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# Evidentiary Failures: A Structural Theory of Evidence Applied to Hearsay Issues

Thomas J Reed

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*Thomas J. Reed*†

> I, Alexandre Manette, unfortunate physician, native of Beauvais, and afterwards resident in Paris, write this melancholy paper in my doleful cell in the Bastille, during the last month of the year 1767.[1]

## I. Introduction

So began Manette's denunciation of Lord Evremonde. Madame Defarge and her husband offered this hearsay document to convict Charles Darnay du St. Evremonde, Lucy Manette's husband, of a crime against the Revolution meriting the guillotine. Charles Dickens began his professional life as a barrister's clerk. He knew that an English court would not admit Manette's self-serving hearsay declaration against Charles Darnay's father and uncle. Only a revolutionary tribunal that ignored questions of relevance and reliability would have used this twenty-year-old document to establish Darnay's collective guilt for the sins of his father.[2]

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The author is also grateful for the incisive comments of Professor Edward J. Imwinkelried, who reviewed an earlier draft of the manuscript.

1. CHARLES DICKENS, A TALE OF TWO CITIES Book III, ch. x. Because so many different editions of this book exist, this Article cites only to the Book numbers and chapter numbers.

2. The document would not have been admissible in a common law court because Dr. Manette was available as a witness. First, although properly authenticated by Mr. Defarge, who was a self-appointed expert on handwriting, it did not qualify as an ancient document

The hearsay rule excludes unreliable out-of-court statements made by people who are usually not under oath.[3] Hearsay is presumptively unreliable, and the party offering hearsay has to demonstrate the reliability of the hearsay offered. In the course of reflecting on hearsay, a new way of approaching and solving evidentiary problems has come to light and will be applied to hearsay issues in this Article.

First, this Article presents a theoretical discussion of a four-step structural analysis that will be applied to three different cases. Judges and lawyers instinctively go through this four-step analysis whenever any objection is made to introduction of evidence. When the trial judge fails to go through all four steps before ruling, the result may be an evidentiary failure that could affect the outcome of the trial. The four-step analysis is a new approach to evidentiary analysis and will cause a revision in thinking about the hearsay questions raised by all three cases.

Second, this Article examines three evidentiary failures. Charles Darnay's trial in Dickens' *A Tale of Two Cities* is compared with two major hearsay cases that define the outer limits of documentary hearsay admissibility. This examination is based on the trial transcripts for *Palmer v. Hoffman*[4] and *Beech Aircraft v. Rainey*.[5] *Palmer* stands for the rule that self-serving hearsay cannot be admitted on the strength of a business records exception to the hearsay rule just because the hearsay was created and kept in the ordinary course of business.[6] *Rainey* stands for the corollary that hearsay opinion evidence contained in an otherwise reliable government investigative report cannot be excluded as improper opinion.[7] Both cases represent evidentiary failures that affected the outcome of the trial.

This Article asserts that in all three cases the courts' actions amounted to evidentiary failures. The revolutionary court erred in admitting Manette's denunciation by failing to consider the hearsay rule at all.

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since it was less than thirty years old. Second, Dr. Manette's professional business was medicine not identification of the perpetrator of a crime, making his document ineligible for admission as his shopbook record.

3. 5 JOHN H. WIGMORE, EVIDENCE § 1361 (Chadbourne rev. 1974).

4. 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

5. 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).

6. *Palmer*, 318 U.S. at 109.

7. *Rainey*, 488 U.S. at 153.

The *Palmer* court erred in excluding the engineer's unsworn statement as hearsay, although the statement may have been excluded on grounds of lack of probative value. Finally, this Article concludes that the *Rainey* court failed to reject the investigating officer's hearsay opinions, by failing to consider the probative value of the investigating officer's opinions balanced against prejudice to the opposition. The trial court also failed to allow the jury to consider the entire text of John Rainey's letter to the investigating officer. These conclusions are intended to demonstrate the analytical method presented in Part II and to show its explanatory power for any evidentiary issue.

# II. Structural Analysis of Evidence Issues

## A. Prologue

Evidence is part of the legal structure for dispute resolution. Long ago, theorists recognized that legal rules were either substantive or adjective, and evidence falls into adjective law.[8] Evidence is a major part of adjective law. Adjective law also includes civil and criminal procedure, post-trial and appellate procedure, alternative dispute resolution and trial law.[9]

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8. JOHN J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE § 3, at 2-5 (5th ed. 1944).

9. Professor Alexander Tanford coined this term to cover the legal limitations on jury size and composition, the regulation of jury selection, opening statements and closing argument. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 7-9 (2d ed. 1993).

A word or two on the structure of adjective law is in order. Civil Procedure defines how a lawyer invokes the judicial process to settle a conflict, the limitations on lawyer behavior in setting up the facts of the case and gathering information with the aid of the court, and how to dispose of a lawsuit without a trial.

Criminal procedure defines how an offender is brought into the criminal justice system. It also regulates the degree to which an offender must cooperate in his own conviction. Criminal procedure regulates the way in which the State and the offender gather information about the other's case, as well as disposal of a criminal prosecution without trial.

Trial procedure governs behavior of counsel and litigants during factfinding hearings before judge or jury. The evidence rules form the greater part of trial procedure, although trial procedure also governs jury qualification and selection, opening statements, closing argument and the formulation of instructions on the law of the case. Evidence controls how the parties make the record on which all participants in the trial process must depend to win or lose the trial.

Post trial procedure defines what litigants can do after the factfinding hearing ends and the litigants, or some of them, unsatisfied with the results. Post trial procedure also regulates how a disappointed litigant can get another group of judges to take a second look at the case. Finally, post trial procedure regulates the process by which litigants argue motions and appeals from adverse judgments.

Adjective law does not define or regulate any substantive right or duty of any person, as do torts, contracts, or property. Instead, adjective law describes how substantive rights and duties of persons are to be determined and enforced. Adjective law is not an analysis of human rights and duties conferred by constitution, statute, rule or custom. Instead, adjective law is an analysis of the serious game by which disputes are resolved. Unless adjective law is studied as a very complicated game that is played in order to settle an argument, the learner misses the point. Evidence amply illustrates the conceptual problem posed by a series of legal game rules that give no substantive right nor prescribe no substantive duty.

Evidence law is exceedingly difficult to learn because the law of evidence is taught in a conceptually incoherent way. Most law students treat evidence law as a static pile of rules that prohibit lawyers from doing some things in court, qualified with apparently endless exceptions and limitations. Students do not see any rational relationship between each rule of evidence, other than that most evidence rules exclude some kind of data from the jury. This attitude towards evidence carries over after graduation. Lawyers and judges confess they do not understand evidence law and do not understand how to apply the rules of evidence to concrete situations in the court room.[10]

## 1. Wigmore's Original Taxonomy

Scholars attempted to give some structure to evidence at the inception of organized scholarly research on adjective law. In the late nineteenth and early twentieth century, Dean John Henry Wigmore worked out

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10. *See, e.g.*, Reed v. State, 438 So. 2d 169, 170 (Fla. Dist. Ct. App. 1983). The trial judge in *Reed* expressed his confusion about the state of mind exception to the hearsay rule:

> Well, how do you—how do you get around—I know that expression, I have heard it a hundred times and I have never understood what it means. We don't offer this for the truth for what it was said, but for the state of mind of the declarant that it was said. If you don't—to me it's so obviously hearsay that the State or the other party cannot rebut it insofar as the state of mind or the truthfulness or anything else. I don't understand, I have never understood what that rule means, I am sorry, I am obtuse, I remember it in law school. It came across once a week, but I have never understood what it means.

*Id.* at 170.

an elaborate evidentiary taxonomy using very precise definitions. Wigmore's evidence taxonomy is seldom used today because his system of thought is so difficult to master.[11]

Wigmore believed that all logically relevant data were admissible in evidence.[12] The trier of fact should consider all facts having rational probative value unless excluded by "rules of auxiliary probative policy"[13] or "rules of extrinsic policy."[14] Relevance was not a rule about admissi-

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11. Wigmore's taxonomy began by dividing the law of evidence into four "books": I. Admissibility of Evidence, II. By Whom Evidence is Presented, III. To Whom Evidence is Presented, IV. Propositions Needing No Evidence. JOHN H. WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT COMMON LAW lxvii-lxix (2d ed. 1935).

12. 1 JOHN H. WIGMORE, EVIDENCE § 9 (2d ed. 1923).

13. 1 *Id.* § 10. Wigmore makes the following descriptive definition of rules of auxiliary probative policy:

> Assume, then, that these principles of Relevancy have been satisfied, and that certain facts, so far as concerns their logical bearing and probative value, have passed the gauntlet and are evidentially worthy to be considered. There still may remain for them another gauntlet to pass. They may be amenable to certain other rules, applicable to specific classes of evidential material, and designed to strengthen here and there the evidential fabric and *to secure it against dangers and weaknesses pointed out by experience*. These Auxiliary Rules have nothing to do with Relevancy as such, *i.e.*, regarded as the minimum requirement for Admissibility. They assume Relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers; that is, the do not, as do the rules of Relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable. . . .
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> These rules of Auxiliary Probative Policy, then, form a set of rules over and above and independent of the rules depending on the Principles of Relevancy. They are distinguished from the rules of Relevancy (Part I) in resting not upon an analysis of the process of inference, but upon artificial expedients designed to avoid common dangers irrespective of the nature of the inference and affecting in common various kinds of evidence resting upon various inferences.

