

## Classifying Admissions and Prior Statements: Alternatives to Rule 801(d)'s Confusing and Misguided Use of The Term "Not Hearsay"

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Admissions of a party and prior statements of a witness -- two of the most frequently used types of evidence -- are different from all other types of hearsay. They are distinctive, each in its own way, because of the status of the declarant,<sup>1</sup> the person who made the out-of-court admission or prior statement and the person on whom the factfinder will rely in evaluating that statement. With an admission, the declarant is a *party* to the action.<sup>2</sup> With a prior statement, the declarant is a *witness* in the case. In none of the myriad other types of hearsay is the declarant a party or a witness.

This status as a party or a witness has a direct impact on the central feature of hearsay policy, the opportunity to cross-examine the declarant concerning the out-of-court statement.<sup>3</sup> Admissions and prior statements are different from every other type of hearsay in this respect. With prior statements, the witness who made the out-of-court statement is in the courtroom, testifying under oath and subject to cross-examination and observation in the current trial. With admissions, the declarant is a party to the case, the evidence is offered against him or her, and, as Wigmore noted, "he does not need to cross-examine himself."<sup>4</sup>

<sup>1</sup> Fed. R. Evid. 801(a) defines declarant as "a person who makes a statement."

<sup>2</sup> This article uses the phrase "admission of a party" or "party admission" because it is the most commonly used phrase. However, a more accurate wording, one recommended by the Advisory Committee on Evidence Rules as part of its restyling effort, is "Statement of party-opponent." Memorandum from Robert L. Hinkle, Chair, Advisory Committee on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States app. A at 63 (May 10, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>. That phrase is more accurate than "admission of a party" in two respects. First, any statement will qualify; it does not have to be an "admission" or a "confession" or a statement against interest. Second, it can not be offered by the party making the statement; it must be offered against the party and thus be a statement of a party-opponent.

<sup>3</sup> The Advisory Committee observed that "the basis of the hearsay rule today tends to center upon the condition of cross-examination . . . a 'vital feature' of the Anglo-American system . . . [t]he belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental." Fed. R. Evid., Introductory Note on Hearsay advisory committee's note. In addition to its importance in hearsay law and policy, cross-examination is also central to a criminal defendant's constitutional confrontation right under the Sixth Amendment. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 51 (2004). This article will not discuss Confrontation Clause matters, however, because the classification issues addressed here are neutral with respect to admissibility and thus confrontation.

<sup>4</sup> 2 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: The Statutes and Judicial Decisions of All Jurisdictions of The United States and Canada* §1048, 505 (2d ed.1923). This observation about not needing to cross-examine oneself certainly applies to personal admissions. With some vicarious admissions, such as the statement of an employee of a corporation that is offered against the corporation (or of a co-conspirator offered against a criminal defendant), the corporation (or criminal defendant) may want and need to cross-examine the out-of-court declarant. However, Fed. R. Evid. 801(d)(2) treats vicarious admissions under Fed. R. Evid. 801(d)(2)(d) and (e) identically to personal admissions under Fed. R. Evid. Rule 801(d)(2)(a), and accordingly this article does so as well.

Their distinctiveness has been the source of longstanding debates about their treatment under hearsay law. For prior statements, the main issue has been *whether* they should be admitted as substantive evidence or, as under the orthodox rule that prevailed until the adoption of the Federal Rules of Evidence, only for impeachment.<sup>5</sup> For admissions, which have long been received as evidence and without the requirements (such as compliance with the personal knowledge, competence and opinion rules) imposed on other testimony,<sup>6</sup> the issue has been *why* such statements are allowed without the standard safeguards.<sup>7</sup>

Rather than reprise these well-rehearsed topics, this article explores a different question, what might be called the *how* question. It accepts the policy decision -- policy makers have decided to admit admissions and prior statements as substantive evidence<sup>8</sup> -- and then asks: when we admit these statements, how should we do it -- as hearsay exceptions, or as something else? Under the Federal Rules of Evidence and in thirty-three states that follow them in this respect, the answer to the question is: as something else. Admissions and prior statements, when offered to prove their truth, are hearsay under the hearsay definition in Rule 801(c)<sup>9</sup> but then classified as “not hearsay” in Rule 801(d).<sup>10</sup>

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<sup>5</sup> For impeachment, the prior statement is offered simply for the fact that it was made and is inconsistent with the declarant’s trial testimony, and not for its truth. Therefore, under the standard definition, it is not hearsay. However, when offered as substantive evidence to prove the truth of the matter asserted in the statement, the prior statement is hearsay. The orthodox rule allowed the impeachment use but not the substantive, hearsay use. Arguing that the purposes of the hearsay rule had been met since the declarant was in court and subject to cross-examination and observation, reformers long sought the admissibility of prior statements for their substantive use. See Fed. R. Evid. 801 (d) (1) advisory committee notes; Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 218-19 (1948); Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 573, 575 (1947).

<sup>6</sup> The absence of these foundational requirements has led one commentator to call admissions “among the least trustworthy of all proof admissible at trial.” Freida F. Bein, *Parties’ Admissions, Agents’ Admissions: Hearsay Wolves in Sheep’s Clothing*, 12 Hofstra L. Rev. 393, 401 (1984). See also James L. Hetland, *Admissions in the Uniform Rules: Are They Necessary*, 46 Iowa L. Rev. 307, 315 (1961) While that remark overstates the point -- in most instances the statement is reliable, because in most cases it will be against interest and will be based on the personal knowledge of a party, who almost always will be in court; Roger C. Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 516-17 (1988)-- it does emphasize this first corollary for admissions: the lack of doctrinally-required prerequisites of reliability.

<sup>7</sup> Scholars have advanced a variety of reasons for receiving admissions as evidence, including the adversary system of litigation, a sense of party responsibility for one’s own words and actions, estoppel, basic fairness and emotion. After reviewing the literature and cases, Professor Park concluded any single reason is reductionist and incomplete and that their favorable treatment is best justified by a series of interlocking reasons. Park, *supra*. note 6. See also Roger C. Park, *A Subject Matter Approach to the Hearsay Rule*, 85 Mich. L. Rev. 51, 77-81 (1987).

<sup>8</sup> As a shorthand convenience, when this article uses “admitted” or “admissible,” it means “not barred by the hearsay exclusionary rule.” The evidence could still be inadmissible if barred by another exclusionary rule, such as the character evidence rules or privilege rules.

<sup>9</sup> Rule 801(c) provides that an out-of-court statement is hearsay if it is “offered to prove the truth of the matter asserted in the statement.”

<sup>10</sup> Rule 801(d) is titled “Statements which are not hearsay” and provides:

A statement is not hearsay if-

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B)

This something else/"not hearsay" answer is "awkward" (*per* Judge Henry Friendly in 1973),<sup>11</sup> "unnecessarily confusing" (*per* Judge Edward Becker in 1992),<sup>12</sup> and "wrong" (*per* Professor Faust Rossi in 1993)."<sup>13</sup> Oxymoronically, it refers to this admittedly hearsay evidence as something it is not -- "not hearsay."<sup>14</sup> Further, although not appearing in the text of the federal rules, a traditional, analytically important meaning for the term not hearsay (without quotation marks) already exists, to describe evidence that is truly not hearsay under the hearsay definition.<sup>15</sup> The threshold issue in hearsay analysis is whether the evidence is hearsay, and, as every law student learns, many out-of-court statements are not hearsay, typically because they are not offered to prove the truth of the matter asserted in the statement.<sup>16</sup> The meaning of "not hearsay" under Rule 801(d) is inconsistent with this traditional meaning of not hearsay. A rule that has two different meanings for the same term violates what has been called the "Golden Rule for

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consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or 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 co-conspirator of a party during the course and in furtherance of the conspiracy.

Fed. R. Evid. 801 advisory committee's note begins by stating that "[s]everal types of statements which would otherwise literally fall within the definition of hearsay are expressly excluded from it." *Id.*

<sup>11</sup> Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 93rd Cong. 97 (1973) (correspondence of Henry J. Friendly, Judge, U.S. Court of Appeals for the Second Circuit), *reprinted in* JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS (1980).

<sup>12</sup> See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years --The Effect of "Plain Meaning" Jurisprudence, The Need For an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 902 (1992). See also Steven H. Saltzburg, Michael M. Martin & Daniel J. Capra, 4 Federal Rules of Evidence Manual (9<sup>th</sup> ed. 2006) ("... Federal Rules regime is . . . confusing in the end because statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, 'not hearsay.'").

<sup>13</sup> See Faust F. Rossi, *Symposium - - Twenty Years of Change*, 20 Litig. 24, 24 (Fall 1993) ("Treating party admissions as non-hearsay rather than as a traditional exception is wrong and has been roundly condemned."). See also Richard O. Lempert, Samuel R. Gross and James S. Liebman, *A Modern Approach to Evidence* 538, n.52 (4<sup>th</sup> ed., 2000) (the classification is a "practical mistake") and George Fisher, *Evidence* 393 (2d ed. 2002) ("Orwellian labeling").

<sup>14</sup> Graham C. Lilly, Steven H. Saltzburg & Daniel J. Capra, *Principle of Evidence*, 160, n.1 (2009) ("This oxymoron is unlikely to make life easier for trial lawyers, students and judges.")

<sup>15</sup> This article will regularly refer to the two different uses of the term not hearsay. To distinguish between them, it will follow the example of 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* 35 (3<sup>rd</sup> ed. 2007) and will place "not hearsay" in quotations when referring to Rule 801(d) "not hearsay" (where the statement is hearsay under Rule 801(c) but is excluded from the hearsay rule by Rule 801(d)) and will not use quotations when referring to the traditional meaning of not hearsay (where the statement is not hearsay under Rule 801(c)).

<sup>16</sup> The categories of these non-hearsay statements are well-known and include: 1) statements that are offered to prove their effect on the listener; 2) words that have an independent legal significance; 3) statements offered as circumstantial evidence of the declarant's state of mind; and 4) prior statements offered to impeach or rehabilitate. See, e.g., 30B Michael Graham, *Federal Practice and Procedure* 41-118 (Interim Edition 2006).

Drafting”<sup>17</sup> – that the same term should be used consistently and with the same meaning throughout a document.<sup>18</sup> As we near the end of a two-decades-long project to revise all federal court rules for clarity and consistency using the Guidelines for Drafting and Editing the Federal Rules,<sup>19</sup> it is anomalous to have a rule that fails to meet the prevailing drafting standards and yet remains thus far untouched by the amending and restyling efforts.<sup>20</sup>

We can and should do better. This article presents several alternatives to Rule 801(d) and endorses an approach that classifies admissions and prior statements as hearsay, treats them as hearsay exceptions and places each in a new, separate, appropriately-labeled category. I call this the “four categories” approach, because it uses four distinct categories for the hearsay exceptions, each organized around the status of the declarant.<sup>21</sup> By eliminating the “not hearsay” term in Rule 801(d), it removes a source of

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<sup>17</sup> Reed Dickerson, *The Fundamentals of Drafting* 16 (2d ed. 1986) (quoting E. Piesse, *The Elements of Drafting* 43 (5<sup>th</sup> ed. 1976)) “the competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one sense . . . In brief, he always expresses the same idea in the same way and always expresses different ideas differently . . . Consistency of expression has appropriately become the “Golden Rule” of drafting.” *Id.*

The drafters intended the term not hearsay to have a different meaning in each context. If an unsuspecting reader were to give the term the same meaning at all times, she would commit the fallacy of the transplanted category, the tendency to give one word or concept a similar meaning in different contexts. Hancock, *The Fallacy of the Transplanted Category*, 37 *Can. B. Rev.* 535 (1959); Review, 70 *Yale L.J.* 1404, 1406 (1961). The norms of clarity and consistency in drafting are designed in part to protect readers from committing that fallacy. Interestingly, in the second edition of his *Handbook on Illinois Evidence*, Professor Edward Cleary, who soon thereafter became the Reporter for the Federal Rules of Evidence and the draftsman of Fed. R. Evid. Rule 801(d), used the phrase “the fallacy of the transplanted category” to describe the misapplication of the term presumption in “nonpresumption situations.” Edward W. Cleary, *Handbook on Illinois Evidence* 60 (2d ed. 1962).

<sup>18</sup> Technically, the Federal Rules of Evidence contain only one meaning for the term not hearsay, as Fed. R. Evid. Rule 801(d) is the only place where it appears. However, the antonym of hearsay is not hearsay, and this antonymic use (particularly when it is the well-established, widely known and analytically important) should surely be considered a part of the rule.

<sup>19</sup> Byron Garner, *Guidelines for Drafting and Editing the Federal Rules* (5<sup>th</sup> ed. 2009). Rule 1.1 is titled “Be Clear.” See Section V, *infra* for discussion of the restyling project, its procedures and standards.

<sup>20</sup> As discussed in Section V, the current restyling project for the Federal Rules of Evidence will not address the “not hearsay” term in Rule 801(d).

<sup>21</sup> The four categories cover statements when: 1) the declarant is a party (for admissions), 2) the declarant is a witness (for prior statements), 3) the availability of the declarant is immaterial (the current Rule 803); and 4) the declarant must be unavailable (the current Rule 804). There is of course a fifth category, the residual exception currently represented by Rule 807. While I have no strong feelings, I have not included Rule 807 in the counting of categories because it is analytically distinct, focusing on the nature and circumstances of the out-of-court statement and not on the status of the declarant. If the residual category were included in the count, the recommendation would be for a “five categories” approach.

Several scholars have suggested modifications to Fed. R. Evid. Rule 801(d) over the years. In 1974, Professor Tribe made what I would call a “four categories” recommendation, stating that such a treatment would be “more likely to keep attention riveted on the underlying reasons for such exceptions and, thereby, on their appropriate limits.” Lawrence Tribe, *Triangulating Hearsay*, 87 *Harv. L. Rev.* 957, 973 (1974). See also Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 *F.R.D.* 330, (1997) (suggesting a “three categories” approach to hearsay); Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 *F.R.D.* 678 (2000); Freda F. Bein, *Parties’ Admissions, Agents’ Admissions: Hearsay Wolves in Sheep’s Clothing*, 12 *Hofstra L. Rev.* 393, 400 (1984) (stating that party

confusion. By placing admissions and prior statements in clearly identified separate exceptions, it reinforces their distinctiveness and reminds users of the separate rationales for their admissibility.

However, before presenting and evaluating the various alternatives and the recommended new approach, it is necessary first to understand how and why the drafters created this “ungainly category.”<sup>22</sup> Rule 801(d) was proposed by a distinguished Advisory Committee, enacted by Congress, and has been adopted by thirty-four states. It has been the law for over thirty-five years. Further, it has substantial historical and intellectual roots, and no change in the rule will be possible until those roots are uncovered and their weaknesses and inadequacies revealed. Accordingly, the article begins in Section I-A by discussing the treatment of admissions and prior statements in the years leading up to the Federal Rules. Two giants of evidence scholarship, John Henry Wigmore of Northwestern and Edmund Morgan of Harvard, debated their classification for much of the first half of the twentieth century. After some initial reservations,<sup>23</sup> Wigmore decided that admissions and prior statements could be offered as substantive evidence but, instead of classifying them as hearsay exceptions, he placed them in his newly invented category called “hearsay rule satisfied,” the intellectual forerunner of Rule 801(d). Morgan on the other hand treated admissions and prior statements as hearsay that should be admitted under a specific hearsay exception

Section I-B then discusses the three predecessor evidence codes that were adopted in each of the three decades prior to the Federal Rules of Evidence and that strongly influenced the drafters of the federal rules -- the A.L.I. Model Code of Evidence in 1942, the first Uniform Rules of Evidence in 1954 and the California Rules of Evidence in 1964. Each of these codes followed Morgan’s lead and classified admissions and prior statements as hearsay, admissible under a hearsay exception. If asked in 1965 to predict how the forthcoming Federal Rules of Evidence would classify admissions and prior statements, a prognosticator would almost surely have said, “As hearsay, and then admissible under a hearsay exception.” But that prognosticator would have been wrong.

While the drafters of the Federal Rules relied on Morgan and the three predecessor codes in many areas, they rejected this guidance as to the classification of admissions and prior statements and instead largely followed Wigmore’s lead. Section II examines in detail the drafting process that led to Rule 801(d) and the reasons for the drafting choices, drawing on records of the Advisory Committee’s internal processes that

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admissions should be reclassified as an exception to the hearsay rule); Roger C. Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 509 (1988) (“because admissions are not required to be trustworthy . . . they should not be considered an exception to the hearsay rule, but should be placed in a special category of their own.”).

<sup>22</sup> Park, *supra*. note 21 at 509.

<sup>23</sup> In the first edition of his treatise, Wigmore said that admissions and prior statements were admissible only for impeachment purposes, as “self-contradiction,” and thus were not hearsay (his term was “hearsay rule inapplicable”). See 2 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* §§ 1018, 1048 (1<sup>st</sup> ed. 1904)

have not previously been used in the evaluation of Rule 801(d).<sup>24</sup> The Reporter's reasons, rooted in the classification debates discussed in Section I, were different for admissions and prior statements but focused on why it was important to treat both types of evidence differently than the other hearsay exceptions. But the Reporter never adequately addressed the how question – how should they be classified.

Section III examines the use and treatment of Rule 801(d) in case law, evidence treatises and law school casebooks. It shows that, while Rule 801(d) is awkward and confusing, it has not caused a crisis in the thirty-five years that it has been the law. Indeed, it has not even created serious practical problems on a day-to-day basis, for two main reasons. First, the “not hearsay” terminology affects only the classification of the evidence, not its admissibility.<sup>25</sup> A particular prior statement or admission will be admitted whether classified as “not hearsay” under Rule 801(d) or, as recommended later and as currently done in 16 states, as a hearsay exception. Second, lawyers and judges soon developed practical ways to “work around” the confusing language, largely by ignoring Rule 801(d)'s “not hearsay” terminology and referring to admissions and prior statements as hearsay exceptions, exclusions, or exemptions.<sup>26</sup> These “work-arounds” are no substitute for clear, consistent drafting in the first place, but they have prevented the trial system from stumbling over Rule 801(d)'s confusing and inapt language.

Section IV looks at Rule 801(d) and the second “not hearsay” category from the perspective of state evidence law and finds both conformity with the federal law and creative non-conformity. Thirty-four of the forty-three states that have adopted the federal rules have also accepted Rule 801(d) and the “not hearsay” category. These conforming jurisdictions have simply “followed the leader,” with no record of considering alternatives to Rule 801(d) or independently evaluating the wisdom of introducing a second meaning of “not hearsay” into their evidence lexicon. Sixteen states have not adopted Rule 801(d), and several of these non-conforming states provide important examples of innovative alternative approaches, fresh ideas from our “laboratories of democracy.”<sup>27</sup>

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<sup>24</sup> These materials include internal memoranda, minutes, and letters. The memoranda and letters are available in a microform collection. Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988. The minutes are now posted online.

<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>.

<sup>25</sup> “There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other rule (e.g. Rule 403).” 4 Steven H. Saltzburg, Michael M. Martin & Daniel J. Capra, 801-27 Federal Rules of Evidence Manual (9<sup>th</sup> ed. 2006).

<sup>26</sup> For example, if opposing counsel makes a hearsay objection to evidence of the out-of-court statement of a party, the proponent will more likely respond by saying, “Yes, it is hearsay, Your Honor, but it comes in under the admissions exception [or exclusion or exemption] under Fed R Evid. Rule 801(d)(2)(A)” than by saying, “Your Honor, it is not hearsay under Fed R. Evid. Rule 801(d)(2)(A).”

<sup>27</sup> Cf. *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) Nine states have adopted the Federal Rules but rejected the Rule 801(d) terminology. Seven other states – two (California and Kansas) that have their own evidence codes and the five states that have not yet adopted the Federal Rules – treat these statements as hearsay exceptions. See Section IV, *infra*.

