From the Mouths of Babes:
Round-Table Discussion between the Bench & Bar

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ARTICLE VIII. HEARSAY

Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) **Declarant.** A declarant is a person who makes a statement.

(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 asserted.

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

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with the declarant's testimony. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action; or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

(C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the 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; or

(3) *Recorded Statement by Child Victims of Crime.* The statement is a recorded statement by the victim of a crime who is less than 16 years of age and

(A) the recording was made before the proceeding;

(B) the victim is available for cross-examination;

(C) the prosecutor and any attorney representing the defendant were not present when the statement was taken;

(D) the recording is on videotape or other format that records both the visual and aural components of the statement;

(E) each person who participated in the taking of the statement is identified on the recording;

(F) the taking of the statement as a whole was conducted in a manner that would avoid undue influence of the victim;

(G) the defense has been provided a reasonable opportunity to view the recording before the proceeding; and

(H) the court has had an opportunity to view the recording and determine that it is sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording into evidence.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1580 effective July 1, 2005)

Note: Chapter 64, section 59, SLA 2005 (HB 53) amended Evidence Rule 801 as reflected in section 13 of this Order. The change to Evidence Rule 801 is adopted for the sole reason that the legislature has mandated the amendment.

Rule 802. Hearsay Rule.

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.

(Added by SCO 364 effective August 1, 1979)

Rule 803. Hearsay Exceptions-- Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Business Records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Record.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind which a memorandum, report, record, or data compilation was regularly made and

preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(b) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

Note: AS 10.06.925, as enacted by ch. 166, § 1, SLA 1988, amended Evidence Rule 803(8) by requiring the court to receive as evidence certain public documents dealing with corporations.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or

by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family Records.** Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings and urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, codes, standards, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of a person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(23) **Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 804. Hearsay Exceptions--Declarant Unavailable.

(a) **Definition of Unavailability.** Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, the declarant's attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

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

(4) *Statement of Personal or Family History.* (A) A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair

opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 1, 2003)

Rule 805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

(Added by SCO 364 effective August 1, 1979)

Rule 806. Attacking and Supporting Credibility of Declarant.

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, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement or a statement defined in Rule 801(d)(2) (C), (D), or (E) has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ARTICLE VIII. HEARSAY

Introductory Reporter's Comment

Like Article V, this Article and the Reporter's Comments that accompany it, do not attempt to analyze the history of the hearsay rule and to assess the strengths and weaknesses of hearsay exceptions that have withstood the test of time. This is not to say that Article VIII is nothing more than a codification of common law rules; departures from the common law tradition are frequent, and they are explained in the comments accompanying the relevant sections of the rules. When the common law is carried forward in the rules, only brief mention is made of the rationale for the relevant provisions.

The comments accompanying the rules draw heavily, and at times are verbatim copies, of the Advisory Committee's Notes accompanying the Federal Rules of Evidence. Conspicuously different is the approach of the introductory note on hearsay found in both the Federal and the Alaska Rules. The latter is shorter and assumes greater knowledge on the part of the reader. Practicing lawyers are quite familiar with the rationale for a hearsay rule that begins with the assumption that evidence not tested by cross-examination should be excluded. No matter what the exact words used, problems of sincerity, ambiguity of narration, memory and perception are familiar ones. The Advisory Committee argued that sincerity is "merely . . . an aspect of the three [otherwise] mentioned." To the extent that some courtroom observers believe that perjury is common even in court, problems of perjury outside of court when there is no cross-examination also are likely to exist. Thus, the Advisory Committee was probably wrong. Aside from cross-examination, other reasons for a hearsay rule include the desirability of having evidence taken under oath and the importance of viewing the demeanor of a witness.

The Advisory Committee is undoubtedly correct in noting that the logic of the argument [supporting a hearsay rule] . . . might suggest that no testimony be received unless in full compliance with the three ideal conditions. [Cross-examination, oath, and demeanor.] No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is

both bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

The Advisory Committee goes on at great length to explain why it decided not to abandon the hearsay rule or to greatly simplify it. The shorter, but similar, answer provided by these rules is that the dangers associated with hearsay are real and continue to plague trial courts today as they have in the past. In addition, arguments for simplification such as those advocated by Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961), assume greater faith in trial judges than yet can be justified. Moreover, a more flexible rule might tend to confer an unfair advantage on the government in criminal cases and wealthy parties in civil cases who have ready and efficient means for preparing their hearsay evidence for use at trial. Finally, it is likely that a more flexible rule would tend to produce categories of exceptions for the guidance of trial judges that resemble those that are presented in these rules, which are themselves the out-growth of adjudication and many years of debate. Thus, as the Advisory Committee helpfully observed

[t]he approach to hearsay in these rules is that of the common law, i.e., the general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those whose unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable [equivalent] circumstantial guarantees of trustworthiness."

In its introductory note, the Advisory Committee wrote at length on the subject of confrontation. Although the United States Supreme Court has recognized that the roots of the confrontation protection and the hearsay rule are common, the constitutional protection and the evidence protection are not identical. Clearly, the confrontation clause speaks to subjects not addressed by the hearsay rule: e.g., the confrontation clause mandates that a defendant be given the opportunity to be present at trial, while the hearsay rule does not address this question; and the confrontation requirement may control the scope of cross-examination and impeachment, while the hearsay rule may not. It is just as clear that the hearsay rule goes beyond minimal confrontation requirements in protecting litigants against unfairness. It is difficult to ascertain precisely what limits the confrontation clause, as applied to the states through the fourteenth amendment, places on states in drafting evidence rules. *California v. Green,* 399 U.S. 149, 26 L.Ed.2d 489 (1970) and *Dutton v. Evans,* 400 U.S. 74, 27 L.Ed.2d 213 (1970) indicate that the highwater marks of the confrontation clause --*Pointer v. Texas,* 380 U.S. 400, 13 L.Ed.2d 923 (1965), *Douglas v. Alabama,* 380 U.S. 415, 13 L.Ed.2d 934 (1965), *Burton v. United States,* 389 U.S. 818, 19 L.Ed.2d 70 (1968), and *Barber v. Page,* 390 U.S. 719, 20 L.Ed. 2d 255 (1968) -- can no longer be read to expand the protection of the confrontation clause in criminal cases to resemble very closely the protection afforded by hearsay rules. There is no need in these rules to