2 *Id.* § 1171.

14. Wigmore describes rules of extrinsic policy as follows:

> The rules of Admissibility of evidence, as already pointed out, fall into three general groups: first, those which determine the probative value, or Relevancy, of circumstantial and testimonial evidence, —that is, the fundamental quality without which no evidential data are to be allowed to be considered by the jury; secondly, those Auxiliary Rules of Probative Policy which impose artificially some added conditions of admissibility, but are directed solely to improving the quality of proof and strengthening the probabilities of ascertaining the truth as a result of the investigation; and thirdly, the present group—those rules which rest on no purpose of improving the search after truth, but on the desire to yield to requirements of Extrinsic Policy. They forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering.

bility, but the statement of a logical condition precedent before applying the rules of evidence to the data. In general, then, relevant data would be admissible unless excluded by some rule. Wigmore's first evidentiary rule stated that data had to have a higher degree of probative value to be submitted to a jury than would be the case in "ordinary reasoning."[15] Therefore, for Wigmore, relevance was a combination of logical relationship of the data to the inductive proof of a fact at issue and a preliminary assessment of the strength or probative value of the data with respect to that fact.[16]

According to Wigmore, relevance was the result of the process of judicial proof. A proposition at trial could be proven only one of two ways. The first way was to present the thing itself that proved a proposition, such as a murder weapon, or to present data from which the trier of fact could infer that the proposition was correct. Wigmore included real evidence,[17] jury views and documents[18] in the first way that he labeled "autoptic proference."[19] Wigmore believed that no question of relevancy could arise about autoptic proference; however, any other data submitted to the court instead of the thing itself, would provoke a relevance issue.[20]

This led Wigmore to state the second way in which propositions were proved. For example, independent data could be submitted by which the trier of fact could infer the existence of a fact, either by the assertion of a human being or by any other fact that would lead to an inference of the fact to be proved. The first way Wigmore labeled "testimonial" or "direct evidence," and the second way was labeled

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> The rules of this last class thus differ from those of the second class, in that their effect is to obstruct, not to facilitate, the search for truth, and in that this effect is consciously accepted as less harmful, on the whole, than the extrinsic disadvantages which would ensue to other interests of society if no such limitations existed.

4 WIGMORE, *supra* note 12, § 2175 (citations omitted).

15. 1 WIGMORE, *supra* note 12, § 28.

16. *Id.*

17. Real evidence is defined as physical objects that are associated with the events of the case. BLACK'S LAW DICTIONARY 1264 (6th ed. 1990).

18. WIGMORE, *supra* note 11, at 224. When evidence cannot be brought into court, the jury may be moved to view the evidence.

19. *Id.* at 223; *see also* BLACK'S LAW DICTIONARY 134 (6th ed. 1990).

20. WIGMORE, *supra* note 11, at 223.

"circumstantial" or "indirect evidence."[21] Wigmore believed that evidence rules worked like a gate valve, permitting some data to be reviewed by the jury, but excluding other data on three grounds: (a) lack of sufficient probative value,[22] (b) an internal judicial administration policy rule precluding that kind of data,[23] and (c) external social and political policy rules that excluded the data.[24]

This general framework for reviewing evidence rules also suggests an algebraic relationship between each component, which could have led Wigmore to a dynamic theory of evidence that accounted for judicial behavior, but the connection does not seem to have occurred to Dean Wigmore.

## 2. Wigmore's Taxonomy Followed By Others

Professor Morgan adopted Wigmore's three principles of evidentiary law and his taxonomy as the structural armature for the 1942 Model

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21. 1 WIGMORE, *supra* note 12, § 24, at 222.

22. 2 *Id.* §§ 1864, 1904.

23. 2 *Id.* §§ 1177-80. Rules of auxiliary probative policy, including preferential rules such as the best evidence rule. 3 *Id.* §§ 1360-63 (analytic rules, *e.g.*, the hearsay rule); 3 *Id.* §§ 1813-15 (prophylactic rules, *e.g.*, the necessity of the oath); 4 *Id.* §§ 1917-22 (some simplicative rules such as the opinion rule); 4 *Id.* §§ 2056-62 (synthetic rules, *e.g.*, required corroboration of complaining witnesses); 4 *Id.* §§ 2128-30 (authentication of documents).

24. The rules of extrinsic policy, *e.g.*, the privilege against self-incrimination, 4 WIGMORE, *supra* note 12, §§ 2183-84, 2250-84; attorney-client privilege, 5 *Id.* §§ 2290-92; husband-wife privilege, 5 *Id.* §§ 2232-34; state secrets, 5 *Id.* §§ 2367-78; physician-patient, 5 *Id.* § 2380; and priest-penitent, 5 *Id.* § 2304.

To make this synthesis work, Wigmore had to follow Professor James Thayer and exclude all rules about presumptions from his system of evidence. Presumptions, for Wigmore, were rules of substantive law masquerading as evidence:

> First and foremost, *the rule is in no sense a rule of Evidence*, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process, —the process of believing one fact on the faith of anther. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. (ante, § 2). But this prohibition of proving it is merely the dramatic aspect of the process of applying the substantive rule of law.

WIGMORE, *supra* note 3, at 236.

Rules of Evidence.[25] Scholars since 1942 have structured their evidence treatises around the Model Rules or the Federal Rules of Evidence adopting, implicitly, Dean Wigmore's theoretical structure of the law of evidence.[26]

Since Dean McCormick's 1954 student evidence text, student textbook writers have adopted the 1942 Model Evidence Code's organizational principles as the general framework for their text books and case books.[27] The 1974 edition of the Uniform Rules of Evidence, the basis for the 1975 Federal Rules of Evidence, were framed to fit the original 1942 model rules and are structurally similar to the organizational scheme of the 1942 Model Rules.

### 3. The Uniform and Federal Rules of Evidence

A brief examination of the Federal Rules of Evidence confirms the impression that Wigmore's structural model provided the basis for the Federal Rules. For example, Rule 401 ratifies Wigmore's original 1913

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25. Professor Morgan declared that

> [a] code of evidence should concern itself primarily with admissibility, and in this respect it should be complete in itself. Consequently it should begin with a sweeping declaration that all relevant evidence is admissible, that no person is incompetent as a witness and there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it. Then it should set up specific exceptions to this fundamental rule. The Code follows this plan.

EDMUND M. MORGAN, *Forward* to MODEL CODE OF EVIDENCE 11 (American Law Inst. ed. 1942).

Although Morgan had much to say about Wigmore's framing of the hearsay rule on the principle that the judge, as trier of the law, filters out unreliable data so the jury will not consider such data in arriving at a verdict, he adopted the alternative rationale that hearsay is inadmissible because the witness cannot be cross-examined, which is a variation on Wigmore's original approach. *Id.* at 36-37.

26. *See, e.g.*, MCKELVEY, *supra* note 8, § 5-9 (following Thayer, his mentor, and schematizing evidence as the law limiting the jury's access to relevant data on grounds of social and judicial policy).

27. *See, e.g.*, RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES (3d ed. 1991); EDWARD W. CLEARY ET AL., EVIDENCE CASES AND MATERIALS (4th ed. 1988); ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES AND MATERIALS OF EVIDENCE (1983); CHARLES T. MCCORMICK ET AL., CASES AND MATERIALS ON EVIDENCE (7th ed. 1992); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES (2d ed. 1993); JACK B. WEINSTEIN ET AL., EVIDENCE CASES AND MATERIALS ON EVIDENCE (8th ed. 1988).

notion of logical relevance.[28] Wigmore's model offers compelling authority to the statement in Uniform Rule 402 that "[a]ll relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible."[29] Uniform Rule of Evidence 402 adopts Morgan's foreword to the 1942 Model Rules, which was rooted in Wigmore's earlier discussion of relevance. Wigmore's rules of auxiliary probative policy and extrinsic policy are dutifully grouped into emulations of his original subsections in Rules 401 through 1006, although not in precisely the same order as Wigmore would have used.[30]

In short, contemporary American evidence law has been shaped by Wigmore's original taxonomy. Judges, lawyers and scholars perceive the evidence rules as a series of limitations on otherwise logically relevant evidence arising out of rules derived from a long history of judicial reflection on the probative value of various types of data[31] and legislatively grafted rules excluding evidence to accomplish some political

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28. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

29. UNIF. R. EVID. 402 (1974).

30. For example, the Federal Rules of Evidence have no rules about autoptic proference because Wigmore asserted that there were no relevance issues raised by autoptic proference. The remainder of the rules represent his organizational scheme modified by Professor Morgan and by political compromises:

(a) Rule 201 covers judicial notice, which Wigmore deemed a substitute for evidence;

(b) Rules 301-302 cover presumptions applicable in Federal practice;

(c) Rules 401, 402 and 404 through 406 reflect his testimonial evidence rules on circumstantial evidence to prove a human act;

(d) His testimonial rules on capacity are covered by Rules 601 through 606;

(e) His simplicative rules are in part covered by Rules 611 through 613;

(f) His rules on testimonial impeachment are reflected in Rules 607 through 610;

(g) Rules 701 through 704 represent his simplicative rules on opinion evidence;

(h) Rules 801 through 805 are his analytic hearsay rules;

(i) Rules 901 and 902 cover his synthetic rules on authentication of documents, while Rule 903 dispenses with the older synthetic rules Wigmore cited on preferences for attesting witnesses;

(j) Rules 1001 through 1006 reflect his original classification of preferential rules for documentary originals; and

(k) Rule 403 is a reflection of his simplicative rule for exclusion of evidence on grounds of confusion of issues and undue prejudice. *See* FED. R. EVID. 201-1006.