In Section V, the article identifies and then evaluates six alternative approaches to classifying admissions and prior statements. This evaluation finds that Rule 801(d) is neither practically, doctrinally nor theoretically sound. It fails the tests of clarity and consistency required by the norms of good drafting and remains a source of awkwardness and potential confusion for busy practitioners and judges, not to mention for law students learning the law of hearsay for the first time. The evaluation also finds that the “four categories” approach best serves the goals of the evidence code. The article concludes by discussing the prospects for adopting some version of this “four categories” approach as an amendment to the Federal Rules of Evidence, using the standards developed by the Advisory Committee on Rules of Evidence, first for evaluating amendments generally and then for making stylistic changes under the restyling process currently underway.

## I. Prelude to the Drafting of the Federal Rules

### A. Wigmore, Morgan and the Debate over the Classification of Admissions and Prior Statements and the Organization of the Hearsay Exceptions

Dean John Henry Wigmore (1863-1943) and Professor Edmund Morgan (1878-1966) were two giants of American evidence scholarship during the first half of the twentieth century. Wigmore has been called the “greatest legal writer in our history”<sup>28</sup> and his famous treatise, first published in 1904 and with a second edition in 1923 and a third edition in 1940, established the framework for the discussion of most major evidence issues during the first six decades of the twentieth century.<sup>29</sup>

The first edition of Wigmore’s famous treatise was to be “the most complete and exhaustive treatise on a single branch of our law that has ever been written,”<sup>30</sup> and the second and third editions were similarly praised.<sup>31</sup> But that first reviewer also noted that Wigmore’s work was in some respects “new and strange...[and used] extravagantly novel terms.”<sup>32</sup> After praising the second edition, another reviewer observed that: “[Wigmore] has an instinct for vocabulary and an instinct for classification; -- but these

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<sup>28</sup> Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 574, 583 (1947).

<sup>29</sup> John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: including the statutes and judicial decisions of all jurisdictions of the United States* (1<sup>st</sup> ed. 1904)[hereinafter, Wigmore, (1<sup>st</sup> ed. 1904)].

<sup>30</sup> Joseph H. Beale, *Book Reviews*, 18 Harv. L. Rev. 478, 479, 480 (1905)(reviewing the first edition).

<sup>31</sup> John M. Maguire, *Book Review*, 22 Ill L Rev. 688, 692 (1928) Referring to the second edition, Professor John Maguire said that, when it comes to evidence treatises, “Wigmore is still first, and there is no second.” Reviewing the third edition, Morgan wrote, “Not only is it the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of Anglo-American law.” Edmund M. Morgan, *Book Review*, 20 B.U.L.Rev. 776, 793 (1940).

<sup>32</sup> Joseph H. Beale, *Book Reviews*, 18 Harv. L. Rev. 478, 479, 480 (1905). Professor Beale was relentlessly critical of Wigmore’s “novel” nomenclature. “In place of well-known terms to which we are all accustomed, Professor Wigmore presents us with such marvels as restrospectant evidence, prophylactic rules, vitriol privilege, integration of legal acts, atopic preference and other no less striking inventions. It is safe to say that no man, however great, could introduce three such extravagantly novel terms, and Professor Wigmore proposes a dozen.” *Id.*

instincts, unfortunately, are not always under control. If the law calls a thing by one name, he is ever on the alert for another; the inevitable result is a classification that, even after all these years, seems not only new but queer.”<sup>33</sup> As we will see, this observation about his “vocabulary and instinct for classification...not always under control” applies all too well to the Wigmore classification that was the intellectual forerunner of Rule 801(d), his “hearsay rule satisfied” category.

Morgan’s numerous articles and extensive professional service made him “one of the greats.”<sup>34</sup> Morgan and Wigmore both served on the two major blue ribbon evidence committees of their time,<sup>35</sup> as well as on the first important attempt to draft a modern evidence code, A.L.I. Model Code of Evidence.<sup>36</sup> Their competing views on the proper classification of admissions helped to shape the drafting of both the three predecessor codes and the Federal Rules of Evidence.

### 1. Wigmore and His Distinctive “Hearsay Rule Satisfied” Category

In contrast to the traditional two-step approach to hearsay analysis, which asked two questions (is the evidence hearsay; if so, is there an exception) and involved three categories (not hearsay, hearsay-not-within-an-exception, and hearsay-within-an-exception), Wigmore created a third step and a fourth hearsay category, an approach which the Reporter adopted for the Federal Rules of Evidence. He developed his distinctive approach in 1899, when he served as editor and revisor of the 16<sup>th</sup> edition of what had long been the leading American treatise on evidence, *Greenleaf on Evidence*.<sup>37</sup> To the traditional two hearsay questions, Wigmore added a third, writing in 1899 that:

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<sup>33</sup> Ralph Clifford, *Book Review*, 24 Col. L. Rev. 440, 441 (1924). A more recent reviewer wrote: “I am newly aware that Wigmore in massive doses is frequently irritating [and] his personally coined language is as often obscuring as illuminating.” Ronan Degnan, *Book Review*, 87 Harv. L. Rev. 1590, 1594 (1970) (reviewing Revised Edition of Volume III of the Third Edition, by James H. Chadbourne).

<sup>34</sup> See generally Mason Ladd, *In Memoriam Edmund M. Morgan*, 79 Harv. L. Rev. 1546 (1966). The citation that accompanied the award of The American Bar Association awarded him a distinguished service medal in 1965, with a citation that read: “...your name, with that of Wigmore, is synonymous with the law of evidence.” Professor Edmund M. Morgan Is Awarded the American Bar Association Medal, 51 A.B.A. J. 844 (1965) (1965).

<sup>35</sup> These were the the Commonwealth Fund Committee in the late 1920s, chaired by Morgan, Edmund M. Morgan, *Law of Evidence: Some Proposals for Reform* (1927), and the ABA Committee on Improvements in the Law of Evidence (the “Wigmore Committee”) in 1938, chaired by Wigmore. Report of the Committee on Improvements in the Law of Evidence, 63 A.B.A. Rep 570 (1938).

<sup>36</sup> Morgan served as Reporter and Wigmore as Chief Consultant, and there was tension both in the selection of Morgan (as opposed to Wigmore) as Reporter and in their competing views on many issues. Professor Twining suggests that the conflicts between Wigmore and Morgan over the Model Code were similar to the clash between Williston and Llewellyn over the Uniform Commercial Code a decade later. “In each case the leading scholar of an earlier generation resisted changes in form and substance in his area of expertise and justified this opposition partly in terms of the established ways of thought of the practicing profession. In each case the older scholar was vulnerable to charges of having a vested interest in the status quo, as both Wigmore and Williston were well aware.” William Twining, *Theories of Evidence: Bentham and Wigmore* 163 (1985).

<sup>37</sup> First published in 1842 by Professor Simon Greenleaf, Royall Professor of Law at Harvard, the book was the leading evidence treatise of the 19<sup>th</sup> century. Wigmore’s work on the 16<sup>th</sup> edition was described as



“...three distinct groups of questions present themselves in connection with the Hearsay rule, viz.: A. Is the Hearsay rule applicable to the case at hand, i.e., is the evidence offered as a testimonial assertion? B. Is there any exception to the Hearsay rule to be made for the evidence offered? C. If the Hearsay rule is applicable, and if no recognized exception covers the case in hand, is the Hearsay rule satisfied, i.e., has there been, in fact, an oath and cross-examination?”<sup>38</sup>

These three questions (and the accompanying four categories) formed the analytic structure of Wigmore’s approach to the hearsay rule. While his treatment of the first two questions was largely traditional, the third question – and his creation of the fourth “hearsay rule satisfied” category – exemplified both his originality and his “instinct for classification...[that was] not always under control.”<sup>39</sup> The importance of the new question and the new category has never before been clearly identified, probably because his own treatise never articulated the third question or developed the fourth category with the clarity and focus of the 1899 Greenleaf book.<sup>40</sup> Nevertheless, they were central to his approach to hearsay and the hearsay exceptions and were the intellectual forerunner of Rule 801(d).<sup>41</sup>

### *The Hearsay Rule and the Hearsay Exceptions*

While Wigmore never offered a precise definition of hearsay, his description of the rule showed his approach: “the Hearsay rule, as accepted in our law, signifies a *rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination.*”<sup>42</sup> For Wigmore, “[t]he theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath

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“more than a reediting of the book; it is a remolding of it.” J.P.C., *Book Review*, 13 Harv. L Rev. 228 (1899).

<sup>38</sup> 1 Simon Greenleaf, *Greenleaf on Evidence* 185 (16<sup>th</sup> ed. 1899).

<sup>39</sup> Clifford, *Book Review*, 24 Col. L Rev. 440, 441 (1924).

<sup>40</sup> Instead of the three questions and three-part classification of the Greenleaf book, he wrote in his own treatise that: “An exposition of the Hearsay rule embraces four general topics: I. The Hearsay rule’s requirements and their satisfaction . . . II. The kinds of assertions admitted as Exceptions to the Hearsay rule; III. Utterances, not being testimonial assertions, to which the Hearsay rule is not applicable; and IV. Sundry statements to which the Hearsay rule is applicable.” 1 Wigmore (1<sup>st</sup> ed. 1904), *supra*. note 29, at §1366 p. 1696. However, these “four general topics” are discursive and descriptive, not analytical. They fit into the original three categories as follows: 1) is the Hearsay rule applicable -- included as parts of his topics I, III and IV; 2) is there an exception – covered in topic II; and 3) is the Hearsay rule satisfied – discussed in I. As we will see, while Wigmore placed admissions and prior statements in the “hearsay rule satisfied” category, he discussed them in the impeachment, not the hearsay, section of his treatise.

<sup>41</sup> See, e.g., Roger C. Park, David P. Leonard & Stephen H. Goldberg, *Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials* 287-288 (2d. ed 2004)(posing what essentially are Wigmore’s three questions in the context of analyzing the federal rules).

<sup>42</sup> 2 Wigmore (1<sup>st</sup> ed. 1904), *supra*. note 29 at §1362, p. 1675 (emphasis in original). Twenty pages later, he penned his famous praise of cross-examination as “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” *Id.* at §1427 p. 1697.

the bare untested assertion of a witness can be brought to light and exposed...by the test of cross-examination.”<sup>43</sup>

However, the hearsay rule did not exclude all untested assertions. Noting that “[t]he purpose and reason of the Hearsay rule [to test assertions through cross-examination] is the key to the exceptions to it,”<sup>44</sup> Wigmore then recognized that “the test...may in a given instance be superfluous... [where] the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.”<sup>45</sup> Furthermore, “the test may be impossible of employment [for example, if the declarant dies] so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape.”<sup>46</sup>

Wigmore generalized from these observations to find that two principles, Necessity and Trustworthiness, were “responsible for most of the Hearsay exceptions.”<sup>47</sup> While they are “only imperfectly carried out,...they play a fundamental part. It is impossible without them to understand the exceptions. In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness.”<sup>48</sup> In applying these principles in all three editions of his treatise, Wigmore listed the exceptions in the following order, starting with the most unavailable:

“1. Dying Declarations; 2. Statements against Interest; 3. Declarations about family history; 4. Attestation of a Subscribing Witness; 5. Regular Entries in the course of Business; 6. Sundry Statements of Deceased Persons; 7. Reputation; 8. Official Statements; 9. Learned Treatises; 10. Sundry Commercial Documents; 11. Affidavits; 12. Statements by a Voter; 13. Declarations of Mental Condition; 14. Spontaneous Exclamations.”<sup>49</sup>

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<sup>43</sup> *Id.* at §1420, p. 1791. Testimonial assertions also had to satisfy a second test, which he called Confrontation. While this article will not discuss his views on non-constitutional and constitutional confrontation, it must be noted that they are idiosyncratic, dated and conflated the Confrontation Clause and hearsay exceptions.” *Id.* at §1397, p. 1757.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1792. Wigmore stated that “Mr. Starkie (Evidence, I, 45) in 1824 was the first to state plainly the Philosophy of the Exceptions.” *Id.* at 1793, n.2.

<sup>48</sup> *Id.* at 1794. Wigmore’s view of Necessity was broader and more flexible than the current understanding of unavailability as expressed in Fed R. Evid. Rule 804(a) and covered not only situations where the declarant was “dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing,” what he called “the commoner and more palpable reason,” but also situations where where “[t]he assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources . . . [as] in the exception for Spontaneous Declarations, for Reputation, and in part elsewhere.” *Id.* at 1793.

<sup>49</sup> *Id.* In the first edition, Wigmore ended his introduction to the hearsay exceptions with the above listing of the fourteen exceptions. In the second and third editions, Wigmore included another section on “The Future of the Exceptions.” He began the new section by writing that “[t]he needless obstruction to investigation of truth caused by the Hearsay rule is due mainly to the inflexibility of its exceptions and to the rigidly technical construction of those exceptions by the Courts.” 3 John Henry Wigmore, A Treatise

Besides showing that there were far fewer hearsay exceptions in Wigmore's time, his list reveals two other interesting points. First, there was the crude beginning of the modern division of the hearsay exceptions into two categories, one based on necessity (the Rule 804 category) and the other based on reliability (the Rule 803 category). Second, former testimony, admissions and prior statements are missing from his list of hearsay exceptions. As discussed in the next sub-section, Wigmore placed these statements in the "hearsay rule satisfied" category, not with the hearsay exceptions.

Morgan was critical both of Wigmore's view that "the hearsay rule and its exceptions in outline, though not in detail, form a logically coherent whole"<sup>50</sup> and of Wigmore's claim that the two principles in fact explained the many different and varied hearsay exceptions. Morgan had a very different perspective. Far from a "logically coherent whole," in his view, "the hearsay rule with its exceptions . . . resemble[s] an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists . . ."<sup>51</sup> Writing at a time when the Federal Rules of Civil Procedure were in the process of being adopted and hoping for a similar modernization of the evidence rules, Morgan believed that the solution lay not in judicial refinement or further scholarly classifications but rather in a codification governed by "practical considerations."<sup>52</sup> While Wigmore also favored legislation,<sup>53</sup> Morgan thought that Wigmore's stated belief in the overall rationality of the common law of evidence undermined the support for the urgency of the needed codification.

### *The "Hearsay Rule Satisfied" Category*

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on the System of Evidence in Trials at Common Law: The Statutes and Judicial Decisions of All Jurisdictions of The United States and Canada §1427, 158 (2d ed.1923)[hereinafter, Wigmore (2d ed. 1923)]. He urged the adoption of a general exception for all statements of deceased persons and, in the third edition, also supported the formation of a committee to codify the exceptions to the hearsay rule. 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: The Statutes and Judicial Decisions of All Jurisdictions of The United States and Canada* §1427, 209 (3<sup>rd</sup> ed. 1943)[hereinafter, Wigmore (3<sup>rd</sup> ed. 1940)]. The third edition also supported a liberalization of the hearsay rule to grant the trial judge flexibility and discretion in applying the hearsay rule in individual cases. *Id.* at 215. Then-Professor Jack Weinstein elaborated and extended Wigmore's suggestion in his famous article, Jack Weinstein, *The Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961).

<sup>50</sup> Edmund M Morgan, John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 920 (1937).

<sup>51</sup> *Id.* at 921. He and his colleague Professor Maguire further explained:

"There is in truth no one theory which will account for the decisions. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court's distrust for the jury; in others only the adversary notion of litigation can account for the reception; and in still others either the absence of a motive to falsify, or a positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built."

*Id.*

<sup>52</sup> *Id.* Morgan was a member of the Advisory Committee on Civil Procedure.

<sup>53</sup> As referenced by his work on the ABA's Wigmore Committee, 63 A.B.A. Rep 570 (1938, and as expressed in the 3<sup>rd</sup> edition of his treatise, 3 Wigmore (3<sup>rd</sup> ed. 1940), *supra*. note 49, at § 1427.

Wigmore invented the “hearsay rule satisfied” category, the forerunner of Rule 801(d)’s “not hearsay” category, as he was preparing the 16<sup>th</sup> edition of Greenleaf on Evidence. Wigmore was considering how to classify evidence of two types of out-of-court statements: the former testimony of an unavailable witness and a deposition of either an available or unavailable witness.<sup>54</sup> The common law and previous treatise writers had long treated both former testimony and depositions as hearsay and admitted them as hearsay exceptions, but Wigmore was not satisfied with this traditional treatment. Examining the issue “in more detail,”<sup>55</sup> he found a 1892 Minnesota case with *dicta* stating that:

“...former testimony is frequently inaccurately spoken of as an exception to the [Hearsay] rule... The chief objections to Hearsay Evidence are the want of the sanction of an oath and of any opportunity to cross-examine; neither of which applies to testimony given in a former trial.”<sup>56</sup>

Using the Minnesota case as his authority, he created the new third category and presented it in a newly titled chapter: Hearsay Rule Satisfied; Testimony by Deposition and Testimony at a Former Trial. With depositions and former testimony, the declarant was under oath and subject to cross-examination (or at least the opportunity for cross-examination) at the time of making the out-of-court statement. Because a major purpose of the hearsay rule had already been accomplished, Wigmore decided to change the classification of former testimony and depositions from their traditional category as hearsay exceptions to “hearsay rule satisfied.”

All three editions of Wigmore’s own treatise had a section entitled “Hearsay Rule Satisfied,” containing several sub-sections and hundreds of pages of general discussion, with many examples of the importance of cross-examination and the value of confrontation. But the actual sub-section applying the category was, in each edition, less than one page and was entitled “Cross-examined Statements not an Exception to the Hearsay Rule.”<sup>57</sup> Pointing out that, in the case of former testimony and depositions, there has been prior cross-examination, Wigmore wrote that the evidence “has satisfied the rule and needs no exception in its favor. This is worth clear appreciation, because it involves the whole theory of the rule.”<sup>58</sup>

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<sup>54</sup> In the paradigm case of former testimony, witness W has testified under oath and has been cross-examined in Trial 1. After the case is reversed on appeal and remanded for a new trial, Trial 2, the witness W becomes unavailable and the proponent offers the transcript of the former testimony from Trial 1. In a deposition, the witness testifies under oath and subject to cross-examination at the out-of-court deposition, and then is either available or unavailable at trial.

<sup>55</sup> 1 Greenleaf on Evidence, 264 (16<sup>th</sup> ed. 1899).

<sup>56</sup> *Minneap. Mill Co. v. R. Co.*, 51 Minn. 304, 315 (1892). The quoted language is *dicta* because the hearsay issue in the case was the scope of unavailability under the former testimony exception and whether the declarant had to be dead or could be unavailable in some other manner. The court required only that the declarant be unavailable. *Id.*

<sup>57</sup> 2 Wigmore (1<sup>st</sup> ed. 1904), *supra*. note 29, at §1370 p. 1709-10.

<sup>58</sup> *Id.*

The “hearsay rule satisfied” category is characteristic of Wigmore’s “instinct for classification” It highlighted an important feature of former testimony and depositions – oath and cross-examination at the time of the making of the out-of-court statement -- and therefore was analytically interesting. However, it was also problematic in one minor and one more serious way.<sup>59</sup> As a minor point, it is descriptively inaccurate. Since the factfinder in the current trial still does not have the opportunity to view the declarant’s demeanor, not all of the concerns of the hearsay rule have been satisfied. For this reason, one of Wigmore’s disciples, Professor Strahorn, renamed the category as “hearsay rule partially satisfied.”<sup>60</sup> More importantly, the new category abandoned a well-accepted approach (treating these statements as hearsay exceptions) and introduced a new approach – with a new legal category and legal term -- without assessing their costs and benefits or evaluating alternatives. Such unexamined innovation is not a virtue even in an author’s individual treatise. It becomes a serious vice when followed in an evidence code, especially if the new term conflicts with a well-established one.