answer the question whether some common law hearsay exceptions violate the confrontation requirement, and if so, which ones. It is sufficient to note that the Alaska Rules are drafted with the confrontation requirement in mind and in an attempt to avoid constitutional difficulties. The federal Advisory Committee made a comment that is appropriate here:

Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in non-constitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.

For a recent case involving an overlap between hearsay and constitutional issues, see *Benefield v. State,* 559 P.2d 91 (Alaska 1977).

Rule 801. Definitions.

(a) **Statement.** The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one. This follows present Alaska law. See *Clary v. Fifth Ave. Chrysler Center, Inc.,* 454 P.2d 245, 250-51 (Alaska 1969).

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement". Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan. L. Rev. 682 (1962). Arguments found in these sources were rejected, however, in *Clary, supra.* Admittedly evidence of this character is

untested with respect to the perception, memory, and narration (or their equivalents) of the actor. See generally Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957 (1975). But the rule adopts the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 Rocky Mt. L. Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 765-67 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code § § 225, 1200; Kansas Code of Civil Procedure § 60-459 (a); New Jersey Evidence Rule 62 (1).

(b) **Declarant.** The definition of "declarant" is straightforward and requires no elaboration.

(c) **Hearsay.** The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick (2d ed.) § 225; 5 Wigmore § 1361, 6 Wigmore § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Cf., e.g., Clary v. Fifth Ave. Chrysler Center, Inc.,* 454 P.2d 244, 250-51 (Alaska 1969); *P.H. v. State,* 504 P.2d 837, 842-43 (Alaska 1972). Although neither case turned on an interpretation of an offer of a statement "to prove the truth of the matter asserted" -- the first case holding that non-assertive conduct was not hearsay and the second holding that a rule of testimonial completeness may override the hearsay rule -- arguably both cases involve evidence not offered for its truth. The effect of this subdivision is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the court of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

(d) **Statements Which are not Hearsay.** Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior Statement by Witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The traditional argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is subject to attack. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement "from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device." While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges v. Wixon,* 326 U.S. 135, 89 L.Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath.

Some have argued that no one has satisfactorily explained why cross-examination cannot be conducted subsequently with success, and that the decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State v. Saporen,* 285 N.W. 898 (Minn. 1939); *Ruhala v. Roby,* 150 N.W.2d 146 (Mich. 1967); *People v. Johnson,* 441 P.2d 111 (Cal. 1968). In respect to demeanor, Judge Learned Hand observed in *Di Carlo v. United States,* 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

(A) The Advisory Committee on the Federal Rules chose to treat prior inconsistent statements as substantive evidence. In doing so it adopted the

position of California in section 1235 of its Evidence Code, which is supported by the following remarks of the California Law Revision Commission:

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.
The Congress was concerned about the broadened use of inconsistent statements. The House of Representatives attempted to limit inconsistent statements admissible for substantive use to those made under oath and subject to cross-examination, but the Senate took the position that the requirement of a prior opportunity for cross-examination was too great a restriction on the use of probative and trustworthy evidence. The compromise in the Federal Rules was to admit prior statements made "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

Existing Alaska law is consistent with the California approach. *See Beavers v. State,* 492 P.2d 88, 94 (Alaska 1971); *Eubanks v. State,* 516 P.2d 726, 729 n.6 (Alaska 1973); *Gray v. State,* 525 P.2d 524, 526 n.6 (Alaska 1974). *See also Hobbs v. State,* 359 P.2d 956 (Alaska 1961); *Johnston v. State,* 489 P.2d 134 (Alaska 1971). Subdivision (d) (1) continues in effect existing Alaska law. Subsection (d) (1) does not alter the holding of *Beavers* that permits admission of prior inconsistent statements in the discretion of the trial judge as substantive evidence regardless of whether the prior statement was under oath and/or subject to cross-examination. Except in special cases, counsel should lay the foundation for an inconsistent statement while the witness who made the statement is testifying, as under Rule 613.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motives but not as substantive evidence. *See* Rule 607(b). Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) Some of the same dangers discussed in connection with prior inconsistent statements surround the use of identification evidence. But the rule provides

that only the identification itself, not statements made about the crime, is to be admitted. Thus, this section is more limited than that on inconsistent statements, which covers all statements regardless of their length, detail and completeness. Constitutional limitations protect against undue suggestiveness. *See, e.g., Neil v. Biggers,* 409 U.S. 188, 34 L.Ed.2d 401 (1972); *Simmons v. United States,* 390 U.S. 377, 19 L.Ed.2d 1247 (1960); *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed.2d 1199 (1967); *United States v. Wade,* 388 U.S. 218, 18 L.Ed.2d 1149 (1967); and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed.2d 1178 (1967), restricted by *Kirby v. Illinois,* 406 U.S. 682, 32 L.Ed.2d 411 (1972). "An early, out-of-court identification provides fairness to defendants by ensuring accuracy of the identification. At the same time, it aids the government by making sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." S.R. No. 94-199, 94th Cong., 1st Sess. (1975). *Accord, Buchanan v. State,* 554 P.2d 1153, 1158 (Alaska 1976). For recent cases discussing eyewitness identifications, *see Buchanan v. State,* 561 P.2d 1197 (Alaska 1977); *Benefield v. State,* 559 P.2d 91 (Alaska 1977); *Blue v. State,* 558 P.2d 636 (Alaska 1977); *Noble v. State,* 552 P.2d 142 (Alaska 1976).