31. *E.g.*, Auxiliary rules of probative policy.

end.[32] Evidence rules reflect the general principle that all logically relevant data are admissible unless excluded by a specific rule. Contemporary thinkers have not followed Wigmore's requirement that, in order to be admissible, logically relevant data must carry something more than the persuasive power of such data in everyday affairs. The Federal and Uniform Rules fail to specifically mention data that would have been classified by Wigmore as autoptic proference since Wigmore held that such data were inherently relevant enough to be admissible. The main operational day-to-day evidence rules consist of two types of limitations on admissibility: (a) those derived from internal judicial policy considerations such as the rule banning hearsay or the rule requiring production of an original document as the best evidence of the document's contents; and (b) those derived from external policy rules excluding data to accomplish some economic or social goal, such as the rule against admissibility of offers of compromise or settlement.

So far, no commentator has tried to explain how these rules operate in the court room or how to account for a judicial decision to either admit or exclude evidence. Wigmore's taxonomy is a remarkably well-reasoned scientific classification of the discrete evidence rules generated by the common law. This insightful classification permits further theoretical factor analysis that may explain how an evidentiary decision is really reached by trial judges.

The first principle to contemplate is that evidence is not a static body of doctrinal law. Rather, evidence is part of the adjective game rules for litigation. Therefore, a factor analysis of evidence must take into account the relationship between relevance, policy, and probative value. Modern theorists have apparently failed to see the importance of Wigmore's concept of additive probative value.[33] This failure explains

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32. *E.g.*, Extrinsic rules of social policy.

33. Commentators, however, are not unanimously in favor of this position. Reinstating Wigmore's proposition of additive probative value, usually referred to as "legal relevance," must be done within the framework of the Federal and Uniform Rules of Evidence, which control admissibility in federal courts and the courts of 34 states. JACK B. WEINSTEIN ET AL., EVIDENCE: RULES, STATUTE, AND CASE SUPPLEMENT iii (1992). Rule 403 offers the greatest opportunity for reinstatement of the principle of additive value. However, a majority of the commentators that have examined Rule 403 hold that Rule 403 cannot legitimately be used to exclude otherwise relevant data by re-evaluating the credibility or reliability of the data. *See, e.g.*, Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*

judicial behavior excluding from the jury otherwise relevant data that are not excludable on policy grounds.[34]

## 4. The Purpose of Evidence Rules

Evidence rules have one purpose: regulation of the basis for the decision of the trier of fact in a hearing, whether that hearing is a jury trial, a bench trial, a preliminary hearing or an administrative factfinding hearing. Evidence rules limit what a lawyer can do for the client during trial because the rules prohibit the trier of fact from hearing certain information. The rules accomplish this prohibition by denying data to the trier of fact. The judge is the enforcer who ensures that the lawyers follow the rules. Since the trier of fact must make a decision based upon data that are part of the official record of the proceeding, evidence rules efficiently curb a lawyer's behavior in court. The evidence rules

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41 VAND. L. REV. 879, 886-87 (1988). Imwinkelried lists eight federal decisions prior to 1988 that restricted trial judges from excluding evidence by weighing credibility under Rule 403, and three cases that support independent evaluation of credibility. *Id.* at 886. Imwinkelried also notes that other commentators have rejected the view that Rule 403 permits credibility evaluation, and presents the most compelling argument for a restrictive interpretation of Rule 403. *Id.* (citing 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5220 (1993)). Wright and Graham assert that to do so would usurp the function of the jury, which is instructed that it is the sole judge of the witness's credibility. 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5220 (1993). However, limiting judicial balancing to the menu set forth in Rule 403 restrains the trial judge's discretion to exclude evidence to a list of undue prejudice to one's opponent and internal housekeeping matters such as waste of time and confusion of the issues has been rejected by other scholars. *See, e.g.*, JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 403[01] (1993) (stating that a judge may consider extrinsic policy); Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556 (1984) (stating that the admissibility of "other crimes evidence" should be analyzed on a sliding scale, with the standard of proof of other crimes directly relating to the danger of prejudice). Judge Weinstein's position is very close to that of Wigmore.

34. This author agrees with Imwinkelried's position that the Federal and Uniform Rules of Evidence are a closed system admitting no common law of evidence, unless specifically authorized by rule or statute to do so. For instance, Federal Rule of Evidence 501 specifically permits the law of privileged communications to grow by common law accretion. This author asserts that Wigmore's principle of additive relevance survives in Rule 403. Rule 403, in this author's estimation, requires more than a quick review of undue prejudice and housekeeping matters; rather, it requires the trial judge to balance or to scale both positive probative value and negative factors or downside risk and determine on the whole whether the probative value of the data offered is not seriously offset by other concerns. Probative value is made up of relevance and reliability, and as this Article illustrates later, reliability corresponds to Wigmore's concerns of intrinsic policy. Thus, the trial judge must weigh the credibility of witnesses and out-of-court declarants to determine probative value in the first place.

also indirectly curb the behavior of the trier of fact by confining the trier of fact to data that have passed a preliminary test defined by the rules.

This leads to a definition of evidence that is highly useful in reviewing the dynamic operation of the trial judge in the court room and the judge's interaction with counsel and the jury.

## B. Defining Evidence

Wigmore and other great evidence commentators recognized that evidence drives the factfinding process at the hearing.[35] In the traditional court room, the judge controls the factfinding process by limiting what the jury may consider in making an historically accurate reconstruction of the actual events. The jury must reach a verdict only on data that are part of the official record of the proceedings.[36] The rules of evidence limit what matter can be part of the record.[37] Consequently, an accurate definition of evidence can be formulated.

Evidence is datum that becomes part of the record of the proceedings.[38] The objective of taking evidence is to make an historically accurate reconstruction of the major events at issue.[39] The accuracy

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35. 1 WIGMORE, *supra* note 12, at xiii-xvi; *see, e.g.*, SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 3 (1842) (16th ed. 1892); JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 263-65 (1892).

36. One need only consider the cases involving juror misconduct when a jury member allegedly considers some information not made part of the record at trial in reaching a verdict. *See, e.g.*, Smith v. Covell, 100 Cal. App. 3d 947, 161 Cal. Rptr. 377 (1980) (holding juror communicating own experience with back ache to other jurors improper); Heaver v. Ward, 68 Ill. App. 3d 236, 386 N.E.2d 134 (1979) (holding juror's private inspection of scene of accident improper); People v. Crimmins, 26 N.Y.2d 319, 258 N.E.2d 708, 310 N.Y.S.2d 300 (Ct. App. 1970) (holding individual juror's visits to crime scene improper); State v. DeMille, 756 P.2d 81 (Utah 1988) (holding that juror's statements to other jury members about a private religious revelation informing her the defendant was guilty did not constitute extraneous prejudicial information and therefore could not be used to attack the jury verdict).

37. FED. R. EVID. 402.

38. Of course, this definition also holds for minor courts in which no written record of proceedings is taken down, such as Delaware Justice of Peace Courts. In such inferior courts, the factfinder is the lay justice, who is confined to the data he is willing to consider. Serious defects may exist in the rules of evidence employed by a lay justice in defining what that justice will consider, but the equation holds.

39. This is the traditional goal of the trial process. This Article from time to time refers to the traditional function as the inquest function. Several commentators have expressed that

of the reconstruction stands or falls on the quality of the data admitted to the record.

However, the judge does not automatically screen data put forward by the witnesses and exhibits in determining whether the data should be part of the record. Instead, the judge must wait until one of the parties complains of a "foul" and asks for a ruling. That, of course, is what an objection accomplishes at trial. Theoretically, unless one side or the other complains about data brought into court, trials are conducted without any rules of evidence. A record can contain data known by all parties to be inadmissible. A record can also support a verdict that is dependent upon inadmissible data so long as no party objected to admission of the data.[40]

## C. The Evidence Process

When a litigant objects to admission of evidence, the judge goes through a four-step process in assessing whether the game rules for the trial have been violated.[41] The process requires the judge to determine an evidentiary violation in an orderly fashion by making the following four mental considerations before ruling:

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the primacy of the inquest function of the trial has obscured or overshadowed more important social functions such as public acceptance of verdicts, particularly in criminal prosecutions, where the verdict serves as a didactic deterrent to future criminal behavior, or catharsis achieved by the parties to litigation through the trial's unfolding dramatization of their contentions. The principle spokesperson for the former position is Professor Charles Nesson, who provides a compelling statement of the position for the didactic value of jury verdicts in the community. *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). Professor David Leonard ably argued that the cathartic view of the trial process could co-exist with the truth-seeking function of the trial process. David Leonard, *The Use of Character Evidence to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 31-41 (1987). However, both the didactic and cathartic functions of the trial process, real as they may be, depend for their social and dramatic value on the slow, painstaking presentation of the data that will allow the trier of fact to figure out what really happened on the day in question.

40. This is, of course, the doctrine of preservation of error for the record. FED. R. EVID. 103. *See, e.g.*, John R. Waltz & John Kaplan, *Making the Record*, *in* EVIDENCE 38-39 (7th ed. 1992); 2 FRED LANE, GOLDSTEIN'S TRIAL TECHNIQUE § 13.01 (3d ed. 1985); TANFORD, *supra* note 9, at 178.

