A PROPOSAL TO REPLACE THE HEARSAY RULES

by Richard D. Friedman*

This essay proposes a set of rules to replace entirely the 800 series of the Federal Rules of Evidence, the hearsay rules, with a very different, and relatively compact, set of procedural rules. (The current hearsay rules run over 3000 words; the proposed rules run under 1000.) The change will improve truth-determination, make trials more efficient, and better protect the rights of criminal defendants and other parties. There would, of course, be some adjustment period for lawyers and judges as they get accustomed to a different system, but I am confident that would soon be easier to administer than the system we have now.

The basic perception underlying this proposal is that a core of the hearsay rule should be preserved by a stringent exclusionary rule and that, beyond that core, the law should be far more receptive to hearsay than it is now. That core is the principle that witnesses, particularly those who testify against an accused, must, absent consent, give their testimony subject to an opportunity for cross-examination and under other prescribed conditions. *Crawford v. Washington*[1] establishes that principle as a matter of constitutional law when the evidence is offered against an accused, but I believe that the principle applies, albeit with lesser force, in other contexts. Hearsay statements that are not testimonial, and indeed other conduct that is offered to prove the truth of a belief assertedly held by the actor, do not pose this problem. In some settings there might be good ground to exclude such evidence, but there is no need for a complex, categorical body of doctrine to govern the area.

The introduction to this essay explains why making such a dramatic change is justified and outlines the general ideas underlying the proposal. I then present each proposed rule and detailed comments in conjunction with each one.

The aim of this essay is simply to present and explain what I consider to be an ideal replacement for the current body of hearsay law. In drafting the proposal, I have made many subsidiary choices in addition to the most significant ones. Of course, if any jurisdiction does decide to revise its hearsay law along the lines I propose, its ultimate codification may differ in many respects, both large and small, from the one I present here.

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1. Crawford v. Washington, 541 U.S. 36 (2004).

I. PROBLEMS WITH THE HEARSAY RULE

The case for abolishing, or drastically reconfiguring, the rule against hearsay has been made many times. In fact, the rule has been virtually eliminated, especially in civil cases, in most of the common-law world.[2] But in American jurisdictions, the rule retains the form that has been dominant for two centuries – most notably, a presumptive exclusion of a broad category of evidence defined as hearsay, qualified by a long list of exemptions and the residual power of the court to admit hearsay on the basis of a case-specific assessment. This doctrine has numerous problems:

- The presumptive exclusion of hearsay impairs truth-determination in litigation. If live testimony by a person to a proposition would have substantial probative value, then so too does evidence that the person asserted the proposition. Such secondary evidence is generally not as optimal as live testimony, but so long as the trier of fact can take its weaknesses into account tolerably well, it will still be net beneficial in determining the truth.
- Though much of the rhetoric concerning hearsay doctrine is based on the assertion that jurors are unlikely to perceive the weaknesses of hearsay evidence, there is no empirical

2. David Sklansky's description of the situation is apt:

> Despite the encomia it has accumulated for generations, the hearsay rule gets little love today. Most lawyers, judges, and scholars, along with most laypeople who give the matter any thought, understand the dangers of secondhand testimony. They think the legal system should try to hear from witnesses directly. Nonetheless they are unlikely to defend the hearsay rule—with its esoteric formalism, its perplexing exceptions, and its arbitrary harshness—as the best way to guard against indirect evidence. Years of trial practice can sometimes give a lawyer a certain fondness for the oddities of hearsay law, but it is the kind of affection a volunteer docent might develop for the creaky, labyrinthine corridors of an ancient mansion, haphazardly expanded over the centuries. The charm arises largely from the elements of quirky dysfunctionality. Scholars, for their part, sometimes argue for preserving the hearsay rule, but almost always in a form very different from what we have today. About the best that anyone has to say for the hearsay rule in its traditional configuration is that it is the devil we know and have learned to live with, and that it has so many exceptions that perhaps it no longer matters.
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> Unsurprisingly, then, the hearsay rule has long been in decline, not just in the United States but everywhere. Britain, where the rule was first formulated, largely eliminated it forty years ago in civil cases and since then has drastically limited its scope in criminal cases—allowing judges to admit, for example, any hearsay statements by witnesses who are unavailable to testify at the time of trial. Other Commonwealth nations have taken similar steps.

David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1–2 (footnotes omitted).

basis for believing that jurors give such evidence too much weight, and by so much that exclusion of the evidence is better for the truth-determination process than is admission. Indeed, there is some reason to believe that jurors tend to *over*-discount hearsay.[3] In any event, arguments based on supposed juror incompetence do not explain why the rule against hearsay is implemented in bench trials.