(2) *Admissions.* Federal Rule 801 provides that admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 564 (1973); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring first-hand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

While the classification of admissions as non-hearsay makes some sense if confined to personal admissions, there is no good reason to treat all the admissions covered by subsection (C), (D), and (E) as non-hearsay. In fact, if these rules were written on a clean slate without reference to the Federal Rules, admissions would be treated as exceptions to the hearsay rule and placed under Rule 803. But for the convenience of the bar the Federal Rule is followed. The end result is the same, and the slight confusion engendered by the treatment of admissions as non-hearsay is a small price to pay for uniformity.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him.

(A) A party's own statement is the classic example of an admission. *See Jordan v. State,* 481 P.2d 383, 386 (Alaska 1971). If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether

he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs. To the same effect is California Evidence Code 1220. *Cf.,* Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." *See,* McCormick (2d ed.) § 246, at 527, n.15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. *See, e.g., Beavers v. State,* 492 P.2d 88, 96 (Alaska 1971). The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. *See, e.g., Doyle v. Ohio,* 426 U.S. 610, 49 L.Ed.2d 91 (1976). Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of and admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. This is the new Maine Rule. The Alaska rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus, a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. *See also* McCormick (2d ed.) § 78, at 159161. In accord is New Jersey Evidence Rule 63(8)(a). *Cf.,* Uniform Rule 63(8) (a) and California Evidence Code § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand. L. Rev. 855, 860-61 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ

agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson v. Williams,* 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller,* 292 F.2d 775, 784 (D.C. Cir. 1961); *Martin v. Savage Truck Lines, Inc.,* 121 F.Supp. 417 (D.D.C. 1954), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., at 66-73, with comments by the editor that the statements should have been excluded as not within the scope of agency. For the traditional view, *see, Northern Oil Co. v. Socony Mobil Oil Co.,* 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9) (a), Kansas Code of Civil Procedure § 60-460(i) (1), and New Jersey Evidence Rule 63(9) (a). The proposed Alaska rule was cited favorably in *P.R.& S. Inc. v. Pellack,* 583 P.2d 195 (Alaska 1978).

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (D) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. *See* Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Comment, 25 U. Chi. L. Rev. 530 (1958). The rule is consistent with the position of the United States Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States,* 336 U.S. 440, 93 L.Ed. 790 (1949); *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441 (1963). For similarly limited provisions *see* California Evidence Code § 1223 and New Jersey Rule 63(9) (b). *Cf.,* Uniform Rule 63(9) (b). While the rule refers to a co-conspirator, it should be clear that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of this rule even though no conspiracy has been charged. *See Amidon v. State,* 565 P.2d 1248 (Alaska 1977). Traditionally the hearsay exception requires independent evidence of conspiracy. This tradition is implicitly carried forward under the rule. *See* K. Redden & S. Saltzburg, *Federal Rules of Evidence Manual* 461-68 (2d ed.1977).

Rule 802. Hearsay Rule.

Under existing Alaska law "hearsay is inadmissible upon objection unless it falls within one of the exceptions to the hearsay rule." *Burkholder v. State,* 491 P.2d 754, 757 (Alaska 1971). Many exceptions are listed in Rules 803 and 804, but exceptions to the hearsay rule may be found outside of Article VIII of these rules. The provision excepting from the operation of the rule hearsay which is made admissible by these rules or others adopted by the Alaska Supreme Court or by the legislature recognizes that it may be convenient to place a

hearsay exception outside of this Article. When the supreme court or the legislature does so, the exception is every bit as valid as those located in Rules 803 and 804. The following examples illustrate hearsay that is rendered admissible by provisions outside of these two rules.

ALASKA RULES OF CIVIL PROCEDURE

Rule 4 (f): proof of service by affidavit.

Rule 32 (a): admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record, now found in Rule 43.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

ALASKA RULES OF CRIMINAL PROCEDURE

Rule 4(a) (1): affidavits to show grounds for issuing warrants.

Rule 5.1(d): written reports of experts in preliminary examination.

ENACTMENTS OF ALASKA LEGISLATURE

AS 03.40.070: certified copy of instrument evidencing sale of brand or mark.

AS 21.06.070: certificate of insurance director.

AS 32.05.060: partner's admission against partnership.

Rule 802 is also not intended to alter the substantive rule of evidence that hearsay not objected to at trial is competent evidence. *Reese v Geierman,* 574 P.2d 445 (Alaska 1978); *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1336 (Alaska 1975); *Gregory v. Padilla,* 379 P.2d 951, 953 (Alaska 1963).

Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial.

The exceptions are phrased in terms of non-application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify non-production of the declarant in person

at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. *See* Rule 602.

(1) and (2) **Present Sense Impression -- Excited Utterance.** In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Subdivision (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-41 (1962).

The theory of Subdivision (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, at 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Subdivision (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928), it finds support in cases without number. *See* cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). It is well grounded in Alaska case law. *See Torres v. State,* 519 P.2d 788, 792-93 (Alaska 1974); *Watson v. State,* 387 P.2d 289 (Alaska 1963). Since unexciting events are less likely to evoke comment, decisions involving Subdivision (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost,* 10 So.2d 83 (Fla. 1942); *Houston Oxygen Co. v. Davis,* S.W.2d 474 (Tex. 1942); and cases cited in McCormick (2d ed.) § 278, at 709-11. *See also Beech Aircraft Corp. v. Harvey,* 558 P.2d 879, 884 (Alaska 1976).