## 2. Wigmore and Morgan On Admissions

Wigmore and Morgan had competing positions on the classification of admissions. While Wigmore changed his initial views as a result of Morgan’s 1921 article, his changed position was still different than Morgan’s, just in a narrower way. In the 1899 edition of Greenleaf’s Treatise, Wigmore treated admissions as an example of self-contradicting impeachment evidence, not as substantive evidence.<sup>61</sup> Since he thought that admissions were used only to contradict and to impeach, they were not testimonial and the hearsay rule was “inapplicable” (i.e., they were not hearsay).

In the first edition of his own treatise in 1904, Wigmore continued to regard admissions as admissible only as impeachment evidence, viewing them as another form of self-contradiction, “when it appears that on some other occasion he has made a statement inconsistent with his present claim.”<sup>62</sup> He located his discussion of admissions

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<sup>59</sup> As an observation and not a criticism, it should also be noted that this category is Wigmore’s invention, with very modest case support. In addition to the dictum from the Minnesota case previously described in note 56, *supra*. Wigmore used a quotation from an early opinion in the famous *Wright v. Tatum* case. The opinion from which Wigmore quote was from the first round of appeals and concerned the former testimony of a deceased attesting witness to the will (and not from Baron Parke’s opinion in a later appeal that addressed the admissibility of letters for their “implied assertions” and used the ship captain’s hypothetical. *Wright v. Tatham*, 7 A & E 313, 113 Eng. Rep. 488 (1837)). Wigmore quoted Chief Judge Tindall for the point that “[t]he evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the viva voce examination of one of the witnesses remaining alive and actually examined in the cause.” *Wright v. Tatham*, 1 A & E 3, 22, 110 Eng. Rep. 1108, 1116 (1834)[Note: the citation is Wigmore’s treatise, 3 A & E 3, 22 (1834), is incorrect.]. This statement established that such former testimony should be received as evidence but had absolutely no bearing on whether it should be admitted as a hearsay exception or under the “hearsay rule satisfied” category.

<sup>60</sup> John S Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Penn. L. Rev. 484 (1937).

<sup>61</sup> 1 Greenleaf on Evidence, 292 (16<sup>th</sup> ed. 1899).

<sup>62</sup> 2 Wigmore (1<sup>st</sup> ed. 1904), *supra*. note 29, at §1048 p. 1218.

in the treatise section on Testimonial Impeachment, immediately following the chapter on Prior Statements, not in his 673-page treatment of the hearsay rule. He wrote that:

“The use of admissions is on principle not obnoxious to the hearsay rule; because that rule affects such statements only as are offered for their independent assertive value after the manner of ordinary testimony, which admissions are receivable primarily because of their inconsistency with the party’s present claim and irrespective of their credit as assertions; the offeror of the admissions, in other words, does not necessarily predicate their truth, but uses them merely to overthrow a contrary position now asserted. Just as the hearsay rule is not applicable to the use of a witness’ prior self-contradiction, so it is not applicable to the use of an opponent’s admissions.”<sup>63</sup>

While he recognized that admissions might also have “an additional and testimonial value, independent of the contradiction and similar to that which justifies the Hearsay exception for declarations against interest,”<sup>64</sup> he believed that this second, substantive use was permitted only if the statement satisfied the requirements of the declaration against interest exception.<sup>65</sup> For Wigmore in 1904, there was no permissible substantive use for admissions *qua* admissions.

In 1921, Morgan wrote an influential law review article that attacked Wigmore’s view that admissions were not hearsay. Entitled “Admissions as an Exception to the Hearsay Rule,”<sup>66</sup> Morgan reviewed the history of admissions and demonstrated that Wigmore’s position was unsound in theory and unsupported by case law. Summarizing his argument, he wrote:

Certain it is that extra-judicial admissions are received in evidence. Equally certain is it that they are received for proving the truth of the matter admitted. It is likewise certain that they do not fall within the exception to the rule against hearsay which admits declarations against interest. These are the facts, and from them the conclusion is inevitable that they are received as an exception to the rule against hearsay, and not that they are received on any theory that they are not hearsay.<sup>67</sup>

Morgan ended his article by posing and then providing an affirmative answer to his question: “Is there a justification in principle for such an exception?” He noted that, in creating hearsay exceptions, courts “have appeared to require only some guaranty of

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* The statement would have to be against interest at the time it was made, and the declarant would have to be unavailable.

<sup>66</sup> Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 20 *Yale L. J.* 355 (1921).

<sup>67</sup> *Id.* at 360. Notice that, in the last sentence of the quotation, Morgan uses the phrase not hearsay. He is referring to Wigmore’s original position that admissions were not offered for their substantive use, but only as self-contradiction. Thus, since they were not used for the truth of the matter asserted, admissions – in Wigmore’s original view – were not hearsay in the traditional sense.

truth ...and some measure of necessity.”<sup>68</sup> And he posited that the reason for these requirements was “chiefly the protection of the party against whom the evidence is to be used, rather than ... eliminat[ing] the possibility of false testimony.”<sup>69</sup> He supported this view by noting that courts regularly receive hearsay (as well as other) evidence if the opponent does not object to it.

Morgan then stated, as “too obvious for comment,” that in the case of an admission, “the party whose declarations are offered against him is in no position to object on the score of lack of confrontation or lack of opportunity for cross-examination” and that “[a]ll the substantial reasons for excluding hearsay are therefore wanting.”<sup>70</sup> He concluded by asserting that the party against whom the admission is offered “cannot object to it being received as prima facie trustworthy, particularly when he is given every opportunity to qualify and explain it.”<sup>71</sup>

In the second edition of his treatise, published in 1923, Wigmore stated that Morgan’s “astute criticism” had led him to revise his views on admissions and to recognize that admissions can be admitted for two purposes: for impeachment, as self-contradiction, and substantively, to prove the truth of the matter asserted.<sup>72</sup> He wrote that, as substantive evidence, they are hearsay but “pass the gauntlet [of the hearsay rule] when offered *against* him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he *does not need to cross-examine himself*.”<sup>73</sup> Elaborating further, Wigmore wrote:

“The theory of the Hearsay rule is that an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the assertion by the cross-examination by the party against whom it is offered...; e.g. if Jones had said out of court, ‘The party opponent Smith borrowed this fifty dollars,’ Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out-of-court, ‘I borrowed this fifty dollars,’ certainly Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away because the very basis of the rule is lacking, viz., the need and prudence of affording an opportunity of cross-examination. In other words, **the hearsay rule is satisfied**; Smith has already had an opportunity to cross-examine himself or, to put it another

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* In a footnote, Morgan also mentioned a quasi-estoppel argument made in a 1911 treatise that argued: “The competency of an admission is not so much an exception to the rule excluding hearsay as based upon a quasi-estoppel which controls the right of a party to disclaim responsibility for any of his statements. 2 Chamberlayne, Evidence sec. 1292 (1911).” Morgan then stated: “The so-called “quai-estoppel” may furnish one of the reasons for making an exception to the hearsay rule, but it cannot prevent its being an exception.” *Id.*

<sup>72</sup> 2 Wigmore (2d ed. 1923), *supra* note 49, at §1048 p. 504 n. 1.

<sup>73</sup> *Id.* at 505.

way, he now as opponent has the full opportunity to put himself on the stand and explain his former assertion.”<sup>74</sup>

While Wigmore accepted the substantive use of admissions, he rejected Morgan’s view that admissions should be treated as an exception to the hearsay rule. But he never fully elaborated the reasons for his rejection. His only discussion of the classification issue was in a single footnote, which reads in its entirety:

“In the following article is found an acute criticism of the theory of admissions originally here expounded, and in light of that article the text has been revised. Professor Edmund M. Morgan, “Admissions as an Exception to the Hearsay Rule,” *Yale L. Journal*, 1921, XXX, 355. It is believed that the reasoning now set forth in §§1048, 1049, places the theory of admissions on a sounder basis.”<sup>75</sup>

There are several interesting yet disappointing aspects to Wigmore’s treatment of admissions in the 1923 treatise (which continued unchanged in the 1940 edition). First, although he used the phrase “the hearsay rule is satisfied” in his discussion, he kept his treatment of admissions in the in the Testimonial Impeachment section of the treatise, where he had discussed admissions (as not hearsay) in the first edition, not in the “hearsay rule satisfied” section, §1370. Furthermore, §1370 of the treatise remained unchanged and still discussed only former testimony and depositions (and did not mention admissions).

Second, Wigmore did not make any attempt to compare admissions to former testimony and depositions, the two types of evidence for which he had originally created the “hearsay rule satisfied” category. Had he done so, he would have noted that, in the case of former testimony and depositions, evidence law imposes a requirement of cross-examination at the time of the making of the out-of-court statement, whereas there is no such cross-examination requirement for admissions. For former testimony and depositions, there is actual cross-examination (or, at the least, an actual opportunity to cross-examine); with admissions, there is only the fact that the party “cannot complain of the lack of opportunity to cross-examine”<sup>76</sup> and will ordinarily have the opportunity to take the stand and explain the prior statement. One can argue that, for practical and policy reasons, the fact that the party “cannot complain” and has an opportunity to explain should satisfy the concerns of the hearsay rule. But the way in which admissions *might* or *should* satisfy the hearsay rule would be quite different from the way that former testimony and depositions unquestionably *do* satisfy the cross-examination aspects of the rule. The actual cross-examination in the case of former testimony goes to traditional hearsay concerns like reliability, whereas the favorable treatment of admissions stems instead from notions of party responsibility for their own statements and the adversary theory of trials. One can reasonably expect a treatise writer to acknowledge and discuss such differences.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 504, n.1. The third edition of the Treatise was unmodified on this point.

<sup>76</sup> *Id.* at 505.



Third, although aware of Morgan's article advocating the treatment of admissions as a hearsay exception, Wigmore did not discuss the comparative advantages and disadvantages of placing admissions into the "hearsay rule satisfied" as opposed to the "hearsay exception" category. Instead, he simply placed it in that category and announced that it was "on a sounder basis." Finally, and related to the third aspect, he did not cite any case law or scholarly writing in support of his decision. In the grand manner of a respected oracle that he was, he simply announced the classification on his own authority.<sup>77</sup>

Morgan continued to advance his argument that admissions should be treated as a hearsay exception and to attack Wigmore's placement of admissions into the "hearsay rule satisfied" category. He also argued that Wigmore classified admissions and former testimony as he did for an ulterior motive, to support his broader project of rationalizing the hearsay exceptions. Morgan wrote:

"So long as Mr. Wigmore agrees with the courts and other commentators that admissions, confessions and former testimony, when received in evidence, are properly used as tending to prove the truth of the matter asserted in them, why argue about classification? Only for this reason, -- by excluding these from the hearsay class, Mr. Wigmore is able to give to this whole subject an apparent coherence and rationality which it totally lacks. By this device of classification he purports to show that in each recognized exception to the hearsay rule some necessity for using the hearsay evidence in place of the declarant's testimony is present, and some guaranty of trustworthiness is to be found which distinguishes the admissible utterance from hearsay in general and serves, however feebly, as a substitute for cross-examination. This enables him to champion the rules and direct his fulminations against foolish refinements in their application. It permits him to slur the fact that the law governing hearsay today is a conglomeration of inconsistencies developed as a result of conflicting theories."<sup>78</sup>

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<sup>77</sup> In his book on Bentham and Wigmore, William Twining observed that "... one of the difficulties of debating with Wigmore was that, so great was his influence, once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap. Great treatise writers are among those who can pull themselves up by their own bootstraps." William Twining, *Theories of Evidence: Bentham and Wigmore* 163 (1985).

<sup>78</sup> Edmund S. Morgan, *Book Review*, 20 B.U.L.Rev. 776, 790-791(1940)[hereinafter, Morgan, *Book Review*].

By classifying admissions, confessions, and admissible reported testimony as nonhearsay, he made the other exceptions appear to have a consistency and rationality which I believe non-existent. In each exception he found a necessity for the use of secondary evidence and a guaranty of trustworthiness in the admitted hearsay which is lacking in ordinary hearsay. In so doing he furnished ammunition for that large segment of the profession which asserts, and sometimes seems to believe, that the accepted rules represent the 'crystallized wisdom of the ages,' and which, therefore, opposes changes that Wigmore would ardently champion.

Edmund S. Morgan, *The Future of the Law of Evidence*, 29 Tex. L. Rev. 587, 593-594 (1951).

Morgan thus suspected that Wigmore placed admissions (and former testimony) in the “hearsay rule satisfied” category not primarily for the affirmative reason that they belonged there but for the negative reason that he wanted to exclude them from the roster of hearsay exceptions, in order to maintain the rationality (and to Morgan, the false rationality<sup>79</sup>) of his organizational plan for the hearsay exceptions. As we will see, rationalizing the hearsay exceptions was precisely the reason that the Reporter gave for placing admissions in the Rule 801(d) “not hearsay” category

The debate between Wigmore and Morgan was never fully joined, primarily because Wigmore never again addressed the classification issue after announcing his amended position in the 1923 edition of his treatise. Reviewing the third edition in 1940, Morgan mildly criticized Wigmore for not engaging this and other issues,<sup>80</sup> but with no response. Wigmore died in 1943.

### 3. Wigmore and Morgan on Prior Statements

The extensive pre-Federal Rules scholarship and case law on prior statements focused almost exclusively on the issue of admissibility – whether prior statements should be admitted as substantive evidence or used only for impeachment – and not on their classification. The orthodox rule permitting prior statements to be used only for impeachment was the prevailing law up to the time of the enactment of the federal rules in 1975, and the writers and judges discussed whether, and to what extent, to overturn the orthodox rule. There was very little writing – by Wigmore, Morgan, or anyone else – on the *how* issue and classification.

Under the orthodox rule, the classification of prior statements was easy. Prior statements offered only to impeach were not hearsay, because they were not offered for their truth. Prior statements offered substantively, to prove their truth, were hearsay and were excluded by the hearsay rule. To admit them substantively, most writers advocated creating a hearsay exception for all or some prior statements.

In the first edition of his treatise, Wigmore endorsed the orthodox position on prior statements: they were admissible for impeachment purposes, but not for the truth of the matter asserted in the statements. Wigmore placed his discussion of prior statements in the treatise section entitled Testimonial Impeachment, in a chapter called Self-

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<sup>79</sup> Edmund S. Morgan, *Defining and Classifying Hearsay*, 86 U.Pa.L.Rev.258, 273 (1938) “[it] seems not only futile but positively harmful to make a classification of utterances which appears to give to the decisions an element of cohesive reasonableness which they lack.” Another writer observed, “Rather than embarrass the symmetry of his logical generalizations, he simply expelled admissions from the realm of hearsay exceptions.” Carl H. Harper, *Admissions of Party-Opponents*, 8 Mercer L. Rev. 252, 253 (1953). (Mr. Harper was the co-author of the Georgia Rules of Evidence with Professor Thomas Green, who went on to become a member of the Advisory Committee.)

<sup>80</sup> “It may . . . be ungrateful and unreasonable to wish that after his second edition he had given a major portion of his limitless energy and extraordinary talent to a reexamination of the entire subject, including his analysis and classification, paying particular attention to those topics in which he had theretofore accepted the conclusions of other scholars.” Morgan, *Book Review,s supra*. note 78, at 778.

Contradiction. He wrote that, “the *prior statement is not hearsay* because it is not offered assertively, i.e., not testimonially.”<sup>81</sup>

In the second edition, Wigmore changed his position slightly, becoming the first major writer to endorse the substantive use of prior statements. He amended his earlier statement to say that: “the *prior statement is not primarily hearsay...*”<sup>82</sup> He then added a new sub-section, in which he said:

It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. *The whole purpose of the Hearsay rule has been already satisfied.* Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.<sup>83</sup>

In a footnote explaining the reason for his changed view, he stated only that “the reasoning is similar to that for admissions.”<sup>84</sup> This is the extent of Wigmore’s discussion of the substantive use of prior statements. He was an early supporter, but his writing on this point was very sparse.

Morgan’s writing on the classification of prior statements was less developed than his work on admissions and showed some ambiguous and perhaps inconsistent use of language and concepts. Writing in 1938, discussing prior recorded recollections and comparing them to prior statements, he wrote that “...it is universally agreed that prior statements [when used as substantive evidence] are hearsay.”<sup>85</sup> Ten years later, however, Morgan posed the question: “Should we not exclude from the hearsay rule prior statements of a witness subject to oath and cross-examination, since in fact these assertions do not involve the traditional hearsay dangers?” His answer: “there is no real reason for classifying the evidence (of prior statements) as hearsay.”<sup>86</sup>

It is unclear if Morgan was answering the *whether* question -- should prior statements be received as substantive evidence or excluded by the hearsay rule -- or the *how* question: if received, how should they be classified. The fact that the witness is in-court, under oath and subject to cross-examination and observation meant, for Morgan,

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<sup>81</sup> 2 Wigmore (1<sup>st</sup> ed. 1904), *supra*. note 29, at §1018, p. 1179 (emphasis in original).

<sup>82</sup> 2 Wigmore (2d ed. 1923), *supra*. note 49, at §1018, p. 459 (added word in boldface)

<sup>83</sup> *Id.* at 460 (emphasis supplied). The text was identical in the 1940 edition.

<sup>84</sup> *Id.* at 461 n 3.

<sup>85</sup> Edmund S Morgan, *Defining and Classifying Hearsay*, 86 U.Pa.L.Rev. 258, 268 (1938).

<sup>86</sup> Edmund S Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 196, 218-19 (1948).

that there were no significant “hearsay dangers” and, for Wigmore, that the purposes of the hearsay rule had been “satisfied.” We shall see that the Reporter used this very reason both to admit prior statements as substantive evidence and to classify them as “not hearsay” in the federal rules. Notwithstanding his answer to his own question, as Reporter for the Model Code of Evidence, Morgan drafted a code which treated prior statements as hearsay and then placed them in a separate hearsay exception.

## B. The Three Predecessor Codes

A major evidence code was drafted in each of the three decades prior to the enactment of the Federal Rules of Evidence. The first of these was the Model Code of Evidence, approved by the American Law Institute in 1942. It was followed by the Uniform Rules of Evidence in 1954 and then the California Evidence Rules in 1964. Each code influenced its successor, and all of them strongly influenced the shape and content of the Federal Rules of Evidence. The Model Code contributed the “code” framework used by the Federal Rules of Evidence, using general rules of broad applicability on a selected number of topics, as opposed to a detailed “catalog” of very detailed rules covering all topics or a “creed” announcing general principles.<sup>87</sup> The Uniform Rules of Evidence provided the outline of code sections – nine articles, each on a different topic – that the Federal Rules of Evidence followed with only few changes.<sup>88</sup>

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<sup>87</sup> The issue of the level of generality or specificity of the rules of evidence was very controversial at the time and occasioned a sharp public disagreement between Wigmore and Morgan. The question was: should the model code be “a catalog, a creed or a code[?]” Edmund Morgan, Foreword to the Model Code of Evidence 12 (1942). Wigmore wanted a “catalog,” a detailed set of concrete rules, rather than a set of general principles. He had drafted such a “catalog” in his own Code of Evidence, first published in 1910 and updated in 1935 and 1942. He also explained his preferred approach in a speech (and later an article) setting forth his “six Postulates of method and style,” See Edmund Morgan, 17 Proc. Am. Law Inst. 66, 87 (1940). Reiterated in his ABA Journal article criticizing the Model Code, John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A.J. 23 (1942). Judge Charles Clark preferred a “creed,” consisting of several statements of general principles. Foreword, at xiv-xv. The A.L.I. held a debate on this topic at its 1941 meeting, with Wigmore, Clark and Morgan each presenting his approach to the members. After hearing the presentations, the Institute voted for the “code” framework, and every evidence codification since that vote has used that framework and its intermediate level of generality. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 Iowa L. Rev. 413, 431-436 (1988). See generally, Michael Ariens, *Progress is Our Only Product: Legal Reform and the Codification of Evidence Law*, 17 Law & Soc. Inq. 213 (1992).