- The rule adds to the expense of litigation in two ways. In some cases, it requires live testimony even though the proponent of the evidence would be satisfied to present cheaper secondary evidence and such evidence suffices for the needs of the adjudicative system. And in other cases, it requires wasted litigation effort, at both the trial and appellate levels, to determine that the evidence is admissible.
- Many of the social perceptions on which the rules purport to be based are at best dubious – for example, the perception that a person speaking while under the stress of a startling event, or on the edge of death, or to her doctor about her medical condition, is almost certainly telling the truth. The result is that the doctrine is often highly unpersuasive, making it a subject of manipulation rather than an actual generator of results. A body of law that operates well directs courts to reach sound results for good reasons. The hearsay rules do not do that. Often, if a court reaches a sound result in deciding a hearsay question, it is because the court has stretched the doctrine out of shape or ignored it altogether.
- The supposed bases on which much hearsay is exempted from the exclusionary rule—reliability of the evidence and need for it—are misconceived. The rules do a poor job of sorting out categories of evidence that are particularly reliable. More significantly, reliability is an inappropriate criterion for admissibility. Truly reliable evidence is very rare; trials consist primarily of unreliable evidence (including most notably live testimony of eyewitnesses), and it is the job of the trier of fact to do its best to determine the truth from the mass of evidence presented to it. As for

3. *See, e.g.*, Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149, 1154–55, 1166–68 (2003).

need, there is always a need for evidence that will help the truth-determination process more than it will hurt.

- The rules are extremely complex. They create confusion among bench, bar, and the public. They do not articulate any principle worthy of respect. And often they require courts and lawyers to go through intellectual contortions to reach a result—admissibility of the evidence—that should have been reached on simpler grounds and would have been obvious had there been no hearsay rules.
- Ironically, the rules do only a fair job of excluding the type of hearsay evidence for which exclusion *is* important. The decision of the United States Supreme Court in *Crawford* highlighted the fact that there is special reason to be concerned about out-of-court statements that are testimonial in nature; indeed, *Crawford* and its progeny establish that the *only* out-of-court statements that raise an issue under the Confrontation Clause of the Sixth Amendment to the United States Constitution are testimonial ones.

II. THE CORE WORTH PRESERVING: ENSURING PROPER CONDITIONS FOR TESTIMONY

The reason why only testimonial statements raise a Confrontation Clause problem is clear and important to understand in considering reform of the hearsay rules. For centuries, the norm in common-law litigation has been that witnesses testify face-to-face with the adverse party, under oath and subject to cross-examination, and if reasonably possible at open trial. Suppose then that a statement is not made in compliance with these conditions and that it is testimonial in nature, which for present purposes may be understood to mean that it was made with the understanding that in all likelihood it would be used in litigation. Admitting it as evidence effectively allows creation of a system in which a witness may testify without submitting to the conditions long required for proper testimony.

This principle is not only older than the rule against hearsay, but it lies at the core of what is worth preserving of that rule. Indeed, if one tries to come up with an illustration in which admission of hearsay would be clearly inappropriate, it is very likely to be testimonial hearsay, and probably offered against a criminal defendant. Two consequences follow: First, it is important to protect the exclusionary rule for testimonial statements made out of court, at least when offered against an

accused, and any set of evidentiary rules that fails to do so will be unconstitutional to that extent. Second, evidentiary rules can and should be far more receptive to *non*testimonial hearsay than they are now.

Proposed Rule 802, the first of the three substantive rules proposed here (proposed Rule 801 offers definitions), therefore provides a general rule of exclusion for the relatively narrow category of out-of-court testimonial statements offered to prove the truth of what they assert. Even when such evidence is offered against a criminal defendant, there are certain limitations to the exclusionary rule: The rule does not apply if the witness (that is, the person who made the testimonial statement) testifies live at trial in accordance with the statement and is then subject to cross-examination; if the defendant has had an adequate opportunity for cross-examination on another occasion and the witness is unavailable to testify live at trial; if the defendant forfeits the right to insist on live testimony by engaging in serious misconduct that has the foreseeable consequence of rendering the witness unavailable to testify live; or if the defendant waives the right to insist on live testimony by failing to make a timely demand though given adequate notice of the prosecution's intention to introduce secondary evidence. These same limitations apply when the evidence is offered against a party other than a criminal defendant. In addition, the proposal contains a provision applicable only in such other contexts that effectively puts the burden on the opponent of producing the witness if the proponent is not substantially better able than the opponent to do so and the proponent has taken such reasonable measures as may have been possible to facilitate the opponent's ability to cross-examine the witness.