With respect to the time element, Subdivision (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Subdivision (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail?

Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 243 (1961); McCormick (2d ed.) § 297, at 706-07.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. Nevertheless, on occasion the only evidence may be the content of the statement itself and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick (2d ed.) § 299, at 705. Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland,* 174 N.E.2d 804 (Ill. 1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden,* 387 P.2d 874 (N.M. 1963); *Beck v. Dye,* 92 P.2d 1113 (Wash. 1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Subdivision (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Subdivision (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. *See* Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204, 206-09 (1960).

Similar provisions are found in Uniform Rule 63(4) (a) and (b); California Evidence Code § 1240 (as to Subdivision (2) only); Kansas Code of Civil Procedure § 60-460(d) (1) and (2); New Jersey Evidence Rule 63 (4).

(3) **When Existing Mental, Emotional, or Physical Condition.** Subdivision (3) is essentially a specialized application of Subdivision (1), presented separately to enhance its usefulness and accessibility.

The exclusion of "statements of memory or belief to prove that fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States,* 290 U.S.

96, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case: Thirty-three Years After, 38 Harv. L. Rev. 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U. Chi. L. Rev. 394, 421-423 (1934). The rule of *Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed as applied to a declarant.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of a declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

The addition of the words "offered to prove his present condition or future action" limits the exception to avoid results like *People v. Alcalde,* 148 P.2d 627 (Cal. 1944). For the statements of one person as to his mental or emotional condition to be used against another, Subdivision (23) must be satisfied. This modifies the *Hillmon* rule.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission,* 119 N.E.2d 224 (Ill. 1954); New Jersey Evidence Rule 63(12) (c). Statements as to fault would not ordinarily qualify under this latter language. Thus, a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

(5) **Recorded Recollection.** A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by

the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly,* 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. *Cf.,* Reporter's Comment accompanying Rule 801(d) (1) (A). Hence, the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1) (b), and this has been the position of the federal courts.

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella,* 107 A. 279 (N.J. 1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d) (1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a) (3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

(6) **Business Records.** This exception continues in effect the business records exception to the hearsay rule previously found in Alaska R. Civ. P. 44(a) (1) and Alaska R. Crim. P. 26(e). While the language is slightly different, the basic thrust of the new rule is identical to the old.

The background of this exception is set forth in the Advisory Committee's Note accompany Federal Rule 803(6). The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Sources of information present no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, are acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz,* 170 N.E. 517 (N.Y. 1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Subdivision (6) has been drafted to eliminate the confusion caused by Federal Rule 803(6), which could be read to read to abolish the business duty concept although the legislative history plainly indicates that no such thing was intended.

Entries in form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. In the state courts, the trend favors admissibility. In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman,* 318 U.S. 109 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate.

The lower court had concluded that the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer,* 129 F.2d 976, 991 (2d Cir. 1942). Other courts also have focused on a motive to misrepresent, although many business records are potentially self-serving. The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in

the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness." *See generally Patrick v. Sedwick,* 391 P.2d 453, 458-59 (Alaska 1964); *Commercial Union Companies v. Smallwood,* 550 P.2d 1261 (Alaska 1976).

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage.

(7) **Absence of Records.** Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, supra, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick (2d ed.) § 307; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence 63(14). This Rule supersedes Alaska R. Civ. P. 44(a) (2) and Alaska R. Crim. P. 26 (e); it provides for identical results.

(8) **Public Records and Reports.** "The reliability and trustworthiness of official documents and also the desire to keep officials from having to testify personally in every instance have generally been established as the policies underlying this hearsay exception." *Webster v. State,* 528 P.2d 1179, 1181 (Alaska 1974). The exception was recognized in Alaska R. Civ. P. 44(b) and Alaska R. Crim. P. 26(e), which are superseded by this rule.

Subdivision (8) follows Maine Rule 803(8), rather than its federal counterpart. The Maine rule is clearer, easier to apply, and avoids some of the confrontation problems presented by the Federal Rule. *See generally, United States v. Smith,* 521 F.2d 957 (D.C. Cir. 1975). It recognizes that government records that are compiled for purposes other than presentation on the government's behalf at trial are generally reliable (part (a)), but that reliability is substantially diminished when the government stands to gain an edge in litigation through the introduction of a record or report it has prepared (parts (b) (ii) & (iii)). Similarly, the rule differentiates factual findings made by the government in the process of carrying out public responsibilities, which are presumed to be reliable, from factual findings resulting from a special investigation of a particular complaint, case or incident, which are not within this exception, since there is no reason to believe that the government would itself rely on its findings outside the litigation context (part (b) (iv)). Finally, investigative reports by police and law enforcement personnel are excluded because they are often unreliable. *See Menard v. Acevedo,* 418 P.2d 766 (Alaska 1966).

While this rule may appear, at first blush anyway, to be at odds with *Webster v. State, supra,* that case would be decided the same way under these rules. Presumably the breathalyzer test would be admissible as a business record under Subdivision (6). *Menard v. Acevedo, supra,* is in accord with this Subdivision.

More leeway is provided for admission of public reports involving factual findings in civil cases than criminal cases. In this way deference is paid the confrontation clause. But records and reports not involving investigations into particular events and findings of fact are admissible under this Subdivision even in criminal cases.

There is no doubt that Subdivision (8) differs from former Alaska R. Civ. P. 44(b), but the goals of both rules are similar. When Subdivisions (6) and (8) of the rules are read together, it should be apparent that the admissibility of official records is not unduly circumscribed by the rule.

The notice requirement, formally found in Alaska R. Civ. P. 44(b) (2) is carried forward, but the authentication provisions of Alaska R. Civ. P. 44(b) (4) & (5) and the regulation of copies under Alaska R. Civ. P. 44(b) (6) & (c) are eliminated as these subjects are covered by Articles IX and X of these rules.