41. This analysis excludes the important role played by other elements of trial law, such as improper voir dire examination of jurors or attorney misconduct during opening statement or closing argument, in limiting attorney behavior and calling for rulings by the judge on attorney misconduct. While important in themselves, these elements of trial law are secondary to the evidence rules that control what the jury may consider in reaching a verdict.

### 1. Relevance

Logically irrelevant data are inadmissible. Thus, the datum objected to can be excluded solely because it is irrelevant without further consideration of other evidence rules. The judge determines what the data prove and how that proof is related to the case. Irrelevant data are inadmissible.

### 2. Reliability

Assuming the judge finds the data relevant, the judge must then determine whether the data are reliable. This step corresponds to a military intelligence officer's assessment of the reliability of intelligence agents. Data that come from a source that is unreliable—that is, usually wrong and probably false—should be excluded. Assessment of reliability is an extremely important step in the evidence process. Data that are otherwise relevant can be excluded if the judge finds that the data are unreliable. Reliability analysis surfaces again in the fourth step, when the judge makes a final assessment of probative value.[42]

### 3. Public Policy

Assuming the judge finds that the data offered are both relevant and reliable, the judge must then determine whether the data are barred by a public policy rule. This step requires the judge to assess known policy limits on data at trial, such as the rules granting privileges against self-incrimination, to see whether the data are barred by policy.

### 4. Probative Value

Finally, assuming the data to be relevant, reliable, and not barred by a policy rule, the judge has to weigh the probative value of the data

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42. This view is consistent with Imwinkelried's position that the Federal and Uniform Rules of Evidence are a closed system, because the fourth analytical step requires a relative assessment of the strength of the data (probative value) and downside risk (undue prejudice and judicial housekeeping). *See* Imwinkelried, *supra* note 33, at 884-88. A judge correctly following the fourth step does not reject evidence based on credibility considerations. The judge reassesses reliability in order to determine probative worth and applies that subjective assessment against the subjective assessment of downside risk in Likert scale fashion.

against other factors. These balancing factors include prejudice against the opponent, confusion of the issues, and waste of time that may arise if the data are put before the jury. The probative value assessment is a double assessment. First, the judge considers the source of the data, its relative reliability, and the limits of public policy that may permit data of this kind to be admitted, despite general restrictions on similar data. After assessing probative value, the judge must measure any prejudice to the opponent, waste of time, confusion of the issues and of the jury. The judge has the power to exclude otherwise relevant, reliable data not barred by public policy if, on the whole, the probative value of the evidence is greatly exceeded by prejudice and waste of time.[43]

Upon reflection, this four-step process has apparently resulted in an algebraic equation. The equation leads to the judge's decision to admit or not to admit data to the record.

The equation is $A + B + C + D = 1$

Let A = logical relevance;
B = source reliability;
C = extrinsic social policy; and
D = assessment of probative value and undue prejudice, confusion and waste of time.

Each factor in this equation is an integer. Any datum that does not satisfy this equation is not fit to become part of the record and is, therefore, inadmissible. Furthermore, once the judge finds that the data fail to meet any of the linear requirements or factors, the judge stops any further assessment because the identity equation cannot be completed.[44] Thus, irrelevant data are rejected without a source reliability

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43. These considerations are laid out in Federal Rule of Evidence 403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403. This is consistent with Imwinkelried's limitation on judicial rejection of data under Rule 403. No data are rejected under this analysis simply because of lack of credibility, or its impact on extrinsic social policy. However, datum that passes the initial screening for reliability and extrinsic social policy may have low probative value because it barely cleared those hurdles due to source unreliability considerations. That would affect the trial judge's subjective rating of probative value.

44. Of course, the judge will not consider any objections that opposing counsel does not present. *See* FED. R. EVID. 103(a)(1). If opposing counsel objects to data based on relevance

assessment or a policy review, and relevant data from an unreliable source are rejected without a policy review, and so on.

## D. Classifying the Rules of Evidence

The evidence equation dictates that Wigmore's classification of the common law and codified Uniform or Federal Rules of Evidence is viable, but the labeling needs to be changed in order to reflect the dynamic process by which evidence decisions are made.

### 1. Relevance

First the trial judge determines if the data have any relevance to the case. After an objection, the trial judge will often ask counsel at side-bar for an offer of proof showing the data's relevance.[45] The one rule on relevance incorporated into Federal Rules of Evidence 401 and 402 is that unless data tend either to prove or disprove some issue at stake in the matter, including the believability of witnesses, the data are irrelevant and thus inadmissible. So-called "legal relevance" rules are social policy rules excluding data that are logically relevant to achieve some policy objective.[46]

### 2. Reliability[47]

The trial judge then makes an assessment of the reliability of the source of the data. The judge considers the competence of the in-court

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or reliability but fails to object on policy or probative value grounds, the judge will ordinarily not consider policy or probative value grounds for rejecting the data.

45. *See* FED. R. EVID. 103(a)(2) (providing that a party cannot predicate error for a ruling to exclude evidence when the court was informed of the substance of the evidence). According to the Advisory Committee note, Rule 103(b) "is designed to resolve doubts as to what testimony the witness would have in fact given." FED. R. EVID. 103(b) (Advisory Committee's Note). It also provides the trial judge with a material aid to evaluating the data offered and reaching a sound conclusion on admissibility.

46. *See* CARLSON, *supra* note 27, at 118.

47. This presentation divides Wigmore's rules based on intrinsic social policy. Most of his intrinsic social policy rules are source reliability rules and are treated as such here. A few intrinsic policy rules are dealt with under probative value versus prejudice assessment.

witness and the authenticity of any document or physical object offered. In the case of a document, the judge further considers whether the original has been submitted and whether the data are hearsay, opinion, offered to refresh a witness's recollection, or offered to impeach the witness's credibility.

### a. Competence

The first assessment must be the competence of the witness The four-pronged common law test for competence[48] is a test of reliability of the witness. The Federal Rules of Evidence have preserved two[49] of the four prongs by specific rules. Rule 602 requires witnesses to testify from first hand knowledge, unless they are experts.[50] Rule 603 requires witnesses to take an oath to tell the truth or otherwise indicate that they understand the penalty for lying on the witness stand.[51] Some rules masquerade as competence rules but reflect social policy, such as the rule forbidding jurors or the judge to be witnesses in the matter they are trying and the rule preventing jurors from impeaching their verdicts.

### b. Authenticity of Physical Objects Associated With the Case

If the data offered are physical objects associated with the case, the judge has to assess the authenticity of the physical objects.[52] The judge

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48. *See, e.g.*, Hill v. Skinner, 81 Ohio App. 375, 79 N.E.2d 787 (1947) (holding a child witness competent after voir dire examination showed child had first hand knowledge, had recollection, could communicate, and knew duty to tell truth).

49. No rules relate to the ability to recall what one has observed at first hand, nor on ability to communicate what one remembers. Rule 601 may have unintentionally done away with these two prongs of the common law rule on competency.

50. Rule 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602.

51. Rule 603 states that, "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." FED. R. EVID. 603.

52. According to Wigmore, relevance is established by source reliability for data submitted autoptic proference. If the data are reliable, their relevance is unquestioned. 4 WIGMORE, *supra* note 3, § 1151.

is handicapped in making this assessment because the Federal Rules of Evidence do not contain specific rules for establishing the authenticity of real evidence,[53] maps,[54] charts, models, demonstrations and experiments,[55] jury views,[56] and demeanor of witnesses.[57] Since the jury may consider all such items in reaching a verdict, the judge must deal with any objection by applying decisional law construing Rules 104, 401, and 901 by analogy.

The Federal Rules do provide a series of examples of proper foundations for admission of photographs, oral conversations and documents.[58] The judge can evaluate the reliability of the source through which a document comes into court by quick reference to Rule 901 or 902, if appropriate.

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53. Fungible objects require proof of chain of custody to ensure that the physical object has not been mishandled. *See* Trichoce v. State, 525 A.2d 151 (Del. 1987) (offering a sound analysis of chain of custody under the Uniform Rules).

54. A map is admissible if it aids an oral witness in presenting testimony, and if it is shown to be a fair and accurate representation of the area mapped. *See, e.g.*, Crocker v. Lee, 74 So. 2d 429 (Ala. 1954).

55. The Federal Rules of Evidence do not state the legal requirements for admission of in-court or out-of-court demonstrations or experiments. Generally, an in-court or out-of-court demonstration will be permitted if the conditions of the demonstration are substantially similar to the actual event to be replicated. *See, e.g.*, United States v. Wanoskia, 800 F.2d 235 (10th Cir. 1986) (in-court demonstration); Hall v. General Motors Corp., 647 F.2d 175 (D.C. Cir. 1980) (out-of-court crash test).

56. Decisions conflict on whether or not a jury view is evidence. Functionally, the jury may use what it learns by a jury view as grist for decision-making, and that would seem to make jury views evidence. That seems to be the current federal position. *See, e.g.*, Price Bros. v. Philadelphia Gear Corp., 649 F.2d 416 (6th Cir.), *cert. denied*, 454 U.S. 1099 (1981). Other jurisdictions, on policy grounds, hold that a jury view is not evidence but is only a way to allow the jury to better understand the evidence. *See, e.g.*, Uhrig v. Coffin, 72 Idaho 271, 240 P.2d 480 (1952).