III. BEYOND TESTIMONIAL STATEMENTS: THE ORDINARY EXERCISE OF DISCRETION

If a statement is not testimonial, then under the proposal there is no general rule of exclusion. Rather—as with most evidence that does not involve any matter of right or principle other than the need for accurate, fair, and efficient determination of the facts—admissibility should depend on the discretion of the trial judge, as provided under the general principles articulated in Federal Rules of Evidence 401 through 403. Indeed, if anyone examining this proposal worries that it leaves a great deal of discretion to the trial judge, one simple answer is that it only extends to the area of non-testimonial statements the general discretion that trial judges have had for centuries across most of the vast range of

evidence. (Another simple answer is that Rule 807, the residual exception, already gives them enormous discretion.)

For that matter, the hearsay rules have not been applied in this country, at least for several decades, to the area of what is often (and misleadingly in my view) called non-assertive conduct – evidence of conduct that, without actually asserting a proposition, appears to demonstrate that the actor believed in the truth of a proposition and that is therefore offered to prove that the proposition is true. And yet such evidence may be very dubious, because it may be highly ambiguous. If (to draw on the well-known case of *Wright v. Tatham*[4]) a neighbor writes Marsden asking him to take a role in a local dispute, does that indicate that the neighbor thought Marsden was mentally competent? Could it be instead that the neighbor was just following form and knew that the letter would be read and acted on by Marsden's steward? And even if the neighbor thought Marsden was incompetent, couldn't her perception and memory on that score have been inaccurate, just as with any hearsay declarant? Notwithstanding these problems, such evidence is now governed by the ordinary discretionary rules, not by the dense categorical structure of hearsay law. Under the proposal, apart from testimonial statements, the same non-doctrinaire approach would be extended to what is now termed hearsay. This change means that the proposed rules do not need to adopt a definition of hearsay at all—and the proposal does not even use the term (though for convenience, some of my comments do).

To say that non-testimonial out-of-court statements, and other conduct offered to prove the actor's belief, are not excluded by a categorical doctrine does not mean that they will necessarily be admitted. That decision may depend on numerous factors, including how probative the evidence appears to be; how prejudicial it might be; how important it is to the litigation; how difficult and costly it would be to make the actor a live witness; whether the proponent is substantially better able than the opponent to produce the actor as a live witness; and whether the proponent has given the opponent notice of intent to introduce the evidence.

IV. A PROCEDURAL DEVICE: MITIGATING THE RISK OF PRODUCING A HOSTILE DECLARANT

Proposed Rule 803 offers a simple procedural device that would facilitate such decisions. This rule is based on a rather striking disparity: If a person testifies live to a significant proposition, the opponent will

4. Wright v Tatham (1838) 7 Eng. Rep. 559 (UKHL).

usually ask some questions on cross-examination. But if instead secondary evidence of that person's statement is presented, and the person does not testify live as part of the proponent's case, the opponent will rarely attempt to produce the person as the opponent's own witness; doing so is too risky. Accordingly, this rule provides in effect that if the proponent wishes to introduce such secondary evidence, but the opponent produces the person in a timely manner, the proponent cannot use the secondary evidence without putting the person on the stand and asking for testimony concerning the proposition and the basis for the person's belief with respect to it. (The rule is not limited to hearsay. In accordance with the comments in Part III above, it applies more generally to evidence of a person's conduct offered on the basis that the conduct tends to prove a proposition by showing that the person believed the proposition to be true. And it applies however the person may come to appear in court, though the usual basis for invoking the rule would be production of the person by the opponent.)

In many cases, this rule would make admission of hearsay a more appealing option to the court, because it would shift to the opponent the burden of producing the declarant in court without otherwise impairing the opponent's ability to cross-examine her. The court might tell the opponent, in effect: "The proponent is satisfied to introduce secondary evidence of what the declarant said, and that evidence appears to me to be more probative than prejudicial. So, I'm inclined to admit it. But if you tell me you want to bring the declarant in, be my guest. I'll set a date and time, and assuming you get her in by then, if the proponent still wants to use the evidence, he'll have to put her on the stand as part of his case and ask what she remembers. I'll decide in light of her current testimony whether the prior statement should be admitted, and in any event you will then have a chance to cross-examine just as if your adversary had brought her to court."