<sup>88</sup> The Federal Rules of Evidence follow the topics and headings of the Uniform Rules of Evidence for seven of the nine sections: Articles I, II, III, V, VII, VIII and IX. Article IX of the Uniform Rules incorporates both authentication and contents of writings, while the Federal Rules split those topics into two Articles, Article IX for authentication and Article X for contents. The two codes differ only on the coverage in Articles IV and VI. Instead of relevance, Article IV of the Uniform Rules deals with witnesses (covered in Article VI of the Federal Rules). And Article VI of the Uniform Rules covers “extrinsic policies” (found in Article IV, Rules 404-415 of the Federal Rules).

While both codes are similar in their use of these Articles, they use different numbering systems within each article and throughout the rules. The Uniform Rules proceed from Rule 1 to Rule 72, with no separate numbering within each Article as is the case with the Federal Rules. Thus, while the hearsay rules of the Uniform Rules are located in Article VIII, the hearsay rules are numbered Rules 62-66. Under the Federal Rules, the hearsay rules, also located in Article VIII, were numbered Rules 801-806 (and now, Rule 807).

The following paragraphs summarize each code's treatment of admissions and prior statements. For purposes of the Rule 801(d) story, these codes teach several important lessons. First, each of the codes classified admissions and prior statements as hearsay and then provided a specific hearsay exception to assure their admissibility. Second, two of the codes simply listed the hearsay exceptions *seriatim* and did not attempt to classify or organize them; California made a modest attempt at organization, with a separate grouping for prior statements and admissions, but did not use Wigmore's trustworthiness/necessity template. Finally, although each code had extensive commentary on many code sections, none of them discussed the reason for treating admissions and prior statements as hearsay exceptions and rejecting Wigmore's "hearsay rule satisfied" classification. They simply did what they did.

### Admissions

The Model Code defined hearsay in Rule 501; Rule 502 excluded it subject to exceptions; and Rules 503-529 listed all the exceptions, with four exceptions for different categories of admissions.<sup>89</sup> The commentary, written by Morgan as Reporter, noted that "some commentators (such as Wigmore) insist that admissions and confessions fall without the reason for the hearsay rule . . ." but concluded that "there is general agreement that such evidence is received as tending to prove the truth of the matter stated [and therefore is hearsay]."<sup>90</sup>

The Uniform Rules had Rule 63 as an all-purpose hearsay rule, both defining hearsay and the hearsay exclusionary rule and then setting forth 31 exceptions:

Rule 63. *Hearsay Evidence Excluded* – Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1)... ..; (2)... ..; (3)... ..

Exceptions 6), (7), (8) and (9) covered admissions. The only comment to the admissions exceptions of the Uniform Rule is that "[t]hey adopt the policy of Model Rules 506, 507 and 508." The California Evidence Code treated admissions as hearsay and provided a basic exception with several specific exceptions covering more detailed categories.<sup>91</sup>

### Prior Statements

The Model Code made prior statements admissible under an exception, Rule 503(b), which provided simply:

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<sup>89</sup> The four separate exceptions for admissions were: Rule 505 for confessions, Rule 506 for party admissions, Rule 507 for authorized and adoptive admissions, and Rule 508 for vicarious admissions.

<sup>90</sup> *Id.* The Comment also noted that "Hearsay within the definition includes admissions, confessions and former testimony." Model Code of Evidence Rule 501, Comment 227.

<sup>91</sup> Cal. Evid. Code §1220-1227 (West 1967).

“Evidence of a hearsay declaration is admissible if the judge finds that the declarant ... (b) is present and subject to cross-examination.”<sup>92</sup>

The Uniform Rules used similar language in Rule 63(1), providing an exception for a “statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness.”<sup>93</sup>

The exceptions created by both the Model Code and the Uniform Rule applied to *all* prior statements and required only that the declarant be “present” and available for cross-examination, not actually testify. The California Evidence Code – in a decision followed by the federal rules – changed both these aspects. It created exceptions only for some prior statements: prior inconsistent and prior consistent statements, past recollection recorded and statements of personal identification. And it required that the declarant actually testify as a witness, and not simply be present and available.<sup>94</sup>

The main story of the treatment of prior statements is consistent: the predecessor codes classified them as hearsay and then created specific exceptions. However, certain aspects of the Model Code and Uniform Rules illustrate the difficulty of thinking clearly about the classification issue and also foreshadow the problems with the drafting of Rule 801(d). With the Model Code, it was the decision to treat depositions differently than other types of prior statements. Instead of classifying them as a hearsay exception, it “excepted” them from its hearsay definition:

A hearsay statement is a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted...*except a statement... contained in a deposition or other record of testimony taken and recorded pursuant to law for use at the present trial.*<sup>95</sup>

But more interesting than this rule was its explanation. The Model Code comment stated that the “definition...distinguishes between testimony given in another trial, making it hearsay (see Rule 511 [the exception for former testimony]), and a deposition taken for use at the trial at which it is offered, classifying it as *non-hearsay*. Some writers insist that no such distinction is justifiable.”<sup>96</sup> This comment to Rule 501 is the first recorded use of

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<sup>92</sup> This Model Code language requiring the witness to be “present and subject to cross-examination” was used in the first draft of the Federal Rules of Evidence and changed in the second and subsequent drafts to require actual testimony, not just a presence in court. See Section II-A *infra*.

<sup>93</sup> See Uniform Rules of Evidence § 63(1) (repealed).

<sup>94</sup> Cal. Evid. Code §1235-1237 (West 1967) The California exception for prior inconsistent statements was broad (“if the statement is inconsistent with his testimony at the hearing . . .”). This exception became very well-known after the 1970 Supreme Court decision in *California v Green*, 399 U.S. 149 (1970) an important early case discussing the Confrontation Clause boundaries on hearsay exceptions.

<sup>95</sup> Model Code of Evidence §501(2)(emphasis added). The rule also “excepted” a statement “made by a witness in the process of testifying at the present trial.” As we will see in Section II-A, the first draft of the Federal Rules of Evidence included both of these “exceptions.” The deposition part was dropped in the second draft; the “made by a witness” part in the third draft.

<sup>96</sup> Model Code of Evidence §501 Comments. at 229.

the term “not hearsay” in the Rule 801(d) sense, to describe evidence that is offered to prove the truth of the matter asserted and is thus hearsay according to the traditional definition but that is then treated as “non-hearsay” for a policy reason.<sup>97</sup> The Model Code made depositions non-hearsay by “excepting” them from the definition of hearsay, which was precisely the approach used for both admissions and prior statements in the first two drafts of the Federal Rules of Evidence. And this comment – the first-ever “not hearsay” comment -- was written by Morgan, the strong advocate of treating admissions and prior statements as hearsay exceptions

The Uniform Rules wrinkle is similarly instructive. It appeared in the Comment to Rule 63(1), the rule that created a hearsay exception for prior statements. The Comment read:

“[Rule 63(1)] has the support of modern decisions which have held that evidence of prior consistent statements is not hearsay because the rights of cross-examination and confrontation are not impaired.”<sup>98</sup>

Note the anomaly: the drafters of the Uniform Rule had just created a new hearsay exception for prior statements in Rule 63(1). Then, in the comment to this exception, they wrote that “evidence of prior consistent statements is not hearsay.” The drafters of the Federal Rules were not the only ones who were confused and inconsistent.

## II. The Drafting of Rule 801(d)

Led by Chairperson Albert Jenner and Reporter Edward Cleary, the members of Advisory Committee on Rules of Evidence<sup>99</sup> worked for six years (from June, 1965 through November, 1971) and produced at least three internal drafts and then three separate published versions of the Federal Rules of Evidence in 1969, 1971 and 1973.<sup>100</sup>

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<sup>97</sup> Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 218-19 (1948). As mentioned in Section I-A, Morgan suggested in 1948 that “there is no real reason for classifying the evidence of prior statements as hearsay.” *Id.* However, in no other place did he use the term “non-hearsay” in this sense.

<sup>98</sup> The drafters concluded the Comment with a bit of cheerleading: “When sentiment is laid aside, there is little basis for objection to these enlightened modifications of the rule against hearsay.”

<sup>99</sup> A contemporary account described the membership of the Advisory Committee as follows: “The committee chairman was the well-known Illinois trial attorney and Warren Commission counsel Albert Jenner, who had participated in drafting the Uniform Rules of Evidence as a longtime Commissioner on Uniform State Laws. The panel also included Judges Simon Sobeloff, Joe Estes, and Robert Van Pelt; Professors (now federal judges) Jack Weinstein and Charles Joiner; Professor Thomas Green; Herman Selvin, father of the pioneering California Evidence Code; former chief of the Justice Department's Criminal Appeals Division, Robert Erdahl; and famed litigators David Berger, Egbert Haywood, Frank Raichle, Craig Spangenberg, Edward Bennett Williams, and the late Hicks Epton. The reporter was Professor Edward Cleary [of the University of Illinois and then Arizona State]. Paul Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L. J. 125 n.3 (1973).

<sup>100</sup> See Standing Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates* 46 F.R.D. 161 (1969); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft Of Proposed Rules*

At the first Advisory Committee meeting on June 18, 1965, after general introductions,<sup>101</sup> the Reporter gave the committee an overview of the materials that he would be using in drafting the rules: “Wigmore, McCormick, an AALS collection of articles on evidence, the Model Code, the Uniform Rules, and the report from the drafting of the California code.”<sup>102</sup> He handed out the table of contents of the three predecessor codes and said that he would distribute a copy of the Kansas Evidence Code (a state adoption of the Uniform Rules of Evidence) prior to the next meeting.<sup>103</sup> He also asked committee member Herman Selvin, a member of the California Law Revision Commission, to speak briefly about the California experience.<sup>104</sup> He then led a discussion of federal-state issues that would necessarily arise in a federal evidence code.<sup>105</sup>

The Committee discussed the Reporter’s draft rules for the first time at the second meeting in October, 1965. The minutes reflect that the Reporter made several basic points about his approach to drafting the federal rules, before turning to a discussion of the specific rules on the agenda for that meeting.<sup>106</sup> He said that in preparing the drafts, he had consulted the Uniform Rules and the California Code.<sup>107</sup> He then made three points about style and approach, the second and third of which he overlooked when drafting Rule 801(d): 1) definitions should be avoided whenever possible; 2) words should be used in their ordinary meaning whenever possible; and 3) he was drafting the rules to be as usable and accessible as possible.

In the next sub-sections, I describe in some detail the three drafts that led to the creation of Rule 801(d) and the “not hearsay” category. I then present the reasons that the Reporter gave for the drafting choices and criticize both those reasons and the failure

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*Of Evidence For The United States Courts And Magistrates*, 51 F.R.D. 315 (1971); *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (1973).

<sup>101</sup> In addition to the members of the Advisory Committee, several members of the Standing Committee on Federal Rules, including Professors William James Moore of Yale and Charles K. Wright of Texas and Judge Alfred Maris, attended many of the committee’s meetings.

<sup>102</sup> Minutes of June 18, 1965 meeting, 1, 5 *United States Courts, Minutes of Rules Committee Meetings*, Aug. 10, 2010 available at

<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> The Reporter had addressed these issues in his Memorandum No. 1, as had Professor Green’s study of the advisability and feasibility of promulgating federal rules of evidence. See Albert B. Maris, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (1962).

<sup>106</sup> See *United States Courts, Minutes of Rules Committee Meetings*, Aug. 10, 2010 available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx> The first topics addressed were authentication (discussed in the Reporter’s Memorandum No. 2), contents of writings (Memorandum No. 3), and expert testimony (Memorandum No. 4). The Chairperson and Reporter set the agenda for the Advisory Committee’s work and decided to address less controversial topics in their early meetings and to leave the discussion of the hearsay rules and presumptions until the end. Prior to a meeting on a topic, the Reporter prepared and circulated a memorandum on the topics for discussion at the meetings, usually accompanied by a first draft of particular rules. See, e.g., Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 Ga. L. Rev. 1, 3-4 (1969).

<sup>107</sup> Edward W. Cleary, 25 *Record of NYCBA* 142, 145-46 (1970). While not reflected in the minutes, his drafting followed the general approach of the Model Code and the structure of the Uniform Rules. *Id.*



of the Reporter and the Advisory Committee to consider alternative approaches to the classification of admissions and prior statements.

#### A. The Hearsay Rules: The First Three Drafts

The Advisory Committee discussed the hearsay rules over the course of four meetings, beginning in October, 1967. Prior to the first hearsay meeting, the Reporter presented the Advisory Committee with his first draft of Rules 801-804, accompanied by Memorandum No. 19, a 185-page memorandum that presented his suggested approach to hearsay and included his reasons for not treating admissions and prior statements as hearsay exceptions.<sup>108</sup> After discussing the first draft in several meetings, the Advisory Committee made changes and in December, 1968 approved a second draft, which was published as the Preliminary Draft in February, 1969, the first published work of the Advisory Committee.<sup>109</sup> The third draft was prepared after the review of public comments on the Preliminary Draft and was published in 1971 as the Revised Draft.<sup>110</sup> This third draft created Rule 801(d) and the “not hearsay” classification.

There are two important storylines in these three drafts, one involving the classification of admissions and prior statements, the other the treatment of the hearsay exceptions generally. With admissions and prior statements, the form of the classification changed from Draft #1 to Draft #3, but not the content. From the beginning, the Reporter recognized that, when offered to prove their truth, these statements were hearsay under the traditional definition. In thinking about how to classify them, he had two goals: first, to assure that they would be received into evidence and not be excluded by the hearsay rule; and second, to make sure that they were not classified as hearsay exceptions. He accomplished the first goal by excluding them from the definition of hearsay, using two different techniques. In Drafts ##1 and 2, in the definition section, Rule 8-01(c), he explicitly excluded admissions and prior statements from the definition of hearsay. In Draft #3, he created the new “not hearsay” category in Rule 801(d) and placed them there. However, the goal, the result, and his reasons were the same for all three drafts – to assure that these statements would be received into evidence. With respect to the second goal, he could and did keep them from being treated as hearsay exception, but he still needed some other category in which to place them. In the first two drafts, the category was only implied: if they were expressly

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<sup>108</sup> See generally Memorandum No. 19: Article VIII, Hearsay (Oct. 9, 1967-March 9, 1968), microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, Nos. EV-120-05 to EV-127-03 (Cong. Info. Serv.)[hereinafter Memorandum No. 19]. Parts of Memorandum No. 19 became, in considerably reduced form, the Introductory Note on Hearsay and the Advisory Committee Notes that accompanied the published drafts of the rules. The Reporter did not include any of Memorandum No. 19’s discussion of the reasons for classifying admissions and prior statements as “not hearsay” in the Advisory Committee Notes.

<sup>109</sup> 46 F.R.D. 161 (1969).

<sup>110</sup> Revised Draft, 51 F.R.D. 315 (1971). The Advisory Committee and the Standing Committee submitted the third draft to the Supreme Court in October, 1970, with the expectation that the Court would promulgate it as the proposed rules. However, in order to give the public the opportunity to comment on the many changes between the second and third drafts, the Court decided instead to publish them as a Revised Draft.

excluded from the hearsay definition, they must be “not hearsay.” In the third draft, Rule 801(d) made the “not hearsay” category explicit.

With the hearsay exceptions, there was a dramatic change from the second to the third draft. The first two drafts followed an innovative approach favored by the Reporter. Instead of the traditional list of categorical exceptions, these drafts had only two hearsay exceptions, each expressed in very general terms:

“A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness.”<sup>111</sup>

The purpose of these two general exceptions was to introduce flexibility into what was seen as a “rigid rule [marked] by numerous rigid exceptions.”<sup>112</sup> However, after receiving a barrage of critical responses during the public comment phase, the Reporter abandoned the innovative approach and returned to the traditional categorical exceptions.

#### The Drafts: Admissions and Prior Statement

In the first draft, Rule 8-01(c)<sup>113</sup> both defined hearsay and then listed several types of evidence (including admissions and prior statements) specifically excluded from that definition.

8-01(c) Hearsay. “Hearsay” is a statement, offered in evidence to prove the truth of the matter intended to be asserted, unless

- (1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing;<sup>114</sup> or
- (2) Declarant present at hearing. The declarant is present at the hearing and subject to cross-examination concerning the statement; or
- (3) Deposition. The statement was made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure; or
- (4) Admission by party-opponent. As against a party, the statement is (i) his own statement, in either his individual or a representative capacity, or

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<sup>111</sup> Rule 8-03(a), first and second draft. Rule 8-04(a) provided: “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.” Professor Wellborn described these as “nonformal” exceptions. Olin Guy Wellborn III, *Article VIII: Hearsay*, 20 Hous. L. Rev. 477, 481 (1983).

<sup>112</sup> Charles T. McCormick, *The Borderland of Hearsay*, 30 Yale L. J. 489, 504 (1930). The first two drafts used the traditional hearsay exceptions, not as categorical exceptions as in the common law and the prior codes, but as examples to illustrate the nature and scope of the two general categories.

<sup>113</sup> The numbering system in the first two drafts was 8-01, 8-02, 8-03, etc. Not until the third draft did the Reporter propose the numbering system, 801, 802, 803, etc., used in the current rules.

<sup>114</sup> This awkward approach – explicitly excluding an in-court witness’s testimony from the definition of hearsay – was pioneered by the Model Code. See Section I-B, *infra*. The third draft rejected this language, replacing it with the “other than by a witness...” language from Uniform Rule 63.

(ii) a statement by a person authorized by him to make a statement concerning the subject, or (iii) a statement of which he has manifested his adoption or belief in its truth, or (iv) a statement concerning a matter within the scope of an agency or employment of the declarant for the party, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, or (vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.

The second draft continued the same approach but tightened the requirements for prior statements, both to specify that the declarant must testify (and not merely be present) and to exclude from the definition of hearsay only certain specified prior statements, not all as in the first draft. It also deleted the treatment of depositions, on the grounds that the Federal Rules of Civil Procedure already addressed the topic.<sup>115</sup>

Language new in the Second Draft is highlighted in a light grey; language stricken from the First Draft is marked by a single ~~strikethrough~~:

8-01(c) Hearsay. “Hearsay” is a statement, offered in evidence to prove the truth of the matter intended to be asserted, unless

(1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing; or

(2) ~~Declarant present at hearing~~. Prior Statement By Witness The declarant ~~is present at the hearing~~ testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) ~~inconsistent with his testimony~~, or (ii) ~~consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive~~, or (iii) ~~one of identification of a person made soon after perceiving him~~, or (iv) ~~a transcript of testimony given under oath at a trial or hearing or before a grand jury~~;

(3) ~~Deposition~~. ~~The statement was made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure; or~~

(4) Admission by party-opponent. The statement is offered ~~As~~ against a party, the statement is (i) his own statement, in either his individual or a representative capacity, or (ii)<sup>116</sup> a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement concerning a matter within the scope of an agency or employment of the declarant for the party, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in

<sup>115</sup> Minutes of October, 1967 meeting, 53,

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf>

<sup>116</sup> The second draft switched the order of the placement of adoptive admissions and authorized admissions.

furtherance of the conspiracy, or ~~(vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.~~

The big change came in the third draft, with the creation of Rule 801(d) and the “not hearsay category.” Once created, this classification portion of Rule 801(d) remained untouched and unchanged, notwithstanding the numerous revisions and amendments to other rules. The admissions and prior statements sections were transferred from Rule 8-01(c)(2) and (3) into the newly created Rule 801(d)(1) and (2). With the transfer out of those sub-sections and the addition of the “out-of-court” language (“other than one made by the declarant while testifying at the trial or hearing”), Rule 801(c) assumed its current form as the now-familiar hearsay definition.