57. The jury is always permitted to consider the demeanor of witnesses in assessing their credibility. *See, e.g.*, DEVIT BLACKMAR'S JURY INSTR. Juries can consider demeanor for other purposes, such as proof of age. *See, e.g.*, Watson v. State, 140 N.E.2d 109 (Ind. 1957); State v. Thompson, 365 N.W.2d 40 (Iowa Ct. App. 1985).

58. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a). Rule 901(b) gives a non-exclusive list of foundation examples for documents, photographs and oral conversations. *See* FED. R. EVID. 901(b). Rule 902 describes ten kinds of "self-authenticating" documents (for example, foreign public documents not under seal that do not require any foundation showing authenticity to be admitted). *See* FED. R. EVID. 902(3).

### c. Best Evidence

The best evidence rule is also one of the classical source reliability rules. In general, the reason that the rule requires producing an original when the contents of the document are to be proved is because of the alleged danger of fraud on the court worked by inaccurate copies or the unreliable memory of witnesses to the document.[59] The judge, when invited to do so by proper objection, must evaluate all documents against the best evidence rule.

The modern version of the best evidence rule included in the Federal Rules of Evidence permits admission of duplicates instead of an original when no serious question is raised as to the authenticity of the document.[60] Secondary evidence of contents of a document may be given if the absence of the original is satisfactorily explained.[61]

### d. Hearsay

The hearsay rule is one of the most important source analysis rules. An out-of-court statement offered in court to prove the truth of the statement is inadmissible unless an exception to the rule exists that permits introduction.[62] Since anywhere from twenty-seven to one hundred specific hearsay exceptions may exist, another way to state the law on hearsay is to assert that unreliable hearsay is inadmissible.[63] Hearsay is often deemed reliable and subsequently admitted.

### e. Foundation Objections

A foundation objection is preliminary and curable, assuming that a sponsoring witness can supply the missing foundation. However, the

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59. *See, e.g.*, Seiler v. Lucasfilm, Ltd., 797 F.2d 1504 (9th Cir.), *modified*, 808 F.2d 1316 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

60. FED. R. EVID. 1003.

61. FED. R. EVID. 1004. Officially, there are no preferences for different types of secondary evidence. FED. R. EVID. 1004 (Advisory Committee's Note).

62. FED. R. EVID. 802.

63. Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 291 (1981); *see also* Irving Younger, *Everything You Wanted to Know About Hearsay*, videotape lecture to the ABA Section on Litigation (Montreal, P.Q., July 13, 1976).

only way that a judge can assess the reliability of a document or any hearsay statement is by way of questions and answers that demonstrate the reliability of the document or statement.[64] Once the judge has what he deems a proper question and answer foundation for testing an exhibit or conversation, he then rules on admissibility.

### f. Opinion

Opinion evidence offered by a lay witness is admissible if founded upon first hand observation of events and deemed helpful to the jury.[65] These two qualifications illustrate the fact that the lay opinion rule is a source evaluation rule. The rules surrounding expert witnesses are also source evaluation rules. Other source evaluation rules include the rule requiring a reliability assessment of the underlying scientific process by which an expert will reach an opinion and the rules requiring the basis in fact for expert opinion to be the kind of basis used by similar experts.[66]

### g. Refreshing Recollection

Rule 612 is a source evaluation rule that concerns refreshing the memory of the witness. Almost anything can be used to refresh recollection, but the opponent is entitled to see what is being used, to have it for purposes of cross-examination, and to introduce it into evidence

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64. Federal Rules of Evidence 104(a) and (c) require the judge to decide preliminary questions of admissibility either before the jury or outside the presence of the jury. The foundation for admission of evidence is the stuff of which the preliminary determination will be formed.

65. FED. R. EVID. 701.

66. Currently, this rule is explicitly labeled as a reliability rule. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 320, 121 L. Ed. 2d 240 (1992). Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

provided it is otherwise admissible, since part of the source of the witness's recall is the matter used to refresh recollection.[67]

### h. Impeachment

When a witness's credibility is attacked by an opponent, the attack must follow structural guidelines. These guidelines are concerned with the source of impeaching information. The guidelines are a composite of perceived fairness to the witness and the party putting the witness on the stand. Additionally, the guidelines include common sense notions about what information will properly allow the jury to assess the credibility of witnesses.

For instance, the evidence rules provide that the character of any witness for truthfulness can be attacked by calling reputation or opinion witnesses.[68] A witness can be impeached by demonstrating the witness's bias, prejudice, interest, or corruption.[69] If a witness has committed specific acts which reflect adversely on the witness's credibility, the witness may be cross-examined regarding those acts.[70] If a witness has been convicted of a crime that carries a statutory penalty of death or imprisonment for more than one year, the witness may be cross-

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67. Rule 612 states:

> [I]f a witness uses a writing to refresh memory for the purpose of testifying either—
> (1) while testifying, or
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

FED. R. EVID. 612.

68. FED. R. EVID. 608(a).

69. *See, e.g.*, United States v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

70. Rule 608(b) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. . . .

FED. R. EVID. 608(b).

examined about the prior conviction.[71] All of these highly specific evidence rules are source rules because each rule limits how the unreliability of a witness may be proved.

### 3. Public Policy[72]

Exclusionary policy rules are made by legislators and occasionally by judicial decisions when the reason for the decision is to protect some value extrinsic to the system of proof at trial. For example, the privilege rules limit proof of facts to matters not deemed privileged. Privilege rules are not concerned with the internal structure of proof. Privileges are granted by the courts and by statute or rule for social policy reasons. The privilege against self-incrimination, granted by the Fifth Amendment, was intended to limit governmental interference and invasion of citizen's privacy. Policy rules exclude perfectly relevant, reliable data on extrinsic social policy grounds.

#### a. Privileges

This classification includes constitutional privileges such as the privilege against self-incrimination, and confidential communication privileges extended by statute or rule[73] to people in certain types of relationships such as attorney-client,[74] physician-patient,[75] psychotherapist-patient,[76] husband-wife,[77] communication to clergyman,[78] political

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71. FED. R. EVID. 609(a).

72. This division corresponds to Wigmore's classification of rules that enforce extrinsic social policy goals. JOHN H. WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW Book I, part 3 (3d ed. 1942).

73. The Federal Rules of Evidence have no specific grants of privilege. Instead, Rule 501 instructs federal judges to deal with privileged communications "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

74. UNIF. R. EVID. 502 (1974).

75. UNIF. R. EVID. 503 (1974).

76. UNIF. R. EVID. 503 (1974).

77. UNIF. R. EVID. 504 (1974).

78. UNIF. R. EVID. 505 (1974).

vote,[79] trade secret,[80] secrets of state,[81] and identity of informant.[82] Privilege rules prevent the ordinary operation of evidence rules by placing confidential communications out of the factfinder's reach for extrinsic reasons, such as protecting a professional relationship between patient and psychotherapist.

### b. Character

Generally, litigants may not prove the character of an individual in order to show that the individual acted in conformity with that character structure.[83] At first blush, this principle may appear to be a reliability rule (for example, character evidence is an unreliable source of predictions about human behavior), but judicial commentary on the character evidence rule indicates that such evidence is excluded because such evidence is "overpersuasive."[84] The character evidence rule is riddled with exceptions. Although generally inadmissible, the defendant in a criminal prosecution may elect to prove his own good moral character in order to create a reasonable doubt in the jury's mind with respect to guilt.[85] In a prosecution for a violent crime when the defendant claims the victim was the first aggressor, the defendant may prove the victim's character for violent conduct, and the prosecution may rebut with evidence showing the defendant's own propensity for violent conduct.[86] When a party's character is an essential element of a claim or defense, the party's character may be proved by reputation or opinion, or even specific instances of conduct.[87]

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79. UNIF. R. EVID. 506 (1974).

80. UNIF. R. EVID. 507 (1974).

81. UNIF. R. EVID. 508 (1974).

82. UNIF. R. EVID. 509 (1974).

83. FED. R. EVID. 404(a).

84. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

85. *See, e.g.*, Edgington v. United States, 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467 (1896); FED. R. EVID. 404(a)(1).

86. FED. R. EVID. 404(a)(2).

87. *See, e.g.*, Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248 (5th Cir. 1982).

### c. Housekeeping Rules[88]

The rules, relating to the form of questions on direct examination, precluding leading questions, compound questions, and questions assuming facts not in evidence are judicial economy rules designed to keep the trial under control.[89] Other housekeeping rules include the rule on the judge's questioning of witnesses,[90] motions to exclude witnesses from the court room so as to prevent any taint of collaboration on stories,[91] the way in which the judge must deal with preliminary questions of admissibility,[92] the use of limiting instructions,[93] and admitting related writings or the remainder of the writing to ensure fairness.[94]

### d. Miscellaneous

About a dozen social policy rules do not form any particular class of rules and reflect unrelated policy judgments. For example, the rape shield rule reflects modern concerns with the deplorable number of rape convictions and with the abusive questions concerning the victim's past sexual activities that are directed toward women who testify against their attackers.[95] Similarly, the rules against admission of evidence of insurance,[96] subsequent remedial measures,[97] offers of compromise,[98] and offers to pay medical expenses[99] reflect social and political

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88. Wigmore would consider these rules to be intrinsic social policy rules, but these particular rules do not seem to fit well as limitations on source reliability. The rules reflect, instead, a judicial sense of fair play in the courtroom and economy of effort to attain a result.