V. YOUNG CHILDREN: SOURCES OF EVIDENCE BUT NOT WITNESSES

I believe that proposed Rules 802 and 803, along with the general principles established in Rules 401 through 403, provide a complete basis for satisfactory resolution of what have been deemed hearsay issues with respect to adult declarants. Proposed Rule 804 addresses the problem of children. It is based on the principle that some very young children are insufficiently developed cognitively, and perhaps morally, for them to

play the role of witnesses.[5] Their out-of-court statements are unlikely to possess the solemnity—meaning in this context appreciation of the nature and gravity of potential consequences—ordinarily characteristic of testimony. And it is inappropriate and likely self-defeating to attempt to impose on them the responsibility and ordeal of acting as a witness in court. But even though such children should not be characterized, or treated, as witnesses, they may nevertheless be valuable sources of evidence. Admissibility of their statements should be determined according to the general standards stated in Rules 401 through 403. A party against whom tangible evidence is offered would ordinarily have an opportunity to examine the evidence out of court through a qualified expert. Similarly, a party against whom a child's statement is admitted should have an opportunity to have a qualified expert—presumably a psychologist—examine the child out of court according to a pre-determined protocol. This procedure would be less traumatic than testimony in open court. It would not require the adjudicative process, in its attempt to determine the truth, to sacrifice potentially valuable information offered by the child, and it would give the party opponent a far better tool than cross-examination in court for assessing the child's credibility.

VI. PROPOSED RULES AND NOTES

With that background, I now offer my proposed rules, and a note on each one. I have written the notes as if the proposal were adopted and the notes were presented by the drafters or adopting authority. (Pardon my hubris.) I step out of character only in footnotes.

Rule 801. Definitions.

The following definitions apply to this article:

(a) The proponent is the party offering evidence.
(b) The opponent is the party against whom the evidence is offered.
(c) A statement is testimonial if a reasonable person in the position of the person who made the statement would realize at the time of making the statement that there is a substantial probability that the statement would be

5. *See* Richard D. Friedman & Stephen J. Ceci, *The Child Quasi Witness*, 82 U. CHI. L. REV. 89 (2015). The same considerations might apply to some cognitively impaired adults.

used in litigation concerning a particular transaction or occurrence or series of transactions or occurrences.

(d) A witness is a person who has made a testimonial statement.

(e) A witness is unavailable at a proceeding if the witness:

(1) is exempted from testifying about the subject matter of the witness's statement because the court rules that a privilege applies;
(2) refuses to testify about the subject matter despite a court order to do so;
(3) testifies to not remembering the subject matter;
(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the witness's attendance at the proceeding, or the witness's testimony under oath, subject to cross-examination and in the presence of the opponent.

But if the proponent wrongfully caused the asserted unavailability to prevent the witness from attending or testifying, then the witness shall not be deemed unavailable.

Note

This Rule contains definitions of terms used in the substantive rules of this Article. The definitions of proponent and opponent in subsections (a) and (b), respectively, are mechanical. Subsection (c) defines testimonial statements, using an objective test from the perspective of the declarant. Subsection (d) makes clear that a person who makes a testimonial statement is a witness; the term witness is therefore used in proposed Rule 802. Subsection (e) incorporates a definition of unavailability closely modeled on the one stated in current Fed. R. Evid. 804(a).

The proposal does not use the term "declarant" because there is no need for it under the proposal. If a statement is testimonial in nature, then the person who made it is a witness. Non-testimonial statements are treated in the same way as other conduct offered to prove the truth of a belief that the proponent contends is indicated by the conduct.

Rule 802. Testimonial Statements.

(a) Subject to the provisions of section (b) of this rule, if a statement made out of court is testimonial, evidence of it may not be admitted to prove the truth of a matter that it asserted.

(b) Section (a) of this rule does not apply if:

(1) the witness testifies at the current proceeding in accordance with the out-of-court statement and the party against whom the evidence is offered has an opportunity to cross-examine the witness; or

(2) the witness is unavailable to testify at the current proceeding, other than through the fault or procurement of the proponent or the proponent's agents, and

(A) the opponent has had, or will have, an adequate opportunity to cross-examine the witness; or

(B) (i) the opponent engaged or acquiesced in serious misconduct; (ii) it was reasonably foreseeable at the time of the misconduct that the misconduct would render the witness unavailable to testify at a subsequent proceeding; and (iii) the misconduct has had that effect; but this provision shall not apply to the extent that, notwithstanding the misconduct, the proponent or the proponent's agents could have taken reasonable measures that would have afforded the opponent an adequate opportunity to cross-examine the witness; or

(3) No later than the date that is two weeks prior to the time the proceeding is scheduled to commence, or such other date prescribed by the court, the proponent gives the opponent notice of the proponent's intention to introduce the evidence, describing the evidence with particularity, and

(A) the opponent does not file an objection by the date that is one week prior to the time the proceeding is scheduled to

commence, or such other date prescribed by the court; or

(B) (i) the evidence is offered in a civil case or by the accused in a criminal case; (ii) the proponent is not substantially better able than the opponent to produce the witness as a witness at the proceeding; (iii) the proponent has taken such reasonable measures as may have been possible to preserve, to the extent reasonably possible, the ability of the opponent to cross-examine the witness; and (iv) the witness has not appeared at the proceeding, able to testify, by a time designated by the court.