(9) **Records of Vital Statistics.** Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment, Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281. It is consistent with the previous exception and may overlap with it in some instances.

(10) **Absence of Public Record or Entry.** The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Subdivision (7) with respect to regularly conducted business activities, is here extended to public records of the kind mentioned in Subdivisions (8) and (9). 5 Wigmore § 1633(6), at 519. Some harmless duplication no doubt exists with Subdivision (7). This continues in effect the policy of former Alaska R. Civ. P. 44 (b) (3).

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry; *e.g., People v. Love,* 142 N.E. 204 (Ill. 1923) (certificate of Secretary of State admitted to show failure to file documents required by Securities Law); as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

(11) **Records of Religious Organizations.** Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, at 371,

and Subdivision (6) would be applicable. However, both the business record doctrine and Subdivision (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge,* 142 N.E. 478 (Ill. 1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the likelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. *See* California Evidence Code § 1315 and Comment.

(12) **Marriage, Baptismal, and Similar Certificates.** The principle of proof by certification is recognized as to public officials in Subdivisions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. *See* 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials (*see,* Rule 902) is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, *see,* Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

(13) **Family Records.** Records of family history kept in family bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra.* The rule is substantially identical in coverage with California Evidence Code § 1312. In approving the Federal Rule counterpart to Alaska Rule 803(13), the House of Representatives' Judiciary Committee approved this rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11). This is a sensible approach to the Subdivision and accurately describes the purpose of the Alaska rule. *See* also, Annot., 39 A.L.R. 372 (1924).

(14) **Records of Documents Affecting an Interest in Property.** The recording of title documents is a purely statutory development. Under any theory of the

admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying or recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. *See* AS 34.15.260. *See also,* AS 34.15.300 and AS 35.25.060. *See generally* Hearsay Under the Proposed Federal Rules: A Discretionary Approach, 15 Wayne L. Rev. 1077, 1172-73 (1968).

(15) **Statements in Documents Affecting an Interest in Property.** Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. Although there is authority restricting this exception to ancient documents, there is no good reason to so limit it. It should not be surprising, however, to see that in practical application the document will most often be an ancient one. *See* Uniform Rule 63(29), Comment. The fact that the Alaska Rule and Federal Rule 803(15) are identical removes any question whether the Federal Rule violates the policy of *Erie* recognized in other Federal Rules (*e.g.,* 301, 501, 601). *See* K. Redden and S. Saltzburg, Federal Rules of Evidence Manual 334 (2d ed. 1977).

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

(16) **Statements in Ancient Documents.** Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b) (8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. 7 Wigmore § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. *But see* 5 Wigmore § 1573, at 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick (2d ed.) § 323, danger of mistake is minimized by authentication requirements, and age affords assurance that the

writing antedates the present controversy. Nebraska followed the usual common law view in defining ancient documents as those in existence more than 30 years. Most other states that have adopted rules based on the federal model agree with the federal provision reducing the number of years to 20. Subdivision (16) also reduces the number of years on the theory that twenty years should be sufficient to counteract fraud.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," *see* California Evidence Code § 1331.

(17) **Market Reports, Commercial Publications.** Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. 6 Wigmore §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, *see* Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market." This rule is consistent with AS 45.05.240.

(18) **Learned Treatises.** Commentators have generally favored the admissibility of learned treatises; *See* McCormick (2d ed.) 321; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692. *See also* Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc). But the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the United States Supreme Court, *Reilly v. Pinkus,* 338 U.S. 269, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson,* 193 So.2d 648 (Fla. App. 1967), *cert. denied,* 201 So.2d 556 (Fla. 1968); *Darling v. Charleston Memorial Community Hospital,* 211 N.E.2d 253 (Ill. 1965); *Dabroe v. Rhodes Co.,* 392 P.2d 317 (Wash. 1964).

Nebraska did not adopt such a provision in its rules, but other states following the Federal model did.

(19), (20), and (21) **Reputation Concerning Personal or Family History -- Reputation Concerning Boundaries or General History -- Reputation as to Character.** Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, at 444, and *see also,* § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Subdivision (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. 5 Wigmore § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions *see,* Uniform Rule 63(26), (27) (c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y) (3); New Jersey Evidence Rule 63 (26), (27) (c).

The first portion of Subdivision (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick (2d ed.) § 324. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, McCormick (2d ed.) § 324, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions *see,* Uniform Rule 63 (27) (a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27) (a), (b).

Subdivision (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick (2d ed.) §§ 44, 186. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63 (28).

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. *See City of London v. Clerke,* Carth. 181, 90 Eng. Rep. 710 (K.B. 1691); *Neill v. Duke of Devonshire,* 8 App. Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and subdivision (22) goes no further, not even including character.

(23) **Other Exceptions.** Whether or not to include a general section like this divided the United States Congress during its consideration of the Federal Rules of Evidence. At first the House Committee on the Judiciary deleted draft rules [803 (24) and 804 (b) (5)] intended to allow courts flexibility in creating hearsay exceptions to fit particular cases. Such rules were viewed "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." The Senate Committee on the Judiciary believed

that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the

guarantees reflected by the presently limited exceptions, and to have a high degree of probativeness and necessity could properly be admissible.
The Senate Committee "intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances." Thus, it modified the rule proposed by the Advisory Committee and approved by the United States Supreme Court to narrow the exception. House and Senate Conferences finally agreed on the Senate's approach but added a provision that a party intending to request the Court to use a statement under this subdivision must notify, sufficiently in advance of trial to allow for a fair contest on the issue of whether the statement should be used, any adverse party of the intent as well as of the particulars of the statement.