89. FED. R. EVID. 611.

90. FED. R. EVID. 614.

91. FED. R. EVID. 615.

92. FED. R. EVID. 103-104.

93. FED. R. EVID. 105.

94. FED. R. EVID. 106.

95. FED. R. EVID. 412.

96. FED. R. EVID. 411.

97. FED. R. EVID. 407.

98. FED. R. EVID. 408, 410.

99. FED. R. EVID. 409.

objectives designed to encourage such behavior.[100] The same kind of thinking precludes impeachment of a witness on the witness's religious belief or lack thereof.[101]

The rule that excludes data obtained by unlawful search and seizure protects the defendant's constitutionally guaranteed right to privacy.[102] The rules that make judges[103] and jurors[104] incompetent to testify in cases on which they sit are governed by policy considerations about the appearance of impropriety.[105] The rule that prevents jurors from impeaching their verdict is based on extrinsic policy grounds arising from fear of upsetting the integrity of verdicts after trial.[106]

### 4. Probative Value Analysis

Assuming that the party offering a matter for evidence has shown the item's relevance, its reliability, and has demonstrated that the item is not barred by a policy rule, the court may still exclude the item on any of the following grounds: that the item's probative value is substantially less than the amount of unfair prejudice to all opponents, that the issues are confusing, that the jury may be confused, or that it would waste the court's time on a collateral matter. This calculus of probative value and prejudice is enshrined in Rule 403.[107] The common law also required judges to make this assessment whenever a party objected

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100. *See, e.g.*, Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (stating policy against admitting evidence of subsequent remedial measures is to encourage improvement in product design by sheltering later product changes from admission); Esser v. Brophey, 212 Minn. 194, 3 N.W.2d 3 (1942) (explaining offer to compromise privileged to encourage compromises).

101. FED. R. EVID. 610.

102. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 2d 652 (1914).

103. FED. R. EVID. 605.

104. FED. R. EVID. 606.

105. *See* FED. R. EVID. 605 (Advisory Committee's Note); FED. R. EVID. 606(a) (Advisory Committee's Note).

106. FED. R. EVID. 606(b).

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

to admission of evidence on the ground of excessive prejudice.[108] If the probative value of the item offered was low and the potential for an emotional outburst against the opponent was significant, the data would not be admitted.

The trial judge is required to make two assessments. First, the judge assesses probative value, which is a subjective appraisal of just how much the data offered will really prove. In making this assessment, the judge must consider the strength of proof.[109] The judge reconsiders the credibility of the witnesses and out-of-court declarants that will establish the data, the authenticity of documents establishing the data, the strength of any hearsay exception supporting admission, and any other source rule previously considered in the process of reviewing reliability to determine the quantum of probative value.

Second, the judge assesses the negative factors relating to admissibility, unfair prejudice to the opponent, waste of time, and confusion of the issues. This assessment is also subjective.

Third, the judge compares the two assessments. Unless the negative factor assessment is substantially greater than the positive probative value assessment, the data should become evidence and the trier of fact should receive the evidence as part of the record.[110]

## III. *A Tale of Two Cities* Analyzed

In reading *A Tale of Two Cities*, it occurred to this author that the revolutionary tribunal admitted Dr. Manette's denunciation of Darnay without regard to its relevance, reliability, or any questions of public policy. If the tribunal had considered the conditions under which Manette

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108. *See, e.g.*, State v. Flett, 380 P.2d 634 (1963); Whitty v. State, 149 N.W.2d 557 (Wis. 1967).

109. It is at this point that Wigmore's requirement of additive relevance returns to the evidence process. The trial judge will now look at the strength of the data, already held to be relevant and reliable. The judge searches for "something more" than bare minimal relevance and reliability that will justify admission.

110. This is in accord with Imwinkelried's view. The scaling of probative value and unfair prejudice does not involve consciously weighing any extrinsic social policy goals. See Imwinkelried, *supra* note 33, at 894-98. It should be noted that trial judges are human and may unconsciously reach a probative value versus prejudice determination based on social policy once in a while.

wrote his denunciation, and his own refusal to testify against his son-in-law during the trial, the tribunal would have refused to convict Darnay.

The Darnay case also suggested the four-step theory of evidence discussed in Part II of this Article.

First the story must be told. This requires analysis of the actual story behind the literary trial and the decision to put Darnay to death. Similarly, for real-world trials, the analyst has to reconstruct the story of the events and then review the actual trial. That requires reading transcripts and identifying significant decision-making situations at the trial court level. Dickens provided a magnificent example of French revolutionary justice in *A Tale of Two Cities*.

## A. The Story

Dr. Alexandre Manette was imprisoned in the Bastille in 1757 because he had witnessed the death of a young woman ravished by the Marquis St. Evremonde.[111] The Marquis, exercising his right of *jus primus nocte*, ravished the woman, had her groom brutally killed, and then gave the woman to his twin brother. The woman's brother followed the pair to an abandoned house and engaged the Marquis' brother in a duel. Manette later heard the entire story from the lips of the woman's dying brother.[112]

In the adjacent room, the woman lay gravely ill from brain fever; she was also pregnant. The victim and her brother refused to give their true names to Manette. The victim died twenty-six days later, and the Marquis allowed Manette to return to his lodgings. Manette began a letter reporting the entire affair to the Minister of the Interior. Meanwhile, the Marquis' wife and her young son, Charles Darnay, paid a call on Manette. The Marquess confirmed her suspicion that her husband had a part in the ravishment of a young woman; the Marquess introduced Charles to Manette.[113]

Manette's letter to the Minister of the Interior was intercepted by the Marquis, who planned to silence Manette forever. On the last day

111. DICKENS, *supra* note 1, Book II, ch. x.

112. *Id.* Book III, ch. X.

113. *Id.*

of 1757, Manette was seized, taken to the Bastille, and imprisoned for seventeen years. While imprisoned, he documented his recollection of the entire St. Evremonde episode and finished his 1767 report with a flourish: "And them and their descendants, to the last of their race, I Alexandre Manette, unhappy prisoner, do this last night of the year 1767, in my unbearable agony, denounce to the times when all these things shall be answered for. I denounce them to Heaven and to earth."[114]

Manette's wife was English. After her husband's seizure, she fled to England with their daughter Lucy. Manette's wife died in 1759, and Lucy was placed under the guardianship of Jarvis Lorry, an English banker, who was trustee of Manette's property. In 1775, Lucy and her guardian crossed the English Channel to locate Manette, who had been released from prison.[115] Lucy and her guardian went to Defarge's wine shop near the Bastille. Defarge had been Manette's servant when he was imprisoned.[116] Defarge took them to Manette, who had become a mentally deranged, prematurely old man.[117]

Lucy's guardian smuggled Manette out of France, and they returned to England, where Manette slowly recovered his senses.[118] The Manettes befriended Sydney Carton, an alcoholic barrister, who fell in love with Lucy.[119] However, Lucy could not return his love for her; instead Lucy married Charles Darnay, surnamed St. Evremonde, who had given up his aristocratic title and emigrated to England.[120]

Shortly after the fall of Bastille, Darnay returned to France to save Citizen Gabelle, an old and trusted family retainer, who had been arrested by the Revolutionary Council and taken to Paris for trial.[121] Darnay was arrested and imprisoned to await trial for his life, charged with

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114. *Id.*

115. *Id.* Book I, ch. IV.

116. DICKENS, *supra* note 1, Book I, ch. V.

117. *Id.* Book I, ch. VI.

118. *Id.* Book II, ch. I.

119. *Id.* Book II, ch. X-XIII.

120. *Id.*

121. DICKENS, *supra* note 1, Book II, ch. XX. Gabelle managed the St. Evremonde estate after the death of the Marquis, turning it over to the best interest of the local peasants, so far as he was able to do so.

violating the Revolutionary Council's ordinance that banished all emigres for life.[122] The penalty for returning to France without permission was the guillotine.[123] Manette and Lucy crossed the channel with Lorry and Sydney Carton to try to save Charles' life.[124]

## B. The First Trial

Darnay was brought before the Revolutionary Tribunal and accused of breaking his sentence of banishment. At the time of his arrest, he had argued that the ordinance had been passed long after he had left France, asserting the ordinance as applied to him was an ex post facto law. The Tribunal paid no attention to this claim. Since the Tribunal followed French inquisitorial procedure, Darnay was required to prove his innocence. He gave evidence in his own behalf, stating that he had left France before the banishment edict had been passed against emigres, that he had married Manette's daughter, a French citizen, and that he had returned to France to assist Gabelle, who was unjustly accused of betraying the revolution.[125]

Darnay called Citizen Gabelle, the man whose life he had saved, as his first witness. Gabelle confirmed the fact that he had been released from custody in order to lure Darnay back into France to be apprehended.

Manette then gave evidence, stating that Darnay had been Manette's first friend after his release from the Bastille and had assisted him when he was in need. Manette had become a hero of the revolution and his character evidence on behalf of Darnay was accepted. The council voted to acquit Darnay.[126]

Darnay was re-arrested within twenty-four hours on the denunciation of Madame Defarge and her husband.[127] Darnay was charged with being an enemy of the Revolution.[128]

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122. *Id.* Book III, ch. I.

123. *Id.* Book II, ch. XXIV.

124. *Id.* Book II, ch. II.