Note

This rule expresses the traditional principle of common law jurisprudence: that witnesses testify face-to-face with the opposing party, under oath and subject to cross-examination, and if reasonably possible, at open trial. It also states traditional qualifications to this principle, and adds one cost-shifting device, not to be used against a criminal defendant.

Subsection (a) states the basic, categorical rule—a constitutionally required one with respect to evidence offered against a criminal defendant—against admitting out-of-court testimonial statements.

Subsection (b) states qualifications to this principle.

Clause (b)(1) provides that there is no restraint on introduction of an out-of-court testimonial statement if the witness who made the statement testifies as a live witness in accordance with the statement. As presented here, the provision applies only if the witness testifies "in accordance with the out-of-court statement." Even when the evidence is offered against a criminal defendant, this limitation is not necessary, under *Crawford v. Washington*, 541 U.S. 36 (2004), to satisfy the Confrontation Clause; it suffices if the witness testifies at trial, even if not in accord with the prior statement. But if the witness does not testify to the substance of the prior statement, the opponent's ability to cross-examine may be severely impaired. *See, e.g.*, Richard D. Friedman, *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277. Accordingly, as a matter of policy this requirement should be maintained. It would not demand, as a precondition for admitting a forensic laboratory report, that the lab technician who performed the test testify to remembering the results of the particular test; it would suffice if the technician were able to

testify to a practice of performing a given type of test according to a prescribed routine and that the given report resulted from that routine.

Clause (b)(2)(A) states the well-recognized rule, reaffirmed by *Crawford*, that a prior testimonial statement may be admitted if the witness who made the statement is unavailable and the opponent has an adequate opportunity to cross-examine, such as at a deposition *de bene esse*—that is, one held for the purpose of preserving testimony.[6]

Clause (b)(2)(B) states the forfeiture principle: Even in the absence of an opportunity for cross-examination, unavailability of the witness may provide a basis for admissibility of the out-of-court testimonial statement if the unavailability was the foreseeable result of serious misconduct on the part of the opponent. This clause, however, includes a mitigation requirement on a "last clear chance" theory: Even if the opponent's wrongdoing rendered the witness unavailable to testify at trial, that should not guarantee admissibility if the proponent has available, but forgoes, reasonable measures to preserve the opponent's opportunity to cross-examine the witness. Suppose, for example, that the accused mortally wounds the witness, but the witness lingers for a period of weeks, in a conscious and alert state. The prosecution could reasonably take the witness's deposition to preserve their testimony. *See, e.g.*, *Rex v. Forbes* (1814) Holt 599, 171 Eng. Rep. 354. Accordingly, the prosecution should not be allowed simply to stand by knowing that if the witness dies before trial it will be able to introduce a statement the witness made privately to police investigators.

Note that the proposal does not include a separately stated "dying declaration" doctrine. Forfeiture doctrine should suitably cover the dying-declaration cases, and on a more persuasive basis than that of the traditional dying-declaration exception, which is based on a perception that dying people would not lie about the cause of their imminent demise. Applicability of forfeiture doctrine would require a preliminary finding that the opponent's wrongdoing is responsible for the unavailability of the witness. This is not problematic, even if the opponent is charged in the same litigation with the very criminal conduct that allegedly rendered the witness unavailable. The situation is much the same as the everyday one in which a court, in a conspiracy case, makes a preliminary finding of a conspiracy as a predicate for admitting a statement as one made by a conspirator of the accused. *See* FED. R. EVID. 801(d)(2)(E).

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6. As drafted, this provision does not define what is and is not an adequate opportunity for cross-examination. More detail could of course be provided, or the matter could be left entirely to later determination. I do not believe that a deposition taken by a criminal defendant for the purpose of discovery should suffice. *See, e.g.*, State v. Lopez, 974 So. 2d 340 (Fla. 2008). The question is closer when the evidence is offered against another party.

Under *Giles v. California*, 554 U.S. 353 (2008), applicability of the forfeiture doctrine against an accused would usually, at least outside the context of dying declarations, require that the misconduct was designed to render the witness unavailable. *Giles* and *Crawford* suggest that the Confrontation Clause would tolerate the results prescribed by the proposed rule, without a showing of such design, if the case fit within the traditional dying-declaration exception.