Some states that adopted rules based on the federal model rejected any residual exception (*e.g.,* Maine and Nebraska), or modified the Federal Rule (*e.g.,* Nevada and New Mexico). Alaska Rule 803(23) copies the Federal Rule in the belief that the Senate Judiciary Committee was correct in concluding that the specific exceptions provided for in Rule 803, "while they reflect the most typical and well recognized exceptions to the hearsay rule may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence made clear that it should be heard and considered by the trier of fact." *Cf., Beech Aircraft Corp. v. Harvey,* 558 P.2d 879 (Alaska 1976). The intent of the rule is that it should be used sparingly. It has been cited with favor in *Alaska Airlines, Inc. v. Sweat,* 584 P.2d 544 (Alaska 1978).

Note on Omission -- Omitted from this rule is an exception for judgments of previous conviction. *See* Federal Rule 803 (22). Since guilty pleas and statements in connection therewith are admissible under Rule 801(d) (2) (a), unless banned under Rule 410, the only reason to include an exception for judgments of previous conviction is to permit a finding of one trier of fact to come before another. If a judgment of guilty in a criminal case, which follows proof beyond a reasonable doubt, is to have impact in subsequent cases, the impact should be by way of collateral estoppel, not by admitting the previous judgment. The judgment tells the second trier of fact nothing; that trier will either disregard it or defer to it, neither of which tactic is intended by the Federal Rule. There are strong arguments to the effect that facts once proved beyond a reasonable doubt should be binding in subsequent proceedings, especially subsequent civil proceedings. But such a rule is beyond the scope of rules of evidence. The only argument in favor of the Federal Rule is that it might be unconstitutional to attempt to invoke the doctrine of collateral estoppel against a defendant in subsequent criminal cases and Federal Rule 803 (22) is an attempt to use a prior finding in *some* way. But the fact remains that the trier of fact in the second case cannot know how to use the first finding. There is no reason to adopt a rule that can only confuse the trial process. In *Scott v. Robinson,* 583 P.2d 188 (Alaska 1978), the Supreme Court held that a conviction in a criminal case would be conclusive in a subsequent civil case as to the facts necessarily decided in the criminal case under certain circumstances, to wit: the prior conviction was for a serious criminal offense,

the defendant had a full and fair hearing, and the issue on which the judgment is offered was necessarily decided in the previous trial.

Rule 804. Hearsay Exceptions--Declarant Unavailable.

(a) **Definition of Unavailability.** The definition of unavailability implements the division of hearsay exceptions into two categories: Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt v. State,* 46 So.2d 837 (Ala. App. 1950); *State v. Stewart,* 116 P. 489 (Kan. 1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7) (a); California Evidence Code § 240 (a) (1); Kansas Code of Civil Procedure § 60-459(g) (1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People,* 384 P.2d 454 (Colo. 1963); *People v. Pickett,* 63 N.W.2d 681, 45 A.L.R.2d 1341 (Mich. 1954). *Contra, Pleau v. State,* 38 N.W.2d 496 (Wis. 1949).

(3) The position that a lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination. However, the court may choose to disbelieve the declarant's testimony as to his lack of memory. To make this clear, Rule 804(a) (3) begins with the word "establishes" rather than the words "testifies to" which begin its federal counterpart. *See United States v. Insana,* 423 F.2d 1165, 1169-1170 (2nd Cir.), *cert. denied,* 400 U.S. 841 (1970). A preliminary finding is required under Rule 104(a).

(4) Death and infirmity find general recognition as grounds. Uniform Rule 62(7) (c); California Evidence Code § 240(a) (3); Kansas Code of Civil Procedure § 60-459(g) (3); New Jersey Evidence Rule 62(6) (c). *See also* the provisions on use of

depositions in Rule 32(a) (3) of the Alaska Rules of Civil Procedure and Rule 15(e) of the Alaska Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means or to depose the declarant in order to provide an opportunity for oath and cross-examination also satisfies the requirement. Uniform Rule 62(7) (d) and (e); California Evidence Code § 240(a) (4) and (5); Kansas Code of Civil Procedure § 60-459(g) (4) and (5); New Jersey Rule 62(6) (b) and (d). If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied.

The requirement that an attempt to depose a witness have been made, if possible, was added by the Committee on the Judiciary of the House of Representatives when it considered the Federal Rules. The Senate Committee on the Judiciary was not enthusiastic about the addition, arguing:

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases.

In dying declaration cases, the declarant usually, though not necessarily, will be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence.... [Footnote omitted.]

But the Senate Committee concluded with a statement indicating it did not completely disagree with the goals of the House Committee:

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not

conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Despite the fact that several states have abjured the provision requiring an effort to depose, this rule follows the federal lead in requiring that oath and cross-examination are utilized whenever reasonably possible. An opportunity for oath and cross-examination is favored despite its costs.

Paragraph (b) (1) is not included under (a) (5) for an obvious reason; there has already been an opportunity for oath and cross-examination. The Federal Rule excluded (b) (5) as well, but no good reason argues why statements falling within the general exception should be admitted if an opportunity to depose has been foregone. Indeed, since this paragraph involves controversial evidence not within traditional exceptions, there is more, not less, reason to include it in (a) (5).

(b) **Hearsay Exceptions.** Rule 803, *supra,* is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

(1) *Former Testimony.* Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of the trier ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, *supra.* However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus, in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) *against* the party against whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, *i.e.,* by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. Testimony given at a preliminary hearing was held in *California v. Green,* 399 U.S. 149, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect. The opportunity to prepare will have to be examined in all cases, however.

Rule 804(b) (1), as submitted by the Supreme Court to the Congress, allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Congress concluded that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party; the sole exception to this is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. Congress amended the rule to reflect these policy determinations. Alaska Rule 804(b) (1) follows the lead of Congress, although several states have adopted the broader exception proposed by the Advisory Committee and approved by the United States Supreme Court.