125. *Id.* Book II, ch. VI.

126. DICKENS, *supra* note 1.

127. *Id.* Book III, ch. VII.

128. *Id.* Book III, ch. IX.

## C. The Second Trial

Dickens did not give a detailed account of the second trial. The trial opens with the President reciting the names of those who had denounced Darnay: Defarge, his wife, and Manette. Manette asserted that a fraud had been worked on the court and that he had not denounced his son-in-law. The President told him to remain silent. Defarge was called, and he gave evidence that he participated in the storming of the Bastille and forced one of the gaolers to conduct him to Manette's cell where he discovered Manette's written statement behind a loose stone in the cell wall. Defarge stated that he was able to recognize the document as Manette's because Defarge had studied Manette's handwriting.[129]

Manette's 1767 statement was read to the tribunal. It recounted how Manette had been lured from his house and family in 1757 by the Marquis St. Evremonde and his twin brother and taken to a house outside Paris where Manette ministered to the young woman suffering from brain fever and her brother who was dying from a sword wound. Manette recorded the dying boy's accusations against the St. Evremonde twins. Manette also recorded the events of the ensuing two weeks while the sister gradually wasted away from brain fever.

Madame Defarge did not give evidence, although she revealed later that evening that she was the younger sister of the ravished woman and murdered boy, and that she had sworn out vengeance against their killers. Madame Defarge's testimony would have corroborated Manette's denunciation.[130] Furthermore, the Tribunal did not call Manette to affirm or deny the truth of the allegations in his denunciation. As a result, Darnay was sentenced to die the next day and would have been guillotined had not Sydney Carton taken his place.[131]

Darnay was convicted on evidence that contained hearsay declarations made by a dying boy and his sister. In fact, the damning evidence against Darnay, as heir to his father's title, came from the dying boy.

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129. *Id.* Book III, ch. VII. Dickens did not make it clear whether Defarge was testifying as a lay witness with knowledge, or as an expert. Perhaps the confusion was intentional to cast doubt on the authenticity of the document.

130. *Id.* Book III, ch. X.

131. DICKENS, *supra* note 1, Book III, ch. XIII.

## D. Analysis

If the four-step analysis system is viable, it should provide a frame of reference to deal with the admission of Manette's 1767 statement. As the following demonstration will show, the system yields a result.

### 1. Relevance

Manette's statement was relevant to prove only what he had observed: that the young boy died from a stab wound inflicted by a sword and that the woman's cause of death was encephalitis. Taking into account the dying boy's statement against the Marquis' twin brother, the statement established that the young woman had been sexually assaulted by the Marquis and his twin brother when the woman refused to give them jus primus nocte rights voluntarily. The statement also provided evidence to link the Marquis and his brother to the death of the woman's husband. The evidence would have been relevant in a similar trial conducted in England.[132]

### 2. Reliability

#### a. Authenticity

Defarge's testimony of the circumstances of finding the document and his identification of Manette's handwriting sufficiently explained the emergence of the document in 1789, twenty-two years after Manette wrote it. The manuscript was probably authentic.[133]

#### b. Hearsay

Manette's document was offered for the truth of the statements contained; therefore, the document was hearsay. Unless the hearsay

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132. The following analysis of Manette's denunciation is supported by English late eighteenth and early nineteenth century evidence commentators. For example, one definition of relevant evidence would include this document. *See* S.M. PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE § 3, at 126 (1815).

133. *See, e.g.*, THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 68-69 (London: 1801) (Garland Press ed. 1979).

document could be admitted under one of the hearsay exceptions, an English tribunal would not have received it.[134]

The document also contained the hearsay declarations of the young boy who tried to rescue his sister and, in fact, depended almost entirely on those assertions for its probative force. Necessity favors making an exception because neither the young woman who had been so cruelly ravished nor her brother were available to give their testimony.

The issue is whether Manette's denunciation carried some substitute for the trustworthiness ensured by oral testimony under oath before the tribunal. Some of Manette's writing detailed his own clinical findings: the woman's symptoms, her ravings, the sword wound in the young boy's chest. However accurate his observations may have been in regard to diagnosis and treatment of his patients, the dying boy's statement had nothing to do with statements made for medical treatment. The dying boy did acknowledge that he was dying, but his statement did not stop simply with the details of the attack he made on St. Evremonde, which would have qualified, even at that date, as a dying declaration relevant to rebut homicide.[135] Most of the boy's accusations related to events that had occurred outside his own observation: the ravishment of a woman, the hitching of the woman's husband to an ox cart, and the death from a broken heart of the woman's father.

Manette's document was composed more than ten years after the events of June 1757 and was not a record of his accounts with the St. Evremonde family, which might have qualified as some form of shopbook hearsay or regularly kept business record.[136]

In short, the tribunal, if it had followed English law, would have found no hearsay exception permitting Manette's denunciation to be used against Darnay. No known hearsay exception would have allowed the admission of the denunciation today.

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134. GEOFFRY GILBERT, THE LAW OF EVIDENCE 107 (London: 1754) (Garland Press ed. 1979); 2 JOHN HAWKINS, PLEAS OF THE CROWN ch. 46, at 431 (London: 1721) (Garland Press ed. 1979); PHILLIPS, *supra* note 132, § 7, at 173.

135. *See, e.g.*, PHILLIPS, *supra* note 132, § 7, at 194-98.

136. The shopbook exception to the hearsay rule dates to the end of the seventeenth century. *See, e.g.*, Pitman v. Maddox, Salk 690, 1 Lord Ray. 732 (K.B. 1698); PEAKE, *supra* note 133, at 9010; PHILLIPS, *supra* note 132, § 7, at 194-98.

### c. Opinion

Manette's denunciation contained opinions. However, his opinions were limited to medical diagnoses, including the woman's pregnancy. Manette would have been competent to give those opinions as a live witness, but opinions contained in a hearsay document were not admissible at the time Dickens wrote *A Tale of Two Cities*. Opinions, whether express or implied, contained in hearsay documents had been excluded by *Doe ex Dem Wright v. Tatham*.[137]

## 3. Public Policy

Manette recognized that the Hippocratic oath forbade his communicating a confidence entrusted to him by a patient, but the communications he received from his patients were not intended to be held in confidence. Had the courts recognized a confidential communication privilege for communications between physician and patient when Dickens wrote the novel, that privilege would not have applied to the boy's denunciation of the Evremonde brothers.[138]

No valid public policy obstacles prevented the admission of the denunciation.

## 4. Probative Value Weighed Against Prejudice

### a. Probative Value

Manette's denunciation was the product of a prisoner who had been kept away from wife and family for ten years. During those ten years in the Bastille, he had little to do but reflect on the reason why he was confined. He knew that Evremonde had destroyed his original letter to the Minister of the Interior revealing the scandal.[139] Manette was

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137. 5 Clark & Fin. 670 (H.L. 1838).

138. In 1776, Lord Mansfield refused to recognize the hippocratic oath as the source of a common law confidential communications privilege between physician and patient. The Duchess of Kingston's Trial, 20 How. St. Tr. 573 (1776). Parliament did not enact a physician-patient privilege statute until the mid-nineteenth century.

139. DICKENS, *supra* note 1, Book III, ch. XIII.

the sole living witness to the events in the house in 1757, other than the Marquis and his twin brother. Manette was disinterested, since he was not a party to their depraved acts, but a healer brought in to satisfy the brothers that both their victims were dying. With no other source for the tragedy at the house, Manette's oral recitation of the events under oath would have been highly persuasive and unrebuttable.

### b. Prejudice

Manette, an educated man, a physician accustomed to making scientific recording of information about his patients, was a high quality observer, but his notes were written more than ten years after the events that he recorded. He was also mentally deranged by the effects of ten years' solitary confinement. He relied on the unsworn, oral statement of the dying boy for most of his accusations against the Evremonde brothers. Since Manette was not called as a witness against his son-in-law, the revolutionary tribunal could not observe his demeanor, nor could he be cross-examined by a skilled adversary to expose the lack of foundation for some of his most important assertions (for example, the ravishing of the woman by the Evremondes).

Furthermore, Darnay could not possibly have rebutted the statement by credible evidence, because all witnesses other than Manette were dead and could not be called to affirm or to deny the story. Darnay was shorn of any legal defense he might have made to the denunciation.

On the whole, the probative value of Manette's statement, even had a special hearsay exception been designed by the court to admit it, was less than the prejudice to Charles Darnay's cause.

Therefore, the most famous literary hearsay document used in a trial turns out not to be admissible under then-current English law and probably not admissible under French procedure at inquisitions had the law been properly applied.

## IV. *Palmer v. Hoffman*

Turning from fiction to reality, a review of *Palmer v. Hoffman*[140] shows a closer relationship between fact and fancy than might be

140. 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

expected. Since United States Supreme Court microfiche collections contain full transcripts for important cases and are readily available, anyone can replicate the kind of analysis that will be demonstrated using *Palmer* and *Beech Aircraft v. Rainey*.[141] The analyst needs to look behind the appellate decisions and even the transcript of the actual trial to understand the trial as an event and the impact of data challenged and ultimately admitted or excluded.