Language new to the third draft is ~~highlighted in a dark grey~~. Language stricken from the second draft is marked by a ~~double strikethrough~~.

801(c) Hearsay. “Hearsay” is a statement, ~~other than one made by the declarant while testifying at the trial or hearing~~, offered in evidence to prove the truth of the matter intended to be asserted. ~~unless~~

- ~~(1) Testimony at hearing~~
- (2) Declarant present at hearing [moved to Rule 801(d)(1)]
- ~~(3) Admissions by party opponent~~ [moved to Rule 801(d)(2)]

~~(d) Statements Which Are Not Hearsay. A statement is not hearsay if~~

~~1~~ Prior Statement by Witness. [content of rule transferred from the former 801(c)(2)]

~~2~~ Admission By Party-Opponent [content of rule transferred from the former 801(c)(3)]

### The Drafts: The Hearsay Exceptions

Using the Reporter’s innovative approach to the hearsay exceptions, the first two drafts had only two general hearsay exceptions, followed by list of specific exceptions “by way of illustration.”

#### 8-03 Hearsay Exceptions. Declarant Not Unavailable

(a) GENERAL PROVISIONS. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

(b) ILLUSTRATION. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule: (1) present sense impression, (2),...(23)

8-04 Hearsay Exceptions. Declarant Unavailable

(a) 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.

(b) ILLUSTRATION. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule: (1) dying declaration; (2)...

There were only two minor changes from the first to the second draft. The title of Rule 8-03 was changed to "Availability of Declarant Immaterial," and the illustrative exception of Past Recorded Recollection was changed from 8-03(21) to 8-03-(5).

There was a major change in the third draft, which was prepared after the review of public comments on the Preliminary Draft and published in 1971 as the Revised Draft.<sup>117</sup> In response to strong objections from the bar, the third draft abandoned the innovative approach of using two general exceptions, with the traditional hearsay exceptions only as illustrative guides, and returned to the common law approach of categorical hearsay exceptions. It still retained the two general categories -- declarant availability immaterial and declarant unavailable -- and grouped the hearsay exceptions within these two categories, but these two categories were now just groupings of specific categorical exceptions, and not themselves general exceptions. The Third Draft also created the new residual exceptions, Rule 803(24) and Rule 804(b)(5), combined and recodified in 1997 as Rule 807. Finally, it changed the numbering system from one with a hyphen after the first number (1-01, 2-01, 3-01) to one with 3-digit numbers (101, 201, 301).

803 Hearsay Exceptions. Availability of Declarant Immaterial

~~(a) GENERAL PROVISIONS. A statement is not excluded....~~

~~(b) ILLUSTRATION. By way of illustration only,....~~

~~The following are not excluded by the hearsay rule, even though the declarant is available as a witness: [803(1)-(23) transferred from 803(b); 803(24) is the new residual exception]~~

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<sup>117</sup> 51 F.R.D. 315 (1971).

804 Hearsay Exceptions: Declarant Unavailable

~~(a) GENERAL PROVISIONS. A statement is not excluded . . . .~~

~~(b) ILLUSTRATION. By way of illustration only, . . . .~~

~~(a) Definition of Unavailability. From former 8-01(d)~~

~~(b) Hearsay exceptions. The following are not excluded by the hearsay~~

~~infinite declarant's unavailability witness. [804(b)(1)-(4) are same;~~

804(b)(5) is the new residual exception]

B. The Reasons Given for the “Not Hearsay” Classification

This part presents, in the Reporter’s own words, the reasons – separate for each type of statement -- for the Federal Rules treatment of admissions and prior statements. Section II-C then discusses those reasons and demonstrates why they did not justify the decision to classify them as “not hearsay.”

Admissions

In Memorandum No.19, the Reporter noted that “the question whether a particular type of statement-evidence is classed as nonhearsay or as hearsay-but-under-exception may seem on first impression to be mere terminological quibbling: in either event the hearsay rule does not call for exclusion.”<sup>118</sup> He then went on to say:

“If, however, the Committee is favorably disposed to the general design of the over-all proposed approach to hearsay, it is desirable to eliminate admissions from the category of hearsay as it will not fit comfortably into either of the major exception groups laid out in proposed Rules 8-03 and 8-04.”<sup>119</sup>

This – “it will not fit comfortably” -- was the Reporter’s reason for his treatment of admissions. This “bad fit” rationale is in part tautological: if Rule 8-03(a) and its illustrative exceptions required reliability and Rule 8-04(a) and its illustrative exceptions required unavailability, then admissions by definition did not meet those requirements. But there were also policy reasons: the Reporter wanted to avoid the harms that he felt a “bad fit” would cause both to admissions and to the hearsay exceptions. What were those harms?

<sup>118</sup> Memorandum No. 19, *supra* note 108, at 86.

<sup>119</sup> *Id.* This passage concluded, “See Reporter’s Memo of 9/12/67.” Unfortunately, an exhaustive search of the Judicial Conference records has failed to produce that memo. See record of an August 2, 2010 voicemail from Elizabeth Endicott, librarian at the Administrative Office of the United States Courts in Washington, D.C. (on file with author).

The “bad fit” had two possible negative consequences: 1) a contraction in the scope of the admissions exception, so that all admissions would have some “assurances of accuracy” or 2) an expansion in the hearsay admitted with no assurance of accuracy.<sup>120</sup> The Reporter wrote that if admissions were placed as an illustrative exception in Rule 8-03(b), there would be pressure on courts “to discard the traditional free-wheeling common law treatment [for admissions] and to search instead for some assurances of reliability...”<sup>121</sup> Courts might narrow the admissions exception in order to make it more reliable (as required by Rule 8-03), and the Reporter thought that this would be an undesirable outcome.

While the Reporter did not directly discuss the impact of a “bad fit” on the hearsay exceptions, one can easily infer the harm that he feared – that admissions would distort (and likely expand) the interpretation of the new general hearsay exception. If admissions were listed as an “illustrative exception,” as an example of the type of evidence that has the “assurances of accuracy” required by Rule 8-03(a), then courts would be inclined (or pressured) to admit other statements that, like some admissions, have no “assurances of accuracy.”

There was only mild questioning of the Reporter’s treatment of admissions during the drafting stage. At the first hearsay meeting, the Reporter provided a general overview of his approach to hearsay and, in response to introductory questioning, said that he would “exclude it from the hearsay definition” and that “he would simply say that they are not hearsay.”<sup>122</sup> The minutes reflect that the members were pleased with his overall approach.<sup>123</sup> At the December, 1967 meeting, Advisory Committee member Craig Spangenburg asked why admissions should not be treated as a hearsay exception. The Reporter responded by saying that he would prefer to wait to discuss that issue until the next meeting, when they would be discussing Rule 803 and his suggested approach to the hearsay exceptions.<sup>124</sup> At the next meeting in March, 1968, the Reporter raised the issue again and pointed out how admissions “have no real circumstantial guarantees of proof... [and]...just did not fit well into 8-03.” After that presentation, the Advisory Committee voted unanimously to approve the treatment of admissions.<sup>125</sup>

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<sup>120</sup> As discussed in the next sub-section, while an expansion of the unenumerated exceptions seems to this writer a more likely outcome than a contraction of the admissions exception, the impact either way would likely be quite small. And any impact – in either direction -- could be easily eliminated by placing admissions into its own, separate hearsay exception, apart from either Rule 803 or Rule 804, so that neither the admissions exception nor the Rule 803 or 804 exceptions would cross-contaminate the other. But there is no indication that the Reporter or the Advisory Committee considered or evaluated such a separate exception.

<sup>121</sup> *Id.* at 87

<sup>122</sup> Minutes of October, 1967 meeting, 33,

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf>

<sup>123</sup> *Id.* at 33-35.

<sup>124</sup> Minutes of December, 1967 meeting, 4,

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV12-1967-min.pdf>

<sup>125</sup> Minutes of March, 1968 meeting, 17-18,

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV03-1968-min.pdf>

Although there is no further record of Committee discussion of the matter, in an article published while the preliminary rules were still under consideration, another member of the Advisory Committee, Professor Thomas Green, wrote briefly in support of the original Rule 8-03(c) position, giving two distinct and internally inconsistent reasons. First, he gave the Reporter's reason, that it is difficult to fit admissions into the theory of the hearsay exceptions. He then added that the most convenient approach was to treat admissions, not as hearsay, but as circumstantial evidence of conduct.<sup>126</sup> He did not (nor did the Reporter or any other Advisory Committee member) advance Wigmore's "hearsay rule satisfied" position to justify the different treatment of admissions.

Only three of the many comments recorded in the Advisory Committee's internal records addressed Rule 8-01(c)'s exclusion of admissions from the definition of hearsay. Two letters expressed support.<sup>127</sup> A third letter, from Attorney Leonard Rubin, opposed it and suggested that admissions be treated as a hearsay exception. Stating that admissions had always been treated as exceptions and were so treated by the Model Code and the Uniform Rules, he argued that "[t]here seems to be no justification for excluding them from the definition of hearsay."<sup>128</sup> Recognizing that admissions did not fit within the parameters of the Rule 803 and Rule 804 exceptions, Attorney Rubin suggested that admissions and prior statement should be listed separately as "General Exceptions," a suggestion very similar to the "four categories" approach recommended in Section V.<sup>129</sup>

While the Reporter did not expressly comment on Attorney Rubins' suggestion, he did discuss the treatment of admissions in his response to the comments from several organizations on Rule 8-01(c) and Rules 8-03 and 8-04 in a May, 1970 memo.<sup>130</sup> In several fascinating sentences, he described two alternative approaches, one that became Rule 801(d) and the other that never surfaced again. First, he wrote, "An alternative ... will be to place them in a special subsection (d), with a prefatory statement, "A statement is not hearsay if..."<sup>131</sup> Here, in May, 1970, is the first expression of the "special" Rule 801(d) and the new "not hearsay" category. While the memo did not provide his reasons for the special section concept, he advanced it while he was reworking the text of Rule 801(c), the hearsay definition section. It is likely that the Reporter decided to keep Rule 801(c) clean, uncluttered and focused on the definition of hearsay, which meant that he needed another place for admissions and prior statements. Perhaps the Reporter also

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<sup>126</sup> Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 Ga. L. Rev. 1, 39 (1969). This was the approach favored by the early Wigmore and, as we will see, one of his supporters, Professor John Strahorn.

<sup>127</sup> Letters from American College of Trial Lawyers and ABA Section on Litigation, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, Nos. Ev-305-01, Ev. 614-58 (Cong. Info. Serv.).

<sup>128</sup> Letter from Attorney Rubin, August 27, 1969, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, No. Ev-501-19 (Cong. Info. Serv.).

<sup>129</sup> *Id.*

<sup>130</sup> Memorandum from Edward Cleary, May 21-27, 1970, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, No. Ev-214-94 (Cong. Info. Serv.). He stated that adding the phrase "other than one made by the declarant while testifying at the trial or hearing" to Rule 8-01(c) "may be an improvement," and noted that, if the change were made, Rules 8-01(c)(2)(prior statements) and (3)(admissions) would have to be renumbered.

<sup>131</sup> *Id.*



decided that, in drafting terms, it was clearer and better to have an explicitly labeled “not hearsay” category under Rule 801(d), as opposed to relying on a default non-hearsay category implied from the exclusion from hearsay in Rule 8-01(c).

Even more dramatically, the Reporter immediately followed this suggestion by briefly sketching another possibility:

“A further alternative treatment of (2) and (3) is available if the Advisory Committee should adopt the general approach to hearsay suggested by the ABA Committees and the American College Committee, i.e. transpose the present illustrations into exceptions and add a growth and development section. Prior statements... and admissions... could then be included in the itemization of exceptions, since the pressure of logic and organization would no longer require that they be excluded from the definition of the hearsay rather than included in the exceptions.”<sup>132</sup>

Including admissions and prior statements “in the itemization of exceptions” was precisely the approach of the three predecessor codes. His brief presentation did not address how to deal with the distinctiveness of admissions and prior statements and the fact that, as he had previously argued, they “do not fit well” with either the Rule 803 or Rule 804 categories. However, once he had abandoned his initial innovative approach to the hearsay exceptions, he was free of “the pressure of logic and organization” imposed by that approach and was able, for one brief moment in May, 1970, to consider treating admissions and prior statements as exceptions.

His May, 1970 memorandum is the final written word on the classification issue.<sup>133</sup> In its third draft, the Advisory Committee selected the first alternative presented in the memo, the creation of Rule 801(d). There is no record of the reason(s) for this selection. By the time of the third draft, the Reporter and Advisory Committee were near the end of a six-year drafting process, and the documentation of their work, in terms of minutes and memoranda, had virtually stopped.<sup>134</sup> The lack of contemporaneous records at this final, critical moment is a disappointment. However, working from the records that we do have, it seems clear that the reason for creating a new Rule 801(d) with the

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<sup>132</sup> *Id.*

<sup>133</sup> The classification was addressed one additional time, but only indirectly. The Senate Committee on the Judiciary noticed a potential coverage gap in Rule 806, the rule governing impeachment of hearsay declarants, for the makers of out-of-court statements falling under Rule 801(d)(2)(C), (D) and (E). It proposed amending Rule 806 to read, “When a hearsay statement, *or a statement defined in Rule 801(d)(2)(C), (D), or (E)*, has been admitted in evidence, the credibility of the declarant may be attacked...” (emphasis added to indicate new language). The Committee report seemed to understand and to accept the Reporter’s classification, noting “...the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, *viz.* some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay.”

<sup>134</sup> The May, 1970 memorandum is the last memo in the microfiche file. The Committee had meetings in May and December, 1970. There are minutes for the May meeting, which discussed the revisions through Rule 406. <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV05-1970-min.pdf> There are no records of minutes of the December, 1970 meeting, where the decision to adopt Rule 801(d) was presumably discussed and approved.

“not hearsay” terminology in the third draft was the same as the reason for excluding admissions and prior statements from the definition of hearsay in Rule 8-01(c) in the first two drafts. It was the “will not fit comfortably” reason given at the outset in Memorandum No.19.

### Prior Statements

Most of the Reporter’s discussion of prior statements in Memorandum No.19 concerned the admissibility issue, not the classification issue. This focus was understandable because, at the time of the drafting, the orthodox rule was still the majority rule. The Reporter, like reformers before and since, wanted to change the orthodox rule and make most prior statements generally admissible. He used the pertinent sections of Memorandum No. 19, and later the text of the ACN, to make the case for this broader admissibility.

When he did touch briefly on the classification issue, his treatment of prior statements was quite different than admissions. Whereas his discussion of admissions omitted the predecessor codes, his discussion of prior statements began by noting that both the Model Code and the Uniform Rules treated prior statements as a hearsay exception and then stating that his proposal treats them “as not falling in the category of hearsay in the first place.”<sup>135</sup> Observing that “the result is the same[, i]n either event the hearsay rule does not operate to exclude the evidence,”<sup>136</sup> he concluded:

“in view of the Reporter, the basis for not excluding the evidence is that the conditions of giving testimony are satisfied, and hence logic dictates a classification as non-hearsay.”<sup>137</sup>

Although he did not cite Wigmore at this point, this rationale for classifying prior statements as non-hearsay is identical to Wigmore’s rationale for placing all prior statements in the “hearsay rule satisfied” category. Because the witness is in court and testifying under oath, the testimonial conditions have been met and the purposes of the hearsay rule are satisfied.

Interestingly, the Reporter did not use “bad fit” and incompatibility with Rule 803/Rule 804 as a rationale for treating them as “not hearsay.” If he had done so, however, he would have observed that prior statements have the same issue as admissions – they do not “fit comfortably” with either Rule 803 or Rule 804, because of the requirement with prior statements that the declarant appear as a witness.<sup>138</sup>

The minutes indicated that, when the Advisory Committee discussed the treatment of prior statements at both the October, 1967 and May, 1968 meetings, their

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<sup>135</sup> Memorandum No. 19, *supra*. note 108, at 70.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Presumably the Reporter would have also thought that “bad fit” would cause analogous distorting effects, although the direction of the distortion would be different, since prior statements have such strong assurances of reliability. It would tend to shrink the exceptions, whereas including admissions as an exception would tend to enlarge them.

discussion focused almost exclusively on whether, and to what extent, to admit prior statements as substantive evidence, and not on the how question. Interestingly, in support of admitting prior statements, Judge Weinstein made reference to New Jersey Rule 63(1), adopted from the Uniform Rules, and the Reporter made reference to the California Evidence Code.<sup>139</sup> Both of these states had recently decided to admit prior statements as substantive evidence, but as a hearsay exception, not as “not hearsay.” The minutes do not reflect whether Judge Weinstein and the Reporter called attention to the “hearsay exception” aspect, as well as the substantive admissibility aspect, of the New Jersey and California codes.

### C. Evaluating the Reporter’s Reasons

The assessment of the Reporter’s reasons for treating admissions and prior statements as he did and creating Rule 801(d) depends on the question asked and the criteria used to evaluate the answer. If the question is -- are admissions and prior statements different from the other hearsay exceptions and should they be treated differently? -- then the answer is yes, and the Reporter’s reasons are fully satisfactory. Those reasons fully support the negative decision of how not to classify admissions. If there are only two categories of hearsay exceptions, one based on reliability and with the availability of the declarant immaterial and the other based on necessity and requiring that the declarant be unavailable, it makes sense not to place admissions and prior statements into either of those exceptions.

However, his reasons do not help in making the more important affirmative decision and answering the *how* question actually before the Advisory Committee: how should admissions and prior statements be classified in an evidence code? Should they be treated, as Wigmore once urged, as non hearsay in the traditional, definitional sense? Should they be excluded from the definition of hearsay (as in drafts ##1 and 2)? Or is it better to follow the Model Code, the Uniform Rules and the California Evidence Code and treat admissions and prior statements as hearsay but then, in recognition of their distinctiveness, place them in their own hearsay exception? Or should they be placed in new, separate categories and, if so, should those new categories be separate hearsay exceptions or something called “not hearsay”?

There are two possible approaches to answering the *how* question. The one that I favor and demonstrate in Section V uses criteria drawn from the standards of rule drafting – primarily clarity and consistency -- and then applies those criteria to the various possible ways of classifying admissions and prior statements.<sup>140</sup> Unfortunately, the Reporter and the Advisory Committee did not follow this approach.

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<sup>139</sup> Minutes, October, 1967 meeting, 40, 42.

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf> Dean Joiner cited a Kansas case, which was decided under the Kansas version of the Uniform Rules. Chairperson Jenner also cited the New Jersey rule and said that it was “equivalent to what is being presented in this proposed rule.” *Id.* at 46.

<sup>140</sup> As discussed in Section V, there is also a secondary factor that I call educational, the ability of the classification to educate users as to the distinctiveness of admissions and prior statements and their differences from the out-of-court statements covered by the other hearsay exceptions.

Instead, to the extent that they even recognized the *how* question, the Reporter and Advisory Committee used an approach that relied on two other factors: first, the protection of the Reporter's goal of rationalizing the hearsay exceptions; and second, a scholarly assessment of the essential nature of admissions and prior statements. I will discuss and evaluate these two factors in turn.