It has been noted that the paragraph (b) (1) when read in conjunction with paragraph (a)(5) is more limited than Alaska R. Civ. P. 32 (a) (limited to depositions; broader definition of unavailability). *Cf.,* K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 731 (2d ed. 1977). This procedural rule remains effective, as does Alaska R. Crim. P. 15(e) (limited to depositions; virtually identical to Rule 801 (a) (5) & (b) (1) in application to depositions). These procedural rules "create of their own force exceptions to the hearsay rule in the case of unavailable deponents, which Rule 802 continues. Rule 804(b) (1) applies to depositions only to the extent that they are offered in a proceeding different from the one in connection with which they are taken." 4 Weinstein's Evidence ¶ 804(b) (1) [01] (1975). Rule 804(b) (1) amends the Federal Rule to make it clear that it does not cover depositions taken by parties in the same case that goes to trial.

It is important to keep in mind that Rule 801(d) (1) (A) may authorize admission of former testimony for its truth even when a witness is present. And Rule 801(d) (2) may do the same.

(2) *Statement Under Belief of Impending Death.* The exception is the familiar dying declaration of the common law, expanded beyond its traditional limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. *See* 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in *Rex v. Woodcock,* 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecution for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, at 224, n.4. While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory or admissibility applies equally in civil cases. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. *See* subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60-460(e); New Jersey Evidence Rule 63(5).

Federal Rule 804(b) (2) is limited to homicide cases and civil cases. While the United States Supreme Court approved a rule like Alaska's the Congress

limited the exception in the belief that dying declarations are not among the most reliable forms of hearsay and should only be admitted when necessary. Admittedly, there are problems with this exception; imminent death may distort perception, jumble narration and disrupt memory. At best, the prospect of death will generate sincerity. But once the balance is struck in favor of admission where the penalty is greatest, there is no reason to distinguish among classes of cases. It is difficult to defend the argument that dying declarations are more necessary in a homicide case than in an abortion prosecution. If the dying declarant is the only or best witness, any case with issues turning on the cause of the death needs dying declarations.

(3) *Statement Against Interest.* The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. If the statement is that of party, offered by his opponent, it comes in as an admission, Rule 801 (d) (2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary. The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick (2d ed.) § 277, at 671-72. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of common law to concede the adequacy of penal interest was no doubt indefensible in logic. *See* the dissent of Mr. Justice Holmes in *Donnelly v. United States,* 228 U.S. 243, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. Annot., 162 A.L.R. 456. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. *Cf.,* Rule 104(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Maine added a sentence to its declaration against interest exception: "A statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused, is not within this exception." Apparently, this was a response to the following comment by the Federal Advisory Committee on its rule:

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas v. Alabama,* 380 U.S. 415 (1965), and *Bruton v. United States,* 389 U.S. 818 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas,* the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton.* On the other hand, the same words, spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation. (multiple citations omitted).
Without deciding the confrontation question, it is fair to say that it is not highly probable that the Constitution will be read to allow one non-testifying defendant's declarations against interest made to the police to be used against another defendant. *But see, Dutton v. Evans,* 400 U.S. 74, 27 L.Ed.2d 213 (1970). Once the decision is made to cooperate with the government, statements by one accused are suspect if offered against another who refuses to cooperate. *Cf.,* Rule 410 and its Reporter's Comment. But declarations against interest made outside of the formal interrogation process may, and perhaps should, be treated differently. To the extent that they are truly disserving to the declarant and only tangentially refer to another, the statements may be thought to be reliable as to both. In custody, statements are difficult to classify as totally disserving; they are disserving, but often are made with a hope of some benefit. To the extent that the Advisory Committee suggests that even declarations against interest made in custody might be admissible against someone other than the declarant if the declarant does not testify, it is probably wrong. Such an approach would cut the heart out of *Bruton.* To the extent that it suggests that other declarations against interest might be admissible irrespective of whether the declarant testifies, it may be correct. This rule is not as quick to close the door to such statements as Maine's is, although it is not easy to imagine many statements intended to be against interest being made by participants in crime outside of custody.

Maine also added to its rule a provision qualifying statements tending to make the declarant an object of hatred, ridicule or disgrace as declarations against interest. Such a provision was found in earlier drafts of the Federal Rule.

Alaska Rule 804(b) (3) rejects this expansion because it is not clear whether the hatred, ridicule, or disgrace that the declarant must fear to qualify his statements under the hearsay exception must be widespread in the community, or in some subgroups, or can be limited to the person to whom the statement is made. Nor is it clear how intense the negative reaction must be thought to be. Proprietary, pecuniary and penal liability offer more objective criteria with which to work. Subdivision (b) (5) allows especially reliable statements to be admitted.

(4) *Statement of Personal or Family History.* The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. *See* 5 Wigmore § 1483, Item (A) specifically disclaims any need of firsthand knowledge respecting a declarant's own personal history. In some instances it is self-evident (marriage) and in other impossible and traditionally not required (date of birth). Item B deals with declaration concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. 5 Wigmore § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. 5 Wigmore § 1491.

For comparable provisions, see, Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

(5) *Other Exceptions.* In language and purpose, this exception is identical with Rule 803. See Reporter's Comment to that provision.

EDITOR'S NOTE: Section 3, Chapter 67, Session Laws of Alaska 1982, provides that "AS 12.45.047 added by sec. 2 of this Act [Chapter 67, Session Laws of Alaska, 1982] has the effect of changing Rule 804, Rules of Evidence, by adding the videotaped evidence of a young victim of a violation of AS 11.41.410 -- 11.41.455 to the list of exceptions to the hearsay rule."

