1969). Under Rule 801, the statement itself is admissible as substantive evidence of the truth of the matter asserted. FED. R. EVID. 801(d)(1)(B), Adv. Comm. Note.


107. Some cases indicate that use of an accused’s post-custodial silence against him violated the fifth amendment. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966); United States v. Brinson, 411 F.2d 1057, 1060 (6th Cir. 1969). See also LA. CONST. art. I § 13, requiring that “any person ... detained in connection with the investigation or commission of any offense ... be advised fully of ... his right to remain silent.”

108. Miranda does not apply to pre-custodial interrogation and admissions. United States v. Carollo, 507 F.2d 50, 51 (5th Cir. 1975).
to fear, ignorance, or other motives rather than his acknowledgment of the truth of the statement.\(^{109}\)

*Statements by Co-Conspirators*

The Rule 801(d) exemption from the definition of hearsay includes statements made "by a coconspirator of a party during the course of and in furtherance of the conspiracy,"\(^{110}\) in keeping with the traditional law in Louisiana\(^{111}\) as well as that in other American jurisdictions.\(^{112}\) As written, the Rule does not explicitly require that a prima facie showing of conspiracy be made before the statement is admissible, although presumably the drafters so intended.\(^{113}\) Since the co-conspirator need not be a party or a witness, the party against whom his statement is introduced may be unable to explain the actions or statement of his alleged co-conspirator, so the rationale for exempting admissions from hearsay may not be satisfied.\(^{114}\) Especially in criminal cases,\(^{115}\) perhaps

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\(^{109}\) Even under the present Rule 801, the trial court in a criminal case should not admit the statement as a tacit admission by the accused unless the circumstances clearly indicate that the defendant had no motive to remain silent other than his belief that the matter asserted was true. 

\(^{110}\) FED. R. EVID. 801(d)(2)(E).

\(^{111}\) LA. R.S. 15:455 (1950); State v. Hodgeson, 305 So. 2d 421, 429 (La. 1974).

\(^{112}\) MCCORMICK § 267. Statements made by alleged co-conspirators after the object of the conspiracy fails or is achieved are no longer admissible as admissions. Wong Sun v. United States, 371 U.S. 471, 490 (1963). MODEL CODE OF EVID. rule 508(b) and UNIFORM RULE OF EVID. 63(9)(b) (1953) deleted the requirement that the statement be made in furtherance of the object of the conspiracy.

\(^{113}\) Stewart at 34. Most courts have required a prima facie showing that the alleged conspiracy did in fact exist. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1176 (1954) [hereinafter cited as Levie]. However, Rule 801 is silent on the point. Arguably the existence of the conspiracy is a "preliminary question concerning . . . the admissibility of evidence" which must be determined by the court before evidence of the co-conspirator's statement is allowed. FED. R. EVID. 104(a).

\(^{114}\) See text at note 102, supra. Although a co-conspirator's statement is generally admissible under the theory that each conspirator has made the others his agent authorized to speak regarding the joint undertaking, several commentators have pointed out that the underlying rationale is actually based on the serious need for such evidence, since otherwise existence of the conspiracy might never be shown. Levie at 1164; Garland & Show, *The Co-Conspirators' Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L.C. & P.S. 1 (1972).

\(^{115}\) In criminal cases, the likelihood of deliberate falsification by the
statements by co-conspirators should not be exempted from the definition of hearsay.

The reason for exempting from the hearsay rule admissions and prior statements by witnesses, that the adversary process furnishes sufficient substitutes for cross-examination, \(^{116}\) differs from justifications for the hearsay exceptions based on trustworthiness and necessity. Although the drafters felt that the difference in rationale justified allowing admissions and some prior statements by witnesses to escape the hearsay ban as express exemptions from the hearsay definition of Rule 801(c), \(^{117}\) the better view appears to be that admissions and prior statements should be considered exceptions to the hearsay rule. \(^{118}\) Clearly, they meet the definition of hearsay found in Rule 801(c), and allowing them to escape the hearsay ban by exempting them from the definition of hearsay adds unnecessary confusion. \(^{119}\)

**Summary**

Although the definition of hearsay in Federal Rule 801 does not embrace all evidence presenting the dangers inherent in the testimonial use of extrajudicial acts or utterances, it does provide a concise, workable formula for determining whether to exclude evidence that has traditionally been deemed objectionable. Constitutional considerations, though not expressed in Rule 801, remain paramount in assessing the admissibility of hearsay evidence, and Rule 403 provides a basis for objection when evidence that does not fall within the Rule 801 hearsay definition appears unreliable. To promote consistency and preserve uniformity, the Rule 801(d) "exceptions" from the hearsay definition should be re-labeled and treated as "exceptions" to the hearsay rule. Because the

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116. See text at notes 75 and 95, supra.
118. E.g., CAL. EVID. CODE §§ 1220-27, 1235 (1965); UNIFORM RULES OF EVIDENCE 63(1), (7), (8), (9). See E. MORGAN, SOME PROBLEMS OF PROOF 130-40, 156 (1956); Tribe at 961.
119. The language of Rule 801(d) could be retained in the interest of uniformity as a separate rule formulating exceptions to the hearsay rule, thus effectuating desirable uniformity should Louisiana use the Federal Rules of Evidence as a model for a Louisiana code of evidence.
hearsay definition found in Federal Rule 801 closely corre-
sponds to that used by Louisiana courts, Federal Rule 801
and the developing jurisprudence construing it may provide
a practical model for the codification of Louisiana evidence law.

Susan R. Kelly

HEARSAY EVIDENCE AND THE FEDERAL RULES:
ARTICLE VIII—
II. EXCEPTIONS TO THE HEARSAY RULE:
EXPANDING THE LIMITS OF ADMISSIBILITY

In addition to the exemptions from the hearsay definition
provided in Rule 801(d), the Federal Rules of Evidence,
following the traditional scheme, also allow numerous extrajudicial assertions to escape the general ban against hear-
say evidence under certain exceptions, when deemed necessary to the interests of justice and the circumstances
generally assure reliability. Two rules comprise these ex-
ceptions: Rule 803 includes those exceptions that apply
whether or not the declarant is available, and Rule 804 con-
tains those which apply only when the declarant is unavail-
able. Both rules conclude with identical residual exceptions
authorizing admission of hearsay evidence not covered by one
of the explicit exceptions, provided the evidence has “equiva-
 lent guarantees of trustworthiness” and meets other gen-
eralized conditions.

Rules 803 and 804 revise and expand the traditional hear-
say exceptions, yet, in accordance with the general policy of
the redactors, rarely incorporate applicable constitutional

120. For text of Rule 801(d), see notes 70-71, supra.
121. See generally C. McCormick, Evidence §§ 254-323 (Cleary ed. 1972);
5 J. Wigmore, Evidence §§ 1420-1684 (Chadborn rev. 1974).
122. FED. R. EVID. 802: “Hearsay is not admissible except as provided by
these rules or by other rules prescribed by the Supreme Court pursuant to
statutory authority or by Act of Congress.”
123. FED. R. EVID. 803, 804. Space limitations prevent analysis of each of
the 29 exceptions set forth under these two rules; thus only the highlights of
those that most significantly affect existing law, especially in Louisiana, are
discussed in this comment.
124. FED. R. EVID. 803(24), 804(5). For text of these rules, see note 131,
infra.
125. See, e.g., FED. R. EVID. art. VIII, Adv. Comm. Note; Discussion of the
Proposed Federal Rules of Evidence Before the Annual Judicial Conference,