Clause (b)(3)(A) is a simple notice-and-demand provision. The Supreme Court has approved provisions of this type in principle, even as against a criminal defendant, in the context of forensic laboratory reports. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326–27 (2009). There is no good reason why such a provision ought not extend to other contexts. The Clause provides that if the proponent gives prescribed notice of intent to offer evidence of an out-of-court testimonial statement, the opponent must state any objection by a prescribed time.

Clause (B)(3)(B) goes beyond clause (b)(3)(A), and beyond traditional procedures, but it does not apply in the context of evidence offered against an accused. (This provision would be unconstitutional as applied against an accused. *Melendez-Diaz*, 557 U.S. 305 at 324–25.) Under this provision, if the proponent gives the prescribed notice, then in certain circumstances a testimonial statement ought to be admissible even absent an opportunity to cross-examine, forfeit, or consent.

The basic idea is that if the opponent is substantially as able as the proponent to produce the witness, then, given that the proponent is satisfied to present the out-of-court statement and that the statement is more probative than prejudicial, or at least not substantially more prejudicial than probative (for otherwise it would be excluded by Rule 403), the burden ought to be placed on the opponent to produce the witness. At the same time, proposed Rule 803 means that the consequences at trial for the opponent of producing the witness are the same as if the proponent had produced them.

The effects of proposed Clause (b)(3)(B) may be assessed by considering three types of cases:

(1) *The opponent could reasonably produce the witness but decides not to.* Given that the proponent is satisfied to rely on the out-of-court statement, and the opponent is as able to produce the witness as is the proponent, but has decided not to, there seems to be no good reason why the out-of-court statement ought not be admitted. In this setting, the proposal could create considerable cost-savings.

(2) *Neither party could produce the witness.* If the witness is dead or otherwise completely unavailable, then the proponent

is of course no more able than the opponent to secure the witness's live testimony, and Clause (b)(3)(B) would usually apply, assuming sufficient notice. In this setting, it would allow the testimonial statement to be admitted against an opponent who is not a criminal defendant even though the opponent has not had an opportunity for cross-examination. But the court must take care to ensure that, at such time as the witness was available, the proponent did not forgo reasonable opportunities to secure the witness's testimony. This includes taking a deposition *bene esse* if the witness was known to be in failing health, to preserve the opponent's ability to cross-examine her. (There would be no expectation of such a deposition if the witness died suddenly, without warning.) If the prerequisites of Clause (b)(3)(B) are met, it seems better to have the benefit of the statement than to do without it altogether.[7]

(3) *The opponent does produce the witness (or somehow else the witness appears timely).* By its terms, Clause (b)(3)(B) would not provide an exception to the exclusionary rule. Instead, proposed Rule 803 would apply, and presumably the proponent would put the witness on the stand as the proponent's own; if the proponent declined to do so, the statement would not be admissible.

Thus, if a proponent is able to satisfy the first three subdivisions of Rule 802(b)(3)(B), then either: (1) the witness will not be produced, in which case subdivision (iv) is satisfied and an exception to the exclusionary rule applies; or (2) the witness will be produced, in which case the proponent may either put her on the stand in accordance with the procedure prescribed by Rule 803 or forgo use of the statement.

To make use of Clause (b)(3)(B), a proponent who starts in a better position than the opponent to produce the witness may even the situation out. For example, if the proponent alone knows the identity or location of the witness, the proponent may eliminate this advantage by giving the information to the opponent. Or if a witness beyond the subpoena power is friendly with the proponent but hostile to the opponent, the proponent might secure a written promise by the witness that if the opponent arranges and pays for transportation the witness will appear at the proceeding prepared to testify.

7. That conclusion is debatable, of course, and if it is not accepted the Clause may be dropped or limited without undermining the rest of the proposal.

No exclusionary rule beyond testimonial statements. As summarized above, this proposed Rule 802 states an exclusionary rule, with prescribed exceptions, for out-of-court testimonial statements. The proposal states no comparable exclusionary rule for evidence of non-testimonial statements or of other conduct offered to prove the truth of a proposition that appears to be reflected in the conduct. Accordingly, the usual standards for admissibility apply to such evidence. In particular, unless there is some other ground of exclusion, the standards of Rule 403 would apply, and the evidence should be admitted unless its probative value is substantially outweighed by countervailing factors.

In making its decision, the court should consider all material factors, including how probative the evidence appears to be; how prejudicial it might be; how important it is to determination of the action; how difficult and costly it would be to make the actor whose conduct (whether a statement or not) a live witness; whether the proponent is substantially better able than the opponent to produce the actor as a live witness (which, if so, would render Clause (b)(3)(B) inoperative); and whether the proponent has given the opponent notice of intent to introduce the evidence or otherwise facilitated the opponent's ability to produce the actor. *See generally* Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883 (1991); Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992). The procedure prescribed by proposed Rule 803 may help facilitate such decisions.