### Rationalizing the Hearsay Exceptions

The Reporter was strongly committed to creating a rational system for the hearsay exceptions. While noting that some writers had been skeptical about such a project,<sup>141</sup> "...the Reporter believes that the hearsay exceptions may be seen in larger outlines of acceptable rationality."<sup>142</sup> His plan for achieving "acceptable rationality" consisted "of recognizing two general exceptions to the rule excluding hearsay, one prescribing conditions for declarations of unavailable declarants and the other prescribing conditions for declarations without regard to whether the declarant is unavailable."<sup>143</sup> He used the traditional hearsay exceptions, not as categorical exceptions as in the common law and the prior codes, but as examples to illustrate the nature and scope of these two general exceptions. He hoped that the general exceptions would "encourage growth and development in this area of the law" while the illustrative traditional exceptions would "preserv[e]...the values of the past"<sup>144</sup>

The Reporter's approach to the exceptions drew strong criticism during the public comment period following the publication of the Preliminary Draft. Critics argued that the "illustrative" approach would vest too much discretion with the trial judge and create conditions of uncertainty that would make it difficult to prepare adequately for trial. Several groups suggested that the Committee return to the common law approach, change the illustrations to categorical hearsay exceptions and then add a separate residual exception to provide for future growth.<sup>145</sup>

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<sup>141</sup> Memorandum No. 19, *supra*. note 108, at 236. He quoted two of the skeptics: Morgan (hearsay is "a conglomeration of inconsistencies due to the application of competing theories, inconsistently applied," from Foreword to Model Code of Evidence 46 (1942)) and Chadbourne ("To admit some, but to stop short of admitting all, declarations of unavailable declarants and to perform the operation on a rational basis is, as experience has proved, a difficult endeavor.").

<sup>142</sup> Memorandum No. 19, *supra*. note 108, at 236. In the Introductory Hearsay Note that accompanied the preliminary draft, the Reporter identified three approaches to the hearsay exceptions and wrote that the federal rules were taking the third approach, that of "rationalizing the hearsay exceptions." In remarks to the New York City Bar shortly after the publication of Preliminary Draft, he said that he sought to accomplish two things in the proposed hearsay rules: "one is to weave the values of the traditional hearsay rule into a cohesive patten, in lieu of a crazy quilt, and the other is to reverse the unhappy process...by which justifications are transformed into requirements, resulting in more and more and smaller and smaller pigeonholes into which things must be fitted. Accordingly Rule 8-03 and 8-04 set forth in broad outlines two large categories of hearsay exceptions." Edward W. Cleary, 25 Record of NYCBA 142, 145-46 (1970).

<sup>143</sup> Memorandum No. 19, *supra*. note 108, at 236

<sup>144</sup> Memorandum No. 19, *supra*. note 108, at 24.

<sup>145</sup> Letter from American College of Trial Lawyers, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, Nos. Ev-305-01, Ev-614-58 (Cong. Info. Serv.), Trial Lawyers.

In the 1971 Revised Draft, the Reporter yielded to the criticism and retreated to the current system of categorical exceptions. He revised the Introductory Note: The Hearsay Problem for the third draft, so that the rules were no longer “rationalizing” the hearsay exceptions (as stated in the first draft of the Introductory Note) but instead used the approach “of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay.”<sup>146</sup> The exceptions were then “collected under two rules.”<sup>147</sup> The Third Draft thus transformed Rules 8-03(a) and 8-04(a) from broadly-phrased general exceptions into largely ceremonial headings in which the traditional hearsay exceptions were “collected.”

As we have seen, the Reporter thought that admissions and prior statements were a “bad fit” that would undermine the rationality and distort the interpretation of the hearsay exceptions. There are two minor problems with this view. First, like Wigmore, he achieved some semblance of rationality for the hearsay exceptions by using Wigmore’s technique of not considering some types of evidence as hearsay exceptions. Second, importance of the Reporter’s concern was undermined when he replaced the general exceptions with the categorical exceptions in the third draft, as he recognized in his May 20, 1970 memorandum.<sup>148</sup> But the fundamental problem with the Reporter’s “bad fit” concern is that it addresses only the negative decision to exclude admissions and prior statements from those categories of hearsay exceptions and is simply non-responsive to the important question of how they should be classified. It does not affirmatively justify the decision to classify them as “not hearsay.”

### Scholarly Assessment

The Reporter’s treatment of the extensive scholarship on admissions was incomplete, inaccurate and misleading. Because the Reporter’s inaccuracies and misrepresentations were so striking, I discuss his treatment of admissions at considerable length and then follow with a much briefer review of prior statements.

The Reporter began his discussion of admissions by observing that “the authorities have differed in some measure” in their views on admissions and then noting that Wigmore changed his position based on the influence of Morgan’s writing.<sup>149</sup> However, he never clearly explained either Wigmore’s original or Morgan’s contrary

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<sup>146</sup> Fed. R. Evid., Introductory Note on Hearsay advisory committee’s note.

<sup>147</sup> *Id.*

<sup>148</sup> There are two supplemental points about the rationalizing goal after the third draft. First, one might argue that that it is still necessary to avoid treating admissions and prior statements as exceptions, to prevent them from distorting the residual exceptions (then 803(24) and 804(b)(5), now Rule 807), in the manner discussed with the “bad fit” *supra*. To the extent that there is a distortion problem, it can be addressed and eliminated in the language of the residual exception more effectively than by creating a “not hearsay” category. Second, to the extent that it has any validity, the rationalizing/ anti-distortion goal has been somewhat undermined by the promulgation of the Rule 804(b)(6), a hearsay exception that has no claim to reliability and therefore could, if the Reporter’s fears are correct, distort the interpretation of the residual exception.

<sup>149</sup> Memorandum No. 19, *supra* note 108, at 87

position. After noting that Wigmore placed the admissibility of admissions on two grounds (inconsistency and self-contradiction of a witness, and the incongruity of a party objecting to the lack of opportunity to cross-examine himself), the Reporter stated that “he [Wigmore] concluded that admissions were not hearsay.”<sup>150</sup>

His claim that Wigmore “concluded that admissions were not hearsay” was an oversimplification that obscured three points important in thinking about the appropriate classification. First, when admissions are offered for self-contradiction, they are not offered for their truth and thus are not hearsay under the traditional definition (Wigmore called this use “hearsay rule inapplicable”). Wigmore held this position in the first edition of the Treatise but modified it in the second and third editions. Second, Wigmore treated admissions used as substantive evidence as “hearsay rule satisfied,” a category that also included former testimony and depositions. Thus, using Wigmore as authority for classifying admissions as non hearsay would also suggest using him as authority for similarly classifying former testimony (or explaining the reasons for not doing so). Finally, Wigmore never used the term “not hearsay” in this manner. For Wigmore, admissions offered as substantive evidence were hearsay, but the hearsay exclusionary rule did not apply because its purpose had been satisfied.

The Reporter was even more misleading when he discussed the views of two other scholars, Professor John Strahorn and Dean Charles McCormick. The Reporter praised one of Strahorn’s articles as “perhaps the most searching examination yet made of the hearsay rule”<sup>151</sup> Like Wigmore, Strahorn was a relentless classifier. Modifying Wigmore’s terminology, he placed all out-of-court statements into three categories: 1) the hearsay rule inapplicable (for evidence that was not offered to prove its truth and thus was not hearsay under the traditional view); 2) the hearsay rule partially satisfied (for former testimony and past recollection recorded); and 3) the “genuine hearsay exceptions.” Strahorn placed admissions in the hearsay rule inapplicable category.

For Strahorn, admissions did not qualify as a “genuine hearsay exception” or fit into his “hearsay rule partially satisfied” category. After looking at the special circumstances under which admissions are received into evidence (including the lack of personal knowledge or competence requirements and the allowance of opinions),<sup>152</sup> he concluded that admissions have “nothing in common with the genuine hearsay exceptions and totally lack the identifying features found in all of them.”<sup>153</sup> They also did not fit his “hearsay rule partially satisfied” category, which was for out-of-court statements that met most, but not all, of what he called the “conditioning devices” that assured the trustworthiness of the testimony.<sup>154</sup> That category contained only two types of

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 89. The article was published in two parts. John S Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Penn. L. Rev. 484 and 564 (1937). In the Advisory Committee Note to Rule 801(d), the Reporter used the Strahorn article as his first citation.

<sup>152</sup> See notes 6-7, *supra*.

<sup>153</sup> Strahorn, *supra* note 151, at 575

<sup>154</sup> In addition to oath, presence in the courtroom and cross-examination, these “conditioning devices” also include sequestration, discovery and publicity. *Id.* at 484. Surprisingly, despite the author’s knowledge of

statements: former testimony (where only demeanor is missing) and past recollection recorded (where the “conditioning devices” are applied to the witness in the courtroom and not at the time of the making of the statement).<sup>155</sup> Admissions did not fit this category because “the concept of the party’s ‘cross-examining’ himself, or applying the conditioning devices to himself, seems an awkward one.”<sup>156</sup> At this point, Strahorn considered either adding a fourth category for admissions, “hearsay rule waived,” or making admissions a second sub-category of the hearsay rule inapplicable category, but decided that “to have to fall back on waiver or estoppel is very weak analysis.”<sup>157</sup>

Strahorn concluded that admissions fit into the hearsay rule inapplicable category because, in his view, admissions were “offered not to prove the truth of their content, but for some other relevant purpose...”<sup>158</sup> He made a distinction between statements used as conduct (where the hearsay rule was inapplicable) and statements used as narration (where the hearsay rule applies). With admissions, he believed that the statements themselves were relevant conduct, regardless of their truth or falsity. As he put it:

“The fact of the utterance by the party and his opponent’s desire to use it throw some light on the separate and non-contemporaneous conduct of the party-speaker, viz., his conduct of the affair on which the instant case hinges. The justification for using admissions, as for circumstantial utterances generally, is the relation between the utterance and the other relevant conduct of the speaker.”<sup>159</sup>

Strahorn then tied this approach to the view Wigmore expressed in his first edition and to the analogy to prior inconsistent statements.<sup>160</sup> “Just as a prior inconsistent statement of a witness is admissible [for impeachment] without reference to whether it is the present or previous statement which is false, so it is that the admissions comes in equally soon whether it, standing alone, be true or false.”<sup>161</sup> In such a case, “there is no concern for their trustworthiness,”<sup>162</sup> and therefore the hearsay rule is inapplicable. Though never using the term not hearsay to describe admissions, Strahorn placed them in his “hearsay rule inapplicable” category because he believed that they were not hearsay in the traditional sense of that term.

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Wigmore’s views and the similarity between his “hearsay rule partially satisfied” and Wigmore’s “hearsay rule satisfied” category, Strahorn does not cite Wigmore in his discussion of this category.

<sup>155</sup> *Id.* at 494, 496.

<sup>156</sup> *Id.* at 577.

<sup>157</sup> *Id.* at 577-578.

<sup>158</sup> *Id.* at 488

<sup>159</sup> *Id.* at 572-573

<sup>160</sup> Strahorn described Wigmore’s position as a “modified” one, but this characterization seems inaccurate. Strahorn emphasized only the inconsistency/self-contradiction strand of Wigmore’s writing on prior statements and quoted from the 1935 edition of his Code of Evidence and his Student Textbook on Evidence (1935). *Id.*, n. 49, 572 But the 1940 edition of the Wigmore treatise repeats the language of the 1923 treatise, thus strongly suggesting that Wigmore did not “modify” but rather retained his dualistic view of admissions.

<sup>161</sup> *Id.* at 573.

<sup>162</sup> *Id.* at 573

Dean Charles McCormick was an evidence luminary of the rank of Wigmore and Morgan.<sup>163</sup> He was one of the main drafters of the Uniform Rules of Evidence, and his 1954 Handbook on Evidence was the first major Evidence treatise since the publication of Wigmore's third edition in 1940.<sup>164</sup> In his handbook, McCormick summarized the views of different scholars on the classification of admissions. He identified Wigmore's initial ("hearsay rule inapplicable) and revised ("hearsay rule satisfied") positions, as well as Morgan's (hearsay exception) and Strahorn's (hearsay rule inapplicable) views.<sup>165</sup> He also divided admissions into two different types, recognizing both "express admissions" (by which he meant a party's oral or written statements) and admissions by conduct (the acts of a party such as fleeing the scene of a crime or refusing to call a witness or produce evidence.)<sup>166</sup>

After concluding his presentation of the different positions of the writers, McCormick wrote:

"The present writer [McCormick] finds Morgan's classification of admissions as an exception to the hearsay rule, and his explanation therefore, most convincing as to express admissions and Strahorn's theory of admissions as circumstantial evidence most satisfactory as to admissions by conduct."<sup>167</sup>

McCormick thus agreed with Morgan that oral and written admissions should be treated as hearsay and classified as a hearsay exception. For admissions by conduct, he agreed with Strahorn (and the Uniform Rules and both the proposed and enacted Rule

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<sup>163</sup> Professor Falknor referred to McCormick, along with Wigmore and Morgan, as one of "the three masters." Judson Falknor, 1953 Ann. Survey of Am. Law. 755. When Wigmore was forced to retire in 1934, he recruited McCormick, then Dean at the North Carolina, to teach evidence at Northwestern, where he stay until he returned to the University of Texas Law School as dean in 1940. 40 Tex. L. Rev. 176 (1961).

<sup>164</sup> Charles C. McCormick, Handbook on the Law of Evidence (1954)[hereinafter, McCormick, Handbook]. McCormick died in 1963, shortly before the beginning of the drafting of the Federal Rules.

<sup>165</sup> I have one quibble with McCormick's summary. After describing Strahorn's views, he stated that "the affinity between this [Strahorn's] view and Wigmore's is apparent." *Id.* at 503. This statement obscured the important fact that, in Strahorn's view, admissions are not hearsay because they are not offered to prove the truth of the matter asserted, whereas in later Wigmore's view, admissions were considered for their truth but were excluded from the hearsay rule because the concern about cross-examination has been satisfied (causing him to place them in his "hearsay rule satisfied" category).

<sup>166</sup> See *id.* at 525-547 (1<sup>st</sup> ed 1954). Wigmore had originally made this distinction, using the terms "express" and "implied" admissions.

<sup>167</sup> *Id.* Interestingly, when Professor (former Reporter) Cleary became editor of the hornbook for the second edition in 1972, he deleted this concluding paragraph. Instead, he inserted a new paragraph, which stated: "On balance, the most satisfactory justification of the admissibility of admissions is that they are the product of the adversary system, sharing, though on a lower and non-conclusive level, the characteristics of admissions of pleadings or stipulations. This view has the added advantage of avoiding the need to find with respect to admissions the circumstantial guarantees of trustworthiness which traditionally characterize hearsay exceptions; admissions are simply classed as non-hearsay." McCormick, Handbook, 629 (2d Ed. 1972). Professor Cleary then continued: "Nevertheless, the usual practice is to regard admissions as an exception to the hearsay rule, and as a matter of convenience the discussion of them is located at this point in this textbook." *Id.*



801(a)) that such “non-assertive conduct” should be excluded from the definition of statement and thus not be regarded as hearsay.

In Memorandum No.19, the Reporter inaccurately implied that McCormick might support his proposed treatment of admissions. Concluding his discussion of Wigmore, Morgan, Strahorn and McCormick, the Reporter stated:

“McCormick took a position straddling Morgan and Strahorn.”<sup>168</sup>

This statement was literally true but terribly misleading. On the critical issue of how to classify the most common type of admissions – verbal or “express admissions” -- McCormick came down squarely on the side of treating admissions as hearsay and then as a hearsay exception. Far from a straddle, it was a clear vote for classifying admissions as a hearsay exception, not as not hearsay.

In addition to the Reporter’s misleading discussion of the authorities, he also failed to mention or discuss the Model Code, the Uniform Rules or the California Code, each of which, as we have seen, treated admissions as hearsay with a separate exception. This omission contributed to the failure to present and evaluate other alternatives for classifying admissions.

The Reporter’s discussion of the classification issues for prior statements was better than for admissions, but was still incomplete and flawed. It was incomplete because it did not mention McCormick’s famous article, at the end of which he drafted a model statute that treated prior statements as a hearsay exception.<sup>169</sup> Then, while his observation about prior statements – that the “conditions for giving testimony are satisfied” – was correct, his next statement that “logic dictates a classification as non-hearsay”<sup>170</sup> does not necessarily follow. The classification should be determined by practical reason and experience, not by “logic” (by which he presumably meant deductive, syllogistic reasoning). Practical reason and experience, not logic, establish the definitions and categories for evidence law (indeed, as we have known at least since Holmes,<sup>171</sup> for all law). “Logic” then operates somewhat mechanistically to place the objects (in our case, the out-of-court statements offered for their truth) into the correct categories.

Our current definition of hearsay as an out-of-court statement offered for its truth is the product of practical reason and experience. In light of this definition, it logically follows that a prior out-of-court statement offered for its truth is hearsay. If we had a different hearsay definition – say, “Hearsay is a statement by a person who is not a

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<sup>168</sup> Memorandum No.19, *supra*. note 108, at 89

<sup>169</sup> McCormick, *Turncoat Witness*, *supra*. note 5.

<sup>170</sup> Memorandum No.19, *supra*. note 108, at 70.

<sup>171</sup> “The life of the law has not been logic; it has been experience.” Oliver Wendall Holmes, Jr. *The Common Law* 1 (1881).

witness in the current trial” -- then we would logically have a different result, and prior statements of witnesses would “logically” not be hearsay.<sup>172</sup>

Given the fact that prior statements of witnesses are hearsay under the current definition, two subsequent policy questions arise: 1) the whether question: whether, even though hearsay, prior statements should be admitted as substantive evidence; and 2) the how question: if so, should this be accomplished by creating a hearsay exception or by creating, either implicitly or explicitly, a new classification of “not hearsay.” The answers to these questions should be and are based on practical reason and experience. As the Reporter himself recognized when discussing which prior statements to include and exclude from Rule 801(d), “the judgment is one more of experience than logic.”<sup>173</sup>

### Section III Rule 801(d) in Practice

Rule 801(d), while poorly written, has not caused significant problems for lawyers and judges, because they have largely ignored the “not hearsay” terminology and instead have used other, more useful and descriptive words. This adaptive practice has been true in the courtroom and in most reported cases, treatises and law school casebooks.

The Supreme Court has decided four cases involving Rule 801(d). In those cases, the Court has used the terms “exemption,”<sup>174</sup> “exception,”<sup>175</sup> and “exclusion”<sup>176</sup> more frequently than “not hearsay.” The proposed Advisory Committee Note for the stylistic

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<sup>172</sup> Of course this alternative definition is not and never has been the legal definition of hearsay. The fact that the declarant is a witness goes to concerns about cross-examination, oath and demeanor that are policy issues that underlie the hearsay definition, but have not been made a part of that definition.

<sup>173</sup> ACN to Rule 801(d)(1). The Reporter wrote this in explaining whether he should follow the Model Code and Uniform Rules and allow all prior statements to be admitted as substantive evidence, or follow California and exclude some. It of course echoes Holmes’ famous statement quoted in n. 176 *supra*.

The Reporter also relied on practical reason in deciding how to classify depositions and former testimony, both of which Wigmore had placed it in his “hearsay rule satisfied” category. Drawing on (although not citing) McCormick, the Reporter wrote, “It is believed that the thinking of the profession generally does not put depositions in the category of hearsay...On the other hand, a lawyer seeking to explore the admissibility of former testimony..would probably turn to hearsay as the appropriate classification.” *Id.* at 84 (See McCormick, Handbook, *supra*. note 164, at 480: “it follows the usage most familiar to the profession...”). Using “the thinking of the profession” as a criteria is an excellent example of practical reason in this context.

<sup>174</sup> *U.S. v. Inadi*, 475 U.S. 387 (1986). While the opinion uses the term “exemption” in several places, it states it most clearly in footnote 12: “Federal Rule of Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply.” *Id.* at n. 12.

<sup>175</sup> *Bourjailly v. U.S.*, 483 US 171 (1987). The Court uses the phrase “co-conspirator exception” and “exception” four times in the opinion. Justice Blackmun’s dissent uses the phrase “co-conspirator exemption” ten times.