Rule 805. Hearsay Within Hearsay.

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently

qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls within a recognized exception. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. Rule 403 may come into play, however, and lead the trial judge to exclude compound hearsay when it is more prejudicial than probative.

Rule 806. Attacking and Supporting Credibility of Declarant.

The declarant of a hearsay statement, or a statement defined by Rule 801(d)(2)(C), (D), or (E) as non-hearsay (throughout this Comment the reader should take the word "hearsay" to include these statements), which is admitted in evidence, is in effect a witness. The Supreme Court's confrontation cases make this point clear. *See, e.g., Douglas v. Alabama,* 380 U.S. 415, 13 L.Ed.2d 934 (1965); *Bruton v. United States,* 389 U.S. 818, 19 L.Ed.2d 70 (1968). His credibility should in fairness be subject to impeachment and support as though he had in fact testified. *See* Rules 608 and 609. This insures that hearsay declarants who are cross-examined in the presence of the jury are not presumed to be truthful while live witnesses are subject to attack. There are, however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. *See* Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, the benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. *E.g.,* McCormick (2d ed.) § 37. The cases, however, are divided. Cases allowing the impeachment include *People v. Collup,* 167 P.2d 714 (Cal. 1946); *People v. Rosoto,* 373 P.2d 867 (Cal. 1962); *Carver v. United States,* 164 U.S. 694, 41 L.Ed. 602 (1897). *Contra, Mattox v. United States,* 156 U.S. 237, 39 L.Ed. 409 (1895); *People v. Hines,* 29 N.E.2d 483 (N.Y. 1940). The force of *Mattox,* where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver,* where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent

HYPOTHETICAL NO. 1:

Mary and David are getting divorced. They have two children, a 10 year old boy, and a 5 year old girl. Both are represented by counsel and there is no custody investigation. Mary made serious allegations of abuse against David that resulted in supervised visitation for him. David has had three or four supervised visits that lasted approximately two hours each supervised by a paid, qualified, and neutral supervisor. The supervisor is prepared to say that: all visits have gone very well, the children's actions and behavior around David are all good, David speaks and interacts with them appropriately, and she sees no need for further supervision.

Mary is prepared to testify that the children come home wild and out of control, or angry and withdrawn, they both have nightmares for a night or two after a visit, the boy will be nervous and stutter after a visit, and the girl has woke up after a visit, saying "Daddy, stop", sometimes followed by giggling, sometimes by crying.

Assume all the applicable hearsay objections are made:

1. What do you do and why for the visitation supervisor's testimony?
2. What do you do and why for Mary's testimony?

HYPOTHETICAL NO. 2:

Assume the above facts, plus Mary has taken the children to a child therapist three days after their last visit with David. The therapist has seen each child for one visit, right after interviewing Mary for quite awhile to get history and background. David was not told of the counselor's appointment, nor has the counselor talked with him or the visitation supervisor. The therapist is prepared to testify that the children have told him things, through both play therapy and actual statements, that support Mom's position that supervised visits should continue, if the visits are not ended completely, which is what Mom wants.

statement is a *subsequent* one. Although it is true that the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition, the fact remains that he is deprived of cross-examining on the statement or along lines suggested by it.

One commentary on Federal Rule 806 is also apropos of the Alaska rule.

It would have been possible for the draftsmen of the Rule to distinguish situations outside of a formal judicial proceeding or deposition from proceedings where a witness is sworn and a formal statement is made and recorded, and to distinguish statements made prior to a judicial proceeding (including deposition) from those made afterwards. When a deposition is taken, for instance, it is possible to require that any party having knowledge of a statement made prior to deposing the witness and inconsistent with the witness' statement must give the witness a chance to explain the inconsistency at the deposition upon penalty of being unable to demonstrate the inconsistency at trial if the person who was deposed is unable to appear. The Advisory Committee rejected drawing this line between informal and formal statements on the ground that deposition procedures are cumbersome and expensive enough, and to require the laying of the foundation might impose undue burdens. Moreover, the Committee appears to have concluded that a distinction based on the timing of inconsistent statements was more complex than beneficial. The Committee was not inclined to adopt a general Rule requiring a foundation with an exception for special circumstances.

K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 634 (2d ed. 1977).

For similar provisions, *see,* Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60-462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

The Senate Committee on the Judiciary explained why the Rule does not cover statements defined by Rule 801 (d) (2) (A) & (B):

The committee considered it unnecessary to include statements contained in rule 801(d) (2) (A) and (B) -- the statement by the party-opponent himself or the statement of which he has manifested his adoption -- because the credibility of the party-opponent is always subject to an attack on his credibility.

The Alaska rule is in accord.

Assume all the applicable hearsay objections are made to the therapist's testimony.

1. What do you do and why?
2. Does your answer change if instead of a child therapist, the children repeat stories to an OCS social worker? Why?
3. Does your answer change if Mary told a neighbor her story, the children backed Mary's story up and Mary calls the neighbor to testify to what the children said?
4. Do your answers change if either party is unrepresented?
5. Do your answers change if both parties are unrepresented?

HYPOTHETICAL NO. 3:

Dad comes to a Master's courtroom with a request for a domestic violence protective order against Mom on behalf of their minor child. Dad's petition alleges that when he got home from work, the 9 year old child told him Mom had came home drunk and started throwing things, narrowly missing his (the child's) head. The babysitter, who was still at the house, confirms that Mom might have had a few drinks before she got home, but she cannot be absolutely sure. The babysitter also tells Dad that the child told her Mom had thrown a slipper at the aquarium and she did not come close to hitting the child. The babysitter was in another room at the time and did not see the exchange.

A check of court history shows the parties have filed at least two domestic violence cases against each other in the past 5 years. Dad is pro se, and brings the babysitter with him. What do you do?