Rule 803. Procedure when a person whose conduct may prove the truth of the person's belief appears and is able to give live testimony.

> If (a) a proponent wishes to introduce evidence of a person's conduct on the basis that the evidence tends to prove a proposition because it shows that the person believed the proposition to be true, and
> (b) the person appears in timely manner at the proceeding, able to testify, then
> (c) the evidence is not admissible unless the proponent first calls the person as a witness and asks the witness whether the proposition is true and the basis of the witness's belief, or unless the interests of justice otherwise require.

Note

This proposed Rule should be read in conjunction with Clause (b)(3)(B) of proposed Rule 802, but it is broader in scope. Proposed Rule 802(b)(3)(B),

an exception to the exclusionary rule for testimonial statements, only applies when such statements are offered by a party other than a prosecutor, and only when the proponent gives notice to the opponent. This proposed rule has no notice provision and applies more generally, not only to testimonial statements but to any conduct, including but not limited to hearsay as now defined, that is offered on the basis that it demonstrates the actor's belief in a proposition and so tends to make the proposition more probable. Proposed Rule 802(b)(3)(B) comes into force when the actor does not appear at the proceeding (though it may provide an incentive for the opponent to produce the actor); this one comes into force when the actor does appear.

The basic idea is to diminish the cost to the opponent, in terms of litigation risk, of producing the actor as a live witness; that diminution makes it more appealing to admit the conduct, leaving the opponent with the option of bringing the actor to court.

Under prevailing law, when hearsay is admissible, the opponent has the option of calling the declarant as the opponent's own witness, but this virtually never happens. The principal reason is that doing so is highly risky: The declarant has made a statement harmful to the opponent, and calling the declarant as the opponent's witness requires focusing the jury's attention on that fact once again, during the opponent's own case, and raising expectations that the examination will yield some dramatic change in what the declarant has to say. On the other hand, if the declarant were to testify live, the opponent would routinely ask at least some questions on cross-examination. Thus, the need to make the declarant one's own witness clearly inhibits the ability of the opponent to secure the ability to examine her.

This rule corrects the problem. Its primary application is to what has been termed hearsay, but the rule avoids that term, and this Note speaks principally of conduct and an actor, rather than of a statement and a declarant, because the rule is not limited to what has been deemed hearsay and does not depend on definition of the term "statement." As noted above, this rule applies whenever the out-of-court conduct of a person is offered on the basis that the conduct (whether the making of a statement or not) tends to prove that the person believed a proposition to be true and therefore tends to prove that the proposition is true.

The rule gives the opponent the option of producing the actor, ready to testify, but without having to put the actor on the stand. Even if production of the actor is feasible, the opponent may decline the option, though the consequence may be admission of the conduct: The opponent may affirmatively prefer that evidence of the conduct be admitted rather than that the actor appear as a live witness. And even if that is not so, the

opponent might decide that the trouble and expense of producing the actor are not worthwhile.

When hearsay is admissible under prevailing practice, the opponent is essentially told, "The proponent is satisfied to introduce hearsay, and the judicial system is satisfied to admit it. Accordingly, it is appropriate to put the burden on you to produce the declarant. And if you want to examine her, you must call her." Part of the effect of the proposed rule is to replace the last sentence with: "And if you do so, either you will get to cross-examine her after direct examination by the proponent, as in ordinary course, or the evidence will be excluded."

The rule does not specify how the actor comes to appear in court, and so it would apply however she does; she might, for example, appear on her own initiative or on the court's own motion. The rule would most often operate, however, when the presence of the actor is secured by the opponent. And most often it would come into play if the opponent knew in advance—perhaps, but not necessarily through formal notice—of the proponent's intention to offer the evidence of the prior statement or other conduct.

Suppose, then, that an opponent with such advance knowledge objects to admission of the evidence of out-of-court conduct or makes a motion to suppress it, and suppose that the court rules that the evidence appears to be admissible. If the opponent would prefer admissibility of the evidence to live testimony of the actor or does not believe that the benefit of securing the live testimony would be worth the effort and expense, the opponent need do nothing at that point. But if the opponent would prefer to produce the actor, invoking this rule, the opponent ought to announce that intention to the proponent and the court. The court can then determine a time by which the actor must be present for the rule to become effective.