<sup>176</sup> *U.S. v. Owens*, 484 U.S. 554 (1988).

revisions to the current Federal Rules refers to the “hearsay exclusion” in Rule 801(d).<sup>177</sup> Lower court cases regularly used similar terminology.<sup>178</sup>

Most treatises are similarly eclectic and relaxed with their terminology. Professors Saltzburg, Martin and Capra tell us that “The Federal Rules provide for exemptions rather than exceptions...” and that the fact “that the Fed Rules chose the redefinition approach, rather than the approach of the creating exceptions, is of no great moment.”<sup>179</sup> Law school casebooks provide similar treatment.<sup>180</sup> The reason for this relaxed eclecticism is simple. “There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other rule (e.g. Rule 403).”<sup>181</sup>

The facts that the choice of terminology does not make a difference in terms of admissibility and that lawyers and judges have found and use other terminology means that Rule 801(d) can work without creating a crisis but not that it is an appropriate rule. Some states have recognized this and have adopted innovative alternative approaches. I look at those approaches in the following section, before concluding in Section V with an evaluation of five different approaches and the prospects for amending the rule.

#### Section IV Rule 801(d) and The “Not Hearsay” Classification in the States

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<sup>177</sup> Memorandum from Reporter to Advisory Committee, April 1, 2010, in Memorandum from Robert L. Hinkle, Chair, Advisory Committee on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States app. A at 281 (May 10, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>.

<sup>178</sup> See, e.g., for “exemption”: U.S. v. Brockenborough, 575 F.3d 726 (D.C.Cir. 2009), U.S. v. DiSantis, 565 F.3d 354 (7<sup>th</sup> Cir 2009); for “exclusion”: U.S. v. Holden, 557 F.3d 698 (6<sup>th</sup> Cir 2009) and Bennett v. Saint-Gobain Corp., 507 F.3d 23 (1<sup>st</sup> Cir. 2007); and for “exception”: U.S. v. Ayala, 601 F.3d 256 (4<sup>th</sup> Cir. 2010) and U.S. v. Mitchell, 596 F.3d 18 (1<sup>st</sup> Cir. 2010).

<sup>179</sup> 4 Steven H. Saltzburg, Michael M. Martin & Daniel J. Capra, 801-411 Rules of Evidence Manual (9<sup>th</sup> ed. 2006). A recent hornbook says: “Most courts and commentators refer to these two classes of evidence...as hearsay exemptions or exclusions. In this text, we will denote these special classes with the term “exemptions” or, occasionally, with the phrases “statutory nonhearsay” or “definitional nonhearsay.” Graham C. Lilly, Steven H. Saltzburg & Daniel J. Capra, Principles of Evidence, 160-161 (2009).

Professor Michael Graham uses the term “exemption” and writes that “[u]se of the term “exemption” to apply to prior statements...as well as admissions... helps to relieve the confusion.” 30B Michael Graham, Federal Practice and Procedure 28, n.19 (2006). Professors Mueller and Kirkpatrick note that “Rule 801(d)(2)(A) creates what amounts to an exception for personal or individual statements made by a party and offered against him” and that “it is more convenient to refer to admissions doctrine as a hearsay exception.” 4 Christopher R. Mueller, Laird Kirkpatrick, Federal Evidence 360, 361 (3<sup>rd</sup> ed 2007)

<sup>180</sup> See, e.g., Ronald Allen, Kuhns, Swift, Schwartz, Evidence: Text, Problems and Cases (4<sup>th</sup> ed. 2006)(says that there are 8 exemptions and 29 exceptions and that “there is no difference”); Lempert, Gross and Liebman, A Modern Approach to Evidence (4<sup>th</sup> ed 2000)(treats them as exceptions); Prater, Capra, Saltzburg, Arguello, Evidence: The Objection Method (3<sup>rd</sup>. 2007)(use exemption and exclusion interchangeably); Rothstein, Raeder and Crump, Evidence: Cases, Materials and Problems (3<sup>rd</sup> ed 2006)(exemption). George Fisher, Evidence 392 (2<sup>d</sup> ed. 2002)(treats them as exceptions).

<sup>181</sup> 4 Saltzburg et. al., *supra* note 179, at 801-27

Early on, even before the final enactment of the federal rules, states began to adopt some version of the federal rules as their state evidence code. Acting first, Nevada in 1971 adopted the Preliminary Draft.<sup>182</sup> New Mexico and Wisconsin modeled their new rules on the proposed rules promulgated by the Supreme Court in 1972.<sup>183</sup> Several other states jumped on the bandwagon soon after Congress enacted the federal statute, as did the National Conference of Commissioners on Uniform State Laws (NCCUSL), which stated, when it discarded the 1954 Uniform Rules in 1974 and adopted the federal rules as the new Uniform Rules:

“We believe uniformity in the law of evidence is desirable [sic] . To conform state and federal practice is to require a lawyer to learn one set of rules instead of two. The lawyer will better serve the public in whichever of these forums he may be litigating...”<sup>184</sup>

The state adoptions continued apace and as of August, 2010, forty-three states have adopted some version of the federal rules.<sup>185</sup> Especially in light of the experience with the Model Code and the Uniform Rules, this record of state adoptions is a remarkable achievement.

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<sup>182</sup> NV ST 51.035.

<sup>183</sup> New Mexico amended its rules in 1976 to conform to the rules that Congress enacted. *See* NM R Rev Rule 11-801. WI ST 908.01

<sup>184</sup> Prefatory Note to Uniform Rules of Evidence at 256 (1974). The 1974 Uniform Rules did not include Rule 801(d)(1)(C)(prior statements of identification), because it was adopted before Congress reinstated that provision.

<sup>185</sup> The states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware; Florida, Hawaii, Idaho, Indiana, Kentucky, Iowa, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, North Carolina, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. The citations are available at Barbara E. Bergman & Nancy Holland, *Wharton's Criminal Evidence*, (15<sup>th</sup> ed. 1997 and 2009-2010 supplement).

I included both Connecticut and Massachusetts as adopting jurisdictions, although each state was clear that it was adopting only the general organization and numbering system of the federal rules and was simply restating its existing evidence rules in the federal format. For Connecticut, *see* Section 1-2(a), Connecticut Code of Evidence (2009)(one of “[t]he purposes of the [c]ode [is] to adopt Connecticut case law regarding the rules of evidence as rules of court...” in a format “readily accessible body of rules to which the legal profession conveniently may refer” and not to adopt “the Federal Rules of Evidence or cases interpreting those rules.” Commentary to Rule 1-2(a)). In a 2008 case, the Connecticut Supreme Court held that the evidence rules in the Code of Evidence are binding on the Superior Court judges but that the appellate courts “retain the authority to develop and change the rules of evidence through case-by-case common-law adjudication.” *State v. DeJesus*, 228 Conn. 418, 953 A.2d 45 (2008). For Massachusetts, *see* Introduction, Massachusetts Guide to Evidence (2010)(these are “not rules, but rather ... a guide to evidence based on the law as it exists today... Ultimately, the law of evidence in Massachusetts is what is contained in the authoritative decisions of the Supreme Judicial Court and of the Appeals Court, and the statutes duly enacted by the Legislature.”).

While uniformity has been the primary goal of the state adoptions, no jurisdiction adopted the federal rules *verbatim*, and most have modified them in two or more ways.<sup>186</sup> When making these modifications, states have decided that the advantages of a customized state rule in expressing or protecting an important state interest outweighed the disadvantages of non-uniform language. In such instances, the “quality” of a particular provision matters more than uniformity.<sup>187</sup> As a result, states have added considerable variety into the putatively uniform rules.

The non-adoption of Rule 801(d) has been part of that variety. Nine of the adopting states have rejected Rule 801(d) either in whole or in part and have instead classified admissions or prior statements or both as hearsay exceptions.<sup>188</sup> Adopting the federal rules in 1979, Florida rejected Rule 801(d) and instead classified admissions as a Rule 803 exception and placed prior statements as an exclusion in the definition section (as was done in the first two drafts of the federal rules).<sup>189</sup> When North Carolina adopted the federal rules in 1984, it treated admissions as a hearsay exception but did not permit any substantive use of any prior statements.<sup>190</sup> Tennessee treated admissions as a hearsay exception and also created an exception for statements of prior identification and, in accordance with its case law, not for prior inconsistent or consistent statements.<sup>191</sup> Kentucky classified both admissions and prior statements as hearsay exceptions,<sup>192</sup> as did New Jersey, which had adopted the Uniform Rules in 1967 and then in 1993 amended its rules to conform to the numbering system of the Federal Rules of Evidence.<sup>193</sup>

Four jurisdictions in particular -- Hawaii, Maryland, Pennsylvania and Connecticut -- have developed innovative approaches to the classification of admissions and prior statements, with Hawaii leading the way. Guided by the Reporter for the Hawaii Rules of Evidence, Professor Addison Bowman, Hawaii decided to maintain the common law approach of treating admissions and prior statements as hearsay exceptions

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<sup>186</sup> Kinvin L. Wroth, *The Federal Rules of Evidence in the States: a Ten Year Perspective*, 30 Vill. L. Rev. 1315 (1985); Kenneth W. Graham, Jr. *State Adaptation of the Federal Rules: The Pros and Cons*, 43 Okla. L. Rev. 293, 310 (1990).

<sup>187</sup> See, e.g., Neil Cohen, *A Meta-Analysis of the Tennessee Rules of Evidence*, 57 Tenn. L. Rev. 1, 16 (1989) (“The many areas where the Tennessee rules improve on federal language and content are also impressive. The Commission resisted the temptation to adopt the Federal Rules of Evidence *in toto*. Rather, the Commission did a careful analysis of each rule and made some courageous changes in the federal approach.”)

<sup>188</sup> In alphabetical order, the nine states that adopted the federal rules but have not followed Rule 801(d) are: Connecticut; Ct R Rev § 8-5 (1), Florida; Fl St § 90.803 (18), Hawaii; HRS § 626-1, Kentucky; KY ST Rev Rule 801A, Maryland; MD R Rev Rule 5-802.1, New Jersey; NJ R Evid N.J.R.E. 803, North Carolina; NC ST EV §8C-1, Pennsylvania; Pa.R.E. 803 (25), and Tennessee; TN R REV Rule 803.

<sup>189</sup> Florida also created three different exceptions for former testimony – one for former testimony in a prior civil trial with the same parties and issues, FL St §90-803(22); one for former testimony in civil trials; and one for former testimony in criminal trials. FL St § 90.804 (2) (a) is an exception inspired by Wigmore’s “hearsay rule satisfied” treatment of former testimony. See generally Ehrhardt Fl State L Rev article

<sup>190</sup> NC ST EV §8C-1, Rule 801..

<sup>191</sup> TN R Rev Rule 803. (1.1), TN R Rev Rule 803. (1.2); See also Neil P. Cohen, *A Meta-Analysis of the Tennessee Rules of Evidence*, 57 Tenn. L. Rev. 1 (1989)

<sup>192</sup> KY ST Rev Rule 801A

<sup>193</sup> See N.J. R Evid. (1967) and NJ R Evid N.J.R.E. 803.

and then to create separate declarant-based exceptions to highlight their distinctiveness. It created a new category, Rule 803(a), exclusively for admissions and then placed all the “Rule 803” exceptions as sub-sections in a new Rule 803(b) category.<sup>194</sup> It also created a new Rule 802.1 for statements by a witness and, following the California Evidence Code, included the exception for past recorded recollections in the new category.<sup>195</sup> The Hawaii model is one variation of what I call the “four categories” approach, with categories based on whether the declarant is a witness, a party-opponent, unavailable, or where their availability is immaterial.

In 1986, Maryland followed the Hawaii model, using identical language.<sup>196</sup> Pennsylvania (in 1992)<sup>197</sup> and Connecticut (in 1999)<sup>198</sup> each created a new category for prior statements but treated admissions as a general hearsay exception where the availability of the declarant was immaterial.<sup>199</sup>

There were seven states that, as of August, 2010, had not adopted the Federal Rules of Evidence, and all seven treat admissions and prior statements as hearsay exceptions. Two of them already had their own state evidence codes prior to the enactment of the federal rules and retained those codes: California, with the California Evidence Code, and Kansas, as the first adopter of the original Uniform Rules. The five remaining non-adopting states – Georgia, Illinois, Missouri, New York, and Virginia -- have no overall evidence codes and instead rely for their evidence law on a mix of case law, statutes and court rules.<sup>200</sup> Each jurisdiction follows the traditional common law approach of classifying admissions and prior statements as hearsay exceptions.<sup>201</sup>

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<sup>194</sup> HI St § 626-1 Rule 803. (a). In addition to the admissions categories of the federal rules, the Hawaii rule also includes several sub-categories drawn from the California Evidence Code. *Id.*

<sup>195</sup> HI St § 626-1 Rule 802.1

<sup>196</sup> MD R Rev Rule 5-802.1, 5-803. Justice Chasanow supported the state adoption of the rules but, in a separate opinion, objected to the fact that Maryland modified “over 80% of the Federal Rules” in its adoption.” 333 Md. XXXIX (1993). Interestingly, he specifically objected to Rule 803(a): “In an unnecessary attempt to prove that Wigmore, the other evidence scholars and the Federal Rules of Evidence when they classified admissions as non-hearsay, the Rules Committee...classified them as hearsay, but an exception to the rule. This change, like so many others, is unnecessary and a potential source of confusion and misinterpretation.” *Id.* at XLIV-XLV. He also objected to the changes in prior statements. *Id.*

<sup>197</sup> Pa.R.E., §Rule 803.

<sup>198</sup> Ct R Rev §8-3

<sup>199</sup> Connecticut’s category for witnesses is called “Declarant Must Be Available;” Pennsylvania’s is “Testimony of Declarant Necessary.” Pennsylvania (but not Connecticut) included Past Recollection Recorded in the “declarant is a witness” category.

<sup>200</sup> Georgia has an evidence code – the Code of 1863. However, because of the age of the code, Georgia’s evidence law today is the old code, newer statutes and common law. Paul S. Milich, *The Proposed New Georgia Rules of Evidence: An Overview* (2010),

[http://www.gabar.org/public/pdf/news/proposed\\_new\\_evidence\\_rules\\_milich.pdf](http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules_milich.pdf) The proposed new rules treat admissions as a hearsay exception but prior statements as not hearsay. Proposed Georgia Rules of Evidence Rules 801(d)(1) and (2),

[http://www.gabar.org/public/pdf/news/proposed\\_new\\_evidence\\_rules.pdf](http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf)

<sup>201</sup> *Lumpkin v. Deventer North America, Inc.*, 295 Ga.App. 312, 316 (Ga.App., 2008) (admission by agent is admissible under exception to rule against hearsay); *Vojas v. K mart Corp.*, 312 Ill.App.3d 544, 547 (Ill.App. 5 Dist., 2000) (exception to the hearsay rule makes admissions by a party admissible.); *Gamble v. Browning*, 277 S.W. 3d 723, 729 (Mo.App. 2008) (Excerpt of videotape in which defendant admitted to setting up plaintiff in a burglary was an admission by a party opponent and, thus, was admissible as an

My final comment on state practices concerns the reasons given – or, more often, not given – for adopting or not adopting Rule 801(d). In only one of the 34 jurisdictions that adopted Rule 801(d), Texas, is there any record of the reasons for selecting Rule 801(d).<sup>202</sup> One might have expected at least one jurisdiction to have discussed the possible problems of adding a new, contradictory meaning for the not hearsay term, but there have been none.<sup>203</sup> The *imprimatur* of the federal rules and the desire for uniformity have been sufficient in the themselves.

Two of the nine states that rejected Rule 801(d) did give reasons for their action – terse and conclusory, but reasons nevertheless. The Pennsylvania Advisory Committee Notes stated:

“The Pennsylvania rules, like the common law, call an admission by a party-opponent an exception to the hearsay rule. The Pennsylvania rules, therefore, place admissions by a party opponent in Pa.R.E. 803 with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect.”<sup>204</sup>

and

“Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that the Pennsylvania rule classifies those kinds of inconsistent statements that are described therein as exceptions to the hearsay rule, not exceptions to the definition of hearsay.”<sup>205</sup>

The Hawaii comments said that admissions were treated “as exceptions to the hearsay rule rather than as non-hearsay.” It also pointed out that they were placed in Rule 803, where the availability of the declarant was immaterial and then in a separate

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exception to the hearsay rule in a malicious prosecution action.); *Albert v. Denise*, 181 A.D.2d 732, 732 (N.Y.A.D. 2 Dept., 1992) (Statement that mother had used cocaine in his presence and had attempted to have him take cocaine was admissible under hearsay exception for prior statements); *Parker v. Commonwealth*, 41 Va.App. 643, 649 (Va.App., 2003) (prior statements admissible as an exception to the hearsay rule).

<sup>202</sup> The Texas Commentary, written by Professor Olin Guy Wellborn as Reporter, gave a short statement of reasons (“Even though these statements in form would fit the definition of hearsay, they are not excluded as hearsay because they do not invoke all the policies behind the hearsay rule.” Commentary, Texas Rules of Evidence Rule 801(e)). Interestingly, several states noted, in their state Advisory Committee Notes, that Rule 801(d) marked a departure from the state tradition of treating admissions (and sometimes prior statements) as hearsay exceptions. See the ACN or comments to Rule 801(d) for Alabama, Mississippi, Vermont and Ohio. Showing some ambivalence about its adoption, Alabama’s ACN says, “These statements [prior statements in Rule 801(d)(1)]...are declared *arbitrarily* not to be hearsay.” (emphasis supplied).

<sup>203</sup> One might have especially expected some commentary from Utah, which adopted the original Uniform Rules in 1971 and then switched to the federal rules in 1983. Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983 - - Part III*, 1995 UT L Rev 717, 718 (1995).

<sup>204</sup> Advisory Committee Note, Pa St Rev Rule 803 (25).

<sup>205</sup> Advisory Committee Note, PA St Rev Rule 803.1 (1).

exception, (a), with the other Rule 803 exceptions placed in a sub-section (b), because “[t]he rationales for paragraphs (a) and (b) of this rule differ markedly.”<sup>206</sup> For prior statements, placed in a new Rule 802.1, the comment noted that “[t]his rule effects a reorganization of certain of the hearsay provisions found in Article VIII of the federal rules. The formulation follows generally the scheme of Cal. Evid. Code in treating all appropriate prior witness statements in a single rule.”<sup>207</sup>

As has been the case from the time of the Model Code in 1942 to today, the classification of admissions and prior statements has not been the subject of expansive discourse or commentary by the codifiers.

## V. An Evaluation of the Six Alternatives

This section will evaluate six alternative approaches to classifying admissions and prior statements and then consider the several different ways that the preferred alternative – the “four categories” approach – might be implemented through amendments to the federal rules. Before beginning the evaluation, we would do well to remember what McCormick said about the definition of hearsay and apply it to our problem: Too much should not be expected of a classification.<sup>208</sup> That wisdom reminds us that it is unreasonable to expect any classification of admissions and prior statements to capture fully all the theoretical and practical issues involved with these types of statements. If classified as “not hearsay” as in Rule 801(d), there is both confusion over the term’s meaning and the risk of inconsistent use. If classified as hearsay and an exception, there may be a reduced emphasis on the distinctiveness of admissions and prior statements and, since we are not writing on a blank slate, the costs of change after thirty-five years of usage.

On the other hand, neither should we expect too little of a classification. When used as part of a code of rules, we have every reason to demand that a classification and its accompanying terminology comport with the basic criteria for rule-drafting: clarity and consistency. These are the standards of the *Guidelines for Drafting and Editing the Federal Rules* and the leading works on drafting.<sup>209</sup> They are also consistent with the goals that the Reporter himself expressed at the beginning of the drafting process.<sup>210</sup> To

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<sup>206</sup> Comment, Hawaii 803(a).

<sup>207</sup> Comment, Hawaii, 802.1.