If the actor is present at that time, the proponent is then put to the choice: (1) The proponent may put the actor on the stand as the proponent's own witness and ask for the ~~proponent~~'s recollection of the event or condition at issue. After the witness answers that question—perhaps in accordance with the prior statement or other conduct, perhaps at variance with it, and perhaps by claiming inability to remember—if the proponent still wishes to introduce the evidence of the prior conduct, the court can determine whether it ought to be admitted. That determination should depend in large part on the incremental probative value of the conduct, given that the live testimony of the actor has already been received. (2) The proponent might decide not to put the actor on the stand. But that decision should ordinarily lead to exclusion of the prior statement or other conduct, because the proponent has proven unwilling to present as the proponent's own witness the person who made the

statement or otherwise engaged in the conduct in question, even though doing so would be essentially costless to the proponent. (Accordingly, when the opponent announces intention to bring the actor in, the court might, to avoid wasted effort, ask the proponent to confirm that if the opponent does so in a timely manner the proponent will in fact put the actor on the stand. If the proponent declines to make that commitment—afraid that the actor would not be a good live witness—the court should probably exclude the evidence in most cases.)

The rule does not impose on the proponent any burden of giving notice, but if the court determines that the opponent did not know of the evidence until too late to produce the actor, and the proponent could easily have given notice, the court might take that into account in determining admissibility of the evidence.

Further ramifications of this proposal are considered in Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883 (1991).

Rule 804. Statements and other conduct of children.

(1) A child under the age of [six] shall not be deemed to be competent to testify as a witness at trial or other judicial proceeding, nor shall the statements of such a child be deemed to be testimonial within the meaning of Rule 802.
(2) If a party wishes to present evidence of the conduct of a child under the age of [six] on the basis that the evidence tends to prove a proposition because it shows that the child believed the proposition to be true,
    (A) the proponent must give the opponent sufficient notic of that intention for conduct of the examination prescribed by this rule; and
    (B) the opponent shall have the option of designating a qualified expert to conduct an out-of-court examination of the child, according to rules and procedures prescribed by [the court].

Notes

This rule proceeds on the basis that some very young children simply do not have the cognitive development to be deemed witnesses within the meaning of the Confrontation Clause or more generally for jurisprudential purposes. At the same time, the statement or other conduct of a child offered to prove that the child believed a proposition to be true, and that the proposition therefore was more likely to be true, may be extremely valuable evidence. The model appropriate for adult witnesses—live

testimony, including cross-examination, at trial—is inappropriate for very young children. This rule provides another model, one that is more likely to lead to accuracy in factual determinations, more protective of the rights of accused persons and others against whom the evidence is offered, and less traumatic to the child. *See* Richard D. Friedman & Stephen J. Ceci, *The Child Quasi Witness*, 82 U. CHI. L. REV. 89 (2015).

Most very young children[8] lack sufficient understanding of consequences of their conduct, of the states of mind of other people, and of the workings of the world, for their out-of-court statements to be deemed testimonial. Whether the evidence of their statements or other conduct is good evidence is an entirely different question. If a party wishes to present such evidence, it must give advance notice. The opponent may then cause the child to be examined out-of-court by a qualified expert chosen by the opponent.

The examination would be conducted according to a prescribed protocol.[9] The protocol should set limits on the scope and method of the examination. It should provide that the examination be videotaped. Ordinarily, no one should be present at the examination other than the child and the examiner (though it may be appropriate during an introductory period for another person to be present, to make the child more comfortable). Counsel for the proponent and the opponent ought to have the ability to observe the examination, but they should not be allowed to intervene except on consent or with the permission of the court; ideally, the court would also observe the examination, or at least be within telephonic reach.

Final determination of admissibility of the evidence of the child's conduct ought not be made until after conduct of this examination. If the proponent is allowed to introduce such evidence, then the opponent would argue that he ought to be allowed to introduce the testimony of the expert, and if appropriate of other experts, using as appropriate excerpts from the examination. But the proposed rule makes no determination on this, leaving it instead to the general rules governing admissibility of expert evidence. In any event, if either party introduces excerpts from the examination, Rule 106, the rule of completeness, might allow the opposing party to introduce other excerpts.

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8. The rule as proposed uses a flat cutoff of six years of age. But the proposal puts the word "six" in brackets, because another age could be used, or the cutoff could be made more complex, taking into account other factors besides age that indicate the child's development.

9. The proposal calls for the protocol to be prescribed by the court in the particular case, but that choice is bracketed, because there are other possibilities: The rule itself could be drafted to include a general protocol, or the Supreme Court or other rule-creating entity in the jurisdiction could establish such a general protocol separately, or it could delegate to some other body the responsibility to determine the protocol.