<sup>208</sup> McCormick wrote, “Too much should not be expected of a definition.” McCormick, *Handbook*, *supra* note 164, at 459. He then went on to say that a definition “cannot furnish answers to all the complex problems of an extensive field (such as hearsay) in a sentence. The most it can accomplish is to furnish a helpful starting-point for discussion of the problems, and a memory-aid in recalling some of the solutions. But if the definition is to remain brief and understandable, it will necessarily distort some parts of the picture. Simplification is falsification.” *Id.* at 459-460.

<sup>209</sup> Byron Garner, *Guidelines for Drafting and Editing the Federal Rules* (5<sup>th</sup> ed. 2009). Reed Dickerson, *The Fundamentals of Drafting* 16 (2d ed. 1986), Lawrence E. Filson and Sandra L. Strokoff, *The Legislative Drafter’s Desk Reference* (2d ed. 2008).

<sup>210</sup> As noted in Section II-A, at the second meeting of the Advisory Committee in October, 1965, the Reporter told the members that “words should be used in their ordinary meaning whenever possible” and that he was drafting the rules “to be as usable and accessible as possible.”



the two main criteria of clarity and consistency, I would also add a third, what I will call the education factor: the ability of the classification to educate users as to the distinctiveness of admissions and prior statements and their differences from the out-of-court statements covered by the other hearsay exceptions.<sup>211</sup>

The six alternatives for evaluating under these criteria are:

- 1) the Federal Rule approach, with Rule 801(d) and the “not hearsay” terminology;
- 2) the approach of the First Draft and Second Draft, excluding admissions and prior statements from the definition of hearsay in the definition section, Rule 801(c);
- 3) the predecessor code approach, treating admissions and prior statements as one of a list of hearsay exceptions;
- 4) the “three categories” approach adopted by Connecticut and Pennsylvania; and
- 5) the “four categories” approach that I am recommending.<sup>212</sup>
- 6) a “four categories” approach where the categories for admissions and prior statements are labeled “exemptions” or “exclusions” instead of “exceptions.”

Rule 801(d) scores poorly on clarity and consistency. Under Rule 801(d)(1), a prior inconsistent statement is called not hearsay if offered to impeach and “not hearsay” if offered substantively. An admissions is both hearsay under Rule 801(c) and “not hearsay” under Rule 801(d)(2). It is unclear and confusing to have the same term, not hearsay, used in an inconsistent manner.

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<sup>211</sup> These criteria for evaluating the various alternatives are different from and narrower than the goals of the initial codification effort, which also included uniformity, reform and accessibility. The selection of one or another alternative approach to the treatment of admissions and prior statements will have no impact on reform, only a possible short-term impact on uniformity, and should help accessibility.

I have not included as evaluative criteria the two factors that most concerned the Reporter, rationalizing the hearsay exceptions and using the scholarly assessments. As discussed in Section II-C, while those factors may have some bearing on the negative decision of how not to treat admissions and prior statements, they provide no assistance with the affirmative decision of how these statements should be treated.

<sup>212</sup> In addition to having four categories – one each for declarant as a witness, declarant as a party-opponent, availability of declarant immaterial and declarant unavailable – the recommended approach follows California and Hawaii and includes past recollection recorded exception in the declarant as a witness category (thus moving it from its present placement in Rule 803(5)).

A past recorded recollection *is* a prior statement of a witness. Under the terms of the exception, the declarant of the past recorded recollection must appear as a witness in court and testify as to the foundational requirements of the exception. California, Hawaii and Maryland place past recorded recollections within the exception for prior statements. The Reporter’s reasons for not placing it with the other prior statements and classifying it instead as a Rule 803 exception, where the availability of the declarant is immaterial, and are weak. He said that he did not place it with the prior statements provision because Rule 801(d)(1) “requires that declarant be ‘subject to cross-examination,’ as to which the impaired memory aspect of the exception raises doubts.” ACN, Rule 803(5)(interestingly, the quoted language was not in the original ACN but was added in the third draft). There may have been some doubt in 1967 about whether the witness with an impaired memory was subject to cross-examination, there has been no doubt since *United States v. Owens*, 484 U.S. 554 (1988). And the unquestioned non-compliance with Rule 803 and Rule 804 should have trumped any possible doubt over a possible fit with prior statements.

The approach of the First Draft and Second Draft has the same problem. Excluding admissions and prior statements from the hearsay definition does not make them disappear from the courtroom. Lawyers still offer the statements at trials, opponents still object, and lawyers and judges need a term to describe them. If they are not hearsay, what are they? The default term for evidence that is not hearsay is “not hearsay,” which creates the inconsistency with the traditional meaning of not hearsay.

The final four alternatives all score much better on clarity and consistency. They follow the traditional approach, using the term not hearsay only to describe statements that are not offered for their truth and the term hearsay exception to describe statements offered for their truth that we nevertheless wish to admit into evidence. This usage is clear and consistent.

On the education criterion, Rule 801(d) educates somewhat, but in an indirect and opaque manner. Rather than highlighting what admissions and prior statements are (statements by the declarant as a party and as a witness), Rule 801(d) instead asserts that they are “not hearsay,” whereas they are hearsay under the definition of Rule 801(c).<sup>213</sup> As such, it is more confusing than enlightening. Second, by combining admissions and prior statements together in one rule, Rule 801(d) misses the opportunity to educate as to how these two types of statements differ from each other and to remind judges and lawyers that the reasons for granting their admissibility are very different. Prior statements are very reliable, among the best of the admissible hearsay. Admissions are, doctrinally at least, notably unreliable. Grouping them together is artificial and misleading. It did not make sense when Wigmore did it, first as “hearsay rule inapplicable” as self-contradiction and then as “hearsay rule satisfied,” and it does not make sense in Rule 801(d).

The predecessor codes missed the opportunity to educate when they placed admissions and prior statements in an undifferentiated list of hearsay exceptions. The “three categories” approach educates as to the distinctiveness of prior statements but fails to do so for admissions. Only the fifth alternative, the “four categories,” approach performs the educational function effectively. By putting admissions and prior statements in separate categories, it emphasizes their difference, from each other and from the other hearsay exceptions. By labeling those categories correctly, as “Declarant as a Witness” and “Declarant as a Party-Opponent,” it reinforces both the reason for their distinctiveness and the rationales for their admissibility.<sup>214</sup>

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<sup>213</sup> Which is why Professors Lilly, Saltzburg and Capra correctly called the Rule 801(d) usage an “oxymoron.” Lilly et. al., *supra*, note 14.

<sup>214</sup> As another example of the “there is no perfect solution” maxim, a “four categories” amendment that would provide clarity, consistency and educational value for admissions and prior statements would at the same time render certain applications of Rule 806 either redundant or puzzling. If prior statements were a hearsay exception, Rule 806’s authorization of the impeachment of the declarant-witness is redundant, since a witness is already impeachable qua witness. If admissions were a hearsay exception, Rule 806 would authorize a party-opponent to impeach his or her own statement. While this makes sense (and Rule 806 endorses it in the context of vicarious admissions), for personal admissions it is strange.

The sixth and final alternative is a variation on the “four categories” approach that labels the categories for declarant as a witness and declarant as a party as exemptions or exclusions instead of exceptions. The use of one of these synonyms would further highlight the educational point that admissions and prior statements are different from the other exceptions, stressing that they are so different that we use a different noun to describe them. However, this seems like overkill. Creating separate exceptions is sufficient to make the educational point. There is no need to introduce an additional term with the same meaning, and there is a cost (yet another term of art to remember) in doing so. In this instance, simpler is better.

The basic “four categories” approach is superior in terms of clarity, consistency and education, and federal and state evidence codes should be amended to incorporate this approach. Assuming that one agrees with the merits of this argument, it is then necessary to consider the issue of amending the rules, first in terms of form and renumbering issues and finally in terms of the standards for amendment of the Advisory Committee on the Federal Rules of Evidence.

#### Implementing The “Four Categories” Approach

While an amendment that incorporates the “four categories” approach will not change any of the operative language of the rules for admissions and prior statements, it will necessarily change some of the introductory language and the numbering and placement of the rules. Those with more familiarity with the rules drafting and amending process will surely have better insights than mine, but I can at least begin the discussion by suggesting several possible approaches, two that are minimalist and two that are more thoroughgoing.<sup>215</sup>

One minimalist approach would retain the framework and specific rule language of Rule 801(d) but would change the titles of the main rule and the two sub-rules. Thus, the title of Rule 801(d) would change from “Statements which are not hearsay” to “Hearsay Exceptions.” The title of Rule 801(d)(1) would become “Declarant is a Witness” and Rule 801(d)(2) would become “Declarant is a party-opponent.” Additionally, Rule 803(5) would move and become a new Rule 801(d)(1)(4). This approach has the important advantage of being minimally disruptive to the other rules. While it continues to group admissions and prior statements together and thus loses the opportunity to educate as to their distinctiveness, it could provide a different kind of future educational benefit. It might remind readers twenty years from now – when they inquire as to why these two exceptions are placed in Rule 801(d) and grouped together -- of how confusing the classification issue once was.

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<sup>215</sup> Any amendment to Rule 801(d) will require other conforming amendments. Certain language of Rule 806 -- “a statement defined in Rule 801(d)(2)(C), (D), or (E)” -- should be deleted. If the amendments are more thoroughgoing and result in a renumbering of the rules, other rules that refer to certain hearsay exceptions by number (such as Rules 901(11) and (12), would need to be changed. In addition, any renumbering will certainly complicate electronic searches.

Another minimalist approach would follow the one used by several states. Hawaii, Maryland and Pennsylvania created a new category for statements by witnesses and then simply shoehorned in the new category as a new sub-section of an existing category: Rule 802.1 in Hawaii, Maryland, and Rule 803.1 in Pennsylvania. While each of these states then placed admissions into an exception within their Rule 803 category, amenders could simply create another new sub-section for admissions, such as Rule 802.2 or 803.2. This approach is awkward and forced and is not recommended.

A more thoroughgoing approach would be to create the two new categories in renumbered sections of Article VIII. One version of this approach might delete and move Rule 801(d)(1) to the new Rule 803, Rule 801(d)(2) to the new 804, and 803(5) to the new Rule 803(4). It would then result in the following rules:

- 803 Declarant as a witness – Prior Statements<sup>216</sup>
- 804 Declarant as a party-opponent – Statements of party-opponents<sup>217</sup>
- 805 Availability of declarant immaterial<sup>218</sup>
- 806 Declarant unavailable

Another version might create the new category only for declarant as a witness and, for admissions, follow Hawaii and Maryland by placing it in a new Rule 803(a) category and moving the current Rule 803 exceptions to a newly-created Rule 803(b) category. This version has the advantage of emphasizing the similarity that admissions have with the other Rule 803 exceptions (the availability of the declarant is indeed immaterial) but it runs the risk of underemphasizing the differences.

#### Amending the Federal Rules of Evidence

The final issue is evaluating an amendment incorporating the “four categories” approach (whether minimalist or more thoroughgoing) under the standards governing the amendment process. The amendment of the Federal Rules of Evidence follows the same well-defined Rules Enabling Act process as the other federal court rules.<sup>219</sup> The statutory authority for the amendment process is vested with the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, commonly known as the “Standing Committee,” which has delegated the initial rule-amending authority to one of five advisory committees – in the case of evidence, the Advisory Committee on Evidence Rules.<sup>220</sup>

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<sup>216</sup> This would include the language from the current Rule 801(d)(1) as well as the current Rule 803(5), which would be a new Rule 803(4).

<sup>217</sup> This would include the language from the current Rule 801(d)(2).

<sup>218</sup> Rule 803(5) would be deleted and its language transferred to the new Rule 803(4)

<sup>219</sup> James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar* (April 2006), <http://www.uscourts.gov/rules/proceduresum.htm>; 28 U.S.C. §2073(b). This process governs amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure and the Federal Bankruptcy Rules, as well as the Federal Rules of Evidence. Of course, Congress can also unilaterally amend the federal rules, as it did with Rule 412 and Rules 413-415.

<sup>220</sup> The Advisory Committee begins the amending process, by studying an issue and then drafting an amendment and submitting it for public review and comment. The Advisory Committee then presents its

After being unceremoniously abolished soon after the enactment of the Federal Rules of Evidence in 1975, the Advisory Committee on Evidence Rules was reestablished in 1992.<sup>221</sup> In 1993, the Advisory Committee established a general approach for determining when it will amend one of the federal rules, and it has generally followed that approach in evaluating amendments since that time. In addition to this general approach, the Advisory Committee is currently participating in the ongoing effort of the Standing Committee to “restyle” the federal rules. This restyling project, started in the early 1990s with the Federal Rules of Appellate Procedure<sup>222</sup> and now reaching the Federal Rules of Evidence, is designed “to simplify, clarify and make more uniform all of the federal rules of practice, procedure and evidence.”<sup>223</sup> There are thus two approaches to amending the rules – a general amendment or a restyling amendment.

The Advisory Committee stated its approach for considering a general amendment as follows:

Its philosophy has been that an amendment to a Rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies a policy decision believed by the Committee to be erroneous. Any amendment will create uncertainties as to interpretation and sometimes unexpected problems in practical application. The trial bar and bench are familiar with the Rules as they presently exist and extensive changes might affect trials adversely for some time to come. Finally, amendments that seek to provide guidance for every conceivable situation that may arise would entail complexities that might make the rules difficult to apply in practice.<sup>224</sup>

It is unclear if an amendment embodying the “four 4 categories” approach will qualify under this philosophy. On the one hand, it does not meet either of the two factors in the first sentence. It cannot be said that Rule 801(d) is “not working well in practice.”<sup>225</sup> Although the language of Rule 801(d) is awkward, judges and lawyers have

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proposed amendment to the Standing Committee, which reviews it and, if approved, presents the proposed amendment to the Judicial Conference. If approved, the Judicial Conference then transmits the proposed amendment to the Supreme Court. The Supreme Court then reviews and, if approved, promulgates the amendment by forwarding it to Congress by May 1 of any given year. The amendment takes effect on December 1 of that year unless Congress takes action.

<sup>221</sup> *Self-Study*, 168 F.R.D. 679 (1996)

<sup>222</sup> The Rules of Appellate Procedure were amended with an effective date of December 1, 1998. Fed. R. App. P. 1, Advisory Committee Note. The Rules of Criminal Procedure were amended with an effective date of December 1, 2002. The Rules of Civil Procedure were amended with an effective date of December 1, 2008. See Common Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence at 2 (May 6, 2009, released for public comment on Aug. 11, 2009)

<sup>223</sup> See Common Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence at 2 (May 6, 2009, released for public comment on Aug. 11, 2009)

<sup>224</sup> 156 F.R.D. 339 (1994)

<sup>225</sup> See Section III *supra*.

adapted well. Further, it likely does not “embod[y] a policy decision believed by the Committee to be erroneous.” Indeed, because the issue is classification, not admissibility, the dispute over Rule 801(d) does not involve what one typically thinks of as a policy decision.<sup>226</sup>

On the other hand, and counting in its favor, this amendment is unlikely to “create uncertainties as to interpretation and sometimes unexpected problems in practical application,” or to disorient the bench and bar or adversely affect future trials. In fact, the amendment is likely to be welcomed by the bench and bar, will improve clarity and communication, and will lead to fewer uncertainties of interpretation and problems in practice. Also counting as a positive is the fact that Rule 801(d) was not included in the list of rules that the Advisory Committee has tentatively decided “not to amend...”<sup>227</sup> The Advisory Committee at least has not closed the door on the suggested changes to Rule 801(d), and the enactment of an amendment will turn on whether the Advisory Committee believes that it is meritorious. As the current Reporter has written: “Amending or abrogating rules of evidence only makes sense if the benefits of an amendment outweigh the costs. If the courts are surviving with a rule as they appear to be, however unhappily, then benefits of a rule change are unlikely to outweigh the costs. This is not to speak of the costs of upsetting settled expectations that comes with any rule change.”<sup>228</sup>

The status of the proposed amendment under the second approach, the Advisory Committee’s restyling program, is also uncertain. While it seems clear that Rule 801(d) would not have been adopted if the drafters had used the Guidelines for Drafting and Editing the Federal Rules in the drafting of the original rules, it is unclear whether the proposed amendment would qualify now as a restyling amendment.<sup>229</sup> Such an amendment can affect only style, not substance, and the Advisory Committee has stated that a proposed change is substantive if:

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<sup>226</sup> Under the general understanding of that term in evidence circles, “policy decisions” involve questions of admissibility, such as whether to apply Rule 407 to products liability cases, the scope of the attorney-client privilege in the corporate context or the standards for determining the expertise of an expert witness.

<sup>227</sup> 156 F.R.D. 339 (1994). It is unlikely that Rule 801(d) and the “not hearsay” language has any supporters. While many writers have made harsh comments, *see* notes. 12-14 *supra*., I have found only two people who have had anything good to say: Professor Thomas Green in 1970, n. 127 *supra*., and Dean Mason Ladd in 1973, Mason Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 Fl. St. L. Rev. 191, 197 (1973) (“Surely one of the highlights of the new evidence rules is 801(d), entitled statements which are “not hearsay.”).

<sup>228</sup> Daniel J. Capra, *Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. Miami L. Rev. 691, 702 (2001).

<sup>229</sup> This discussion of the restyling criteria is primarily heuristic, not for practical effect during the current restyling, which is nearing completion. The restyling project began in 2007, draft amendments were published for public comment in August, 2009, and the Advisory Committee approved those amendments in April, 2010 and sent them to the Standing Committee. Memorandum from Robert L. Hinkle, Chair, Advisory Committee on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 1-6 (May 10, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>.

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or
3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or
4. It changes what Professor Kimble has referred to as a “sacred phrase” – “phrases that have become so familiar as to be fixed in cement.”<sup>230</sup>

The proposed “four categories” amendment is clearly stylistic, not substantive, on Criteria ## 1 and 2, because it would not change either the result or procedure on an admissibility issue. It also seems stylistic on Criterion #4. While the term not hearsay to describe the impeachment use of an out-of-court statement is likely a sacred phrase,<sup>231</sup> Rule 801(d)’s commandeering of that phrase for its novel, inconsistent use is a usurpation of that traditional phrase that should be undone, not retained.

However, because it will change the “structure of a rule and method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule,” the proposed amendment is likely substantive under Criterion #3. The purpose – indeed the virtue -- of the proposed amendment is to change, for the better, the way that courts and litigants think and talk about admissions and prior statements. Rather than having to think and talk in a convoluted way, all participants will be able to converse clearly. Evidence would be not hearsay if it is not offered for its truth; hearsay but admissible under an exception if it meets the exception’s requirements, or hearsay with no exception if it does not. Evidence law would take a welcome step backwards, returning to a hearsay world with two questions (is it hearsay; if not, is there an applicable exception) and three categories. This change would be a simplification, a clarification and a welcome improvement – but appears to be a substantive change under Criterion #3.

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A classification as substantive not stylistic does not doom an amendment. It simply remits it to the regular amendment process, not the style process. One hopes that, during the regular amendment process, the Advisory Committee will see the wisdom – for the stylistic reasons of clarity and consistency – to consider and then to recommend the amendment of Rule 801(d).

If adopted, an amendment embodying the “four category” approach will not change the quantum or type of hearsay evidence that is admitted or excluded. But it will provide greater clarity and less confusion in the terminology used to classify the evidence

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<sup>230</sup> Id. at 3-4.

<sup>231</sup> The Advisory Committee determined that “truth of the matter asserted” was a sacred phrase and did not change it in the proposed restyling. Id

that we admit and thus would help us all to journey more safely and confidently “through the hearsay thicket.”<sup>232</sup>

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<sup>232</sup> John M. Maguire, *The Hearsay System: Around and Through the Hearsay Thicket*, 14 Vand. L. Rev. 141 (1960).