## A. The Plaintiff's Case

*Palmer* stands for the proposition that records created by corporations in anticipation of future litigation are inadmissible, even if a proper foundation can be laid to show that the record meets the business records exception to the hearsay rule.[142] This summary does not tell the reader why the United States District Court for the Eastern District of New York excluded the written question and answer statement given by the New Haven Railroad engineer before he died.[143]

Harold Hoffman filed a multiple count diversity complaint against the trustees of the New Haven Railroad for personal injuries and the wrongful death of his wife arising out of an automobile-train collision.[144]

Hoffman was the plaintiff's first witness. He testified that on Christmas day he and his wife were returning home after a visit with his in-laws.[145] Hoffman returned home via Route 41.[146] The New York, New Haven & Hartford Railroads crossed Route 41.[147] This crossing was guarded by a cross buck without electric warning lights or a crossing gate.[148] After dark on Christmas night, the Hoffmans' car approached

141. 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).

142. *Palmer*, 318 U.S. at 111.

143. Record at 431, *Hoffman* (No. 300).

144. Hoffman v. Palmer, 129 F.2d 976, 979 (2d Cir. 1942).

145. Record at 35.

146. *Id.* at 36.

147. *Id.* at 37.

148. *Id.* Defense Exhibit B.

this grade crossing at thirty-five to forty miles an hour.[149] Hoffman stopped the car, looked both ways, and began crossing the tracks.[150]

That same night, the New Haven locomotive was running tender first to pick up a cut of freight cars.[151] The engine had a caboose coupled to its front end.[152] The conductor, the brakeman, and the flagman rode in the caboose.[153] The engine crew consisted of two veteran trainmen: the fireman[154] and the engineer.[155] The engine was equipped with a tender headlight that was operated from the locomotive cab by a switch.[156]

Harold Hoffman testified that after he brought the car to a complete stop at the grade crossing, he threw the car into first gear and accelerated slowly to cross the railroad tracks.[157] At that exact instant, he saw or sensed a large dark object, which struck the car, moving up the tracks from the south.[158] Hoffman remembered nothing after impact. He did state that he saw no approaching headlights from the south.[159]

Hoffman was trapped behind the steering wheel, badly injured and unconscious.[160] His wife was thrown from the car and died at the scene from her injuries.[161] After being pried loose from the car, Hoffman was transported to the hospital.[162]

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149. *Id.* at 37.

150. Record at 37-39.

151. *Id.* at 296. The fireman testified that the freight engines running light from Pittsfield to State Line always ran tender first to State Line because there were no facilities to turn engines at State Line. *Id.* at 305.

152. *Id.* at 296.

153. *Id.* at 233, 266-67, 274.

154. *Id.* at 295-96.

155. Record at 431.

156. *Id.* at 302.

157. *Id.* at 39.

158. *Id.* at 42.

159. *Id.*

160. Dr. Newell Copeland testified that Hoffman had fractures of both thigh bones, a possible skull fracture, a broken left hand, and head lacerations. Record at 112.

161. Record at 70.

162. *Id.* at 71.

The defendant disputed three points of Hoffman's testimony: (1) that the Ford came to a complete stop at the crossing before attempting to cross the tracks at about five miles per hour, (2) that the engine's bell was not ringing, and (3) that the engine's tender light was out.[163] The plaintiff called five witnesses, each of whom testified that he was within five hundred feet of the collision scene, did not see the engine coming, did not see its tender headlight, and did not hear its bell or its whistle.[164]

## B. The Defendant's Case

The railroad's rebuttal case consisted of twelve incident witnesses.[165] The defense called the fireman, the conductor, the brakeman, and the flagman. The conductor, the brakeman, and the flagman testified that they were riding the caboose at the front of the engine, were not looking north, and did not see the collision.[166] All three testified that the engine's automatic bell was ringing before and after the collision and that the engine whistle gave two long and two short blasts just before the collision.[167] They could not state whether the tender back up light was on when they got out of the caboose and went to help the victims. However, all three said the light was on at Daly's junction at 5:45 p.m., before the accident, and was on at State Line when the run was finished, after the accident.[168]

The fireman, who was sitting backward on his seat box observing the west side of the engine and tender as it backed down to State Line, saw the collision.[169] About 6:10 p.m., the fireman heard a car and

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163. *Id.* at 45 (cross-examination of Harold Hoffman).

164. *Id.* at 77-84 (testimony of Lawrence Bona); *Id.* at 116-21 (testimony of Arthur Bona); *Id.* at 195-96 (testimony of Lillian Bona); *Id.* at 216-18 (testimony of Edna Bona); *Id.* at 166-72 (testimony of Norma Gennari).

165. The railroad also called a civil engineer employed by the railroad to authenticate a diagram of the collision site, a shorthand reporter who took statements from the Bona family, a lawyer for the railroad's claims department, and an investigator for the railroad. Record at 279, 337, 370, 373.

166. Record at 236-37, 266-67, 274-76.

167. *Id.*

168. *Id.*

169. *Id.* at 298-99.

saw the car's headlights coming south on Route 41. The car slowed down for the crossing, then sped up just as the engine was approaching the crossing, approximately eighteen to twenty feet from the highway.[170] The car struck the locomotive tender, and the fireman yelled to the engineer to stop the engine.[171] Meanwhile, the engineer threw the engine into reverse and released the air brakes.[172] The fireman swore that the tender headlight was on, the automatic bell was ringing, and the engineer had sounded the standard whistle signal for a grade crossing just prior to the collision.[173]

After the victims were removed from the scene, the engine and the train crew proceeded to State Line and completed their run about 6:45 p.m.[174] Two days later, the crew gave statements to the assistant superintendent of the New Haven Railroad in the presence of three witnesses: a member of the New Haven Legal Department, a New Haven Railroad Police lieutenant, and a member of the Massachusetts Public Service Commission.[175]

The railroad lawyers also produced eight residents who were near the railroad tracks on the night of the accident. These witnesses stated that they either heard the engine sound its whistle for the crossing, heard

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170. *Id.*

171. Record at 299.

172. *Id.* at 431-35.

173. *Id.* at 297-98. Each state independently regulates the required bell and whistle signals that a locomotive engineer must activate when approaching a grade crossing. Massachusetts law required that the locomotive operator activate either the bell or whistle at least 80 rods (1,320 ft.) prior to a grade crossing and to sound at least three whistle blasts. MASS. GEN. LAWS ANN. ch. 160, § 138 (West 1940). The record indicates that the engineer used the standard United States grade crossing warning signal of two long and two short whistle blasts. That warning would have met the Massachusetts statutory standard. For that matter, continuous bell ringing would have sufficed. Tyler v. Old Colony R.R., 157 Mass. 336, 32 N.E. 227 (1892).

174. Record at 303.

175. *Id.* at 431. Massachusetts law provided that an inspector of the Department of Public Utilities shall

> investigate as promptly as may be any accident upon a railroad or railway, or resulting from the operation thereof, which causes the death or imperils the life of any person, and shall report thereon to the department which shall investigate the cause of any such accident resulting in loss of life, and may investigate other accident.

MASS. GEN. LAWS ANN. ch. 159, § 129 (1932); Palmer v. Hoffman, 129 F.2d 976, 993 (2d Cir. 1942).

its bell ringing before reaching that crossing, or saw the engine's tender headlight or its reflection on the rails as it approached the crossing.[176]

The engineer did not take the stand because he had been killed in a train wreck in the spring of 1941.[177] The railroad lawyers offered an unsworn stenographic transcript of the engineer's question and answer statement of December 27, 1940, on an offer of proof that it was taken in the regular course of business by railroad employees, because "it was the regular course of such business to make such statement."[178] The plaintiff objected without stating the grounds for objection.[179] Defendant took an exception, and based its appeal from a $25,000 judgment for plaintiff on his personal injuries and a $9,000 judgment for his spouse's wrongful death on the court's failure to admit the engineer's statement.[180]

The trial judge could have concluded that the engineer's statement was inadmissible because it was irrelevant or unreliable, barred by some policy rule, or lacked sufficient probative value to offset the negative factors presented by the self-serving nature of the statement coupled with the inability of the jury to see the engineer's demeanor or to see him cross-examined. Since the trial judge did not give any explanation for his ruling excluding the statement, reviewing courts were free to fashion their own version of the judge's reasoning in assessing whether the railroad was entitled to a new trial because the trial judge excluded the engineer's statement.

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176. The conductor's sister and brother testified that they heard the train whistle or the train bell just prior to the collision. Record at 260-62, 347-49. The engineer's widow and a friend of the family testified that they were on their front porch to greet the engineer's train as it passed their house and that the engine's tender light was on, its bell ringing, and its whistle tooting as it passed the house. *Id.* at 362-69. One witness testified that he saw a "big light" on the grade crossing shining in the direction of State Line, or northward along the tracks after the impact. *Id.* at 361-62. Another witness stated he heard the engine's whistle as it approached the crossing. *Id.* at 353-57. A witness who happened to be looking out a window as the engine went by going toward State Line stated that the engine was proceeding tender first and the tender headlight was on. He also said the engine whistle was sounding as it approached Elkley-Buckley crossing. *Id.* at 319-22. Finally, another witness testified that he saw the reflection of the engine's headlights on the rails from the rear of his office windows and that he heard the train whistle as it approached the crossing. *Id.* at 378-79.

177. Record at 239 (testimony of Conductor Frank Johnson).

178. *Id.* at 381 (offer of proof of Brumley, counsel for defendant).

179. *Id.*

180. *Id.* at 435 (judgment).

## C. The Second Circuit's Review of the Decision

On review of this case in 1942, the Second Circuit did fashion its own version of the trial court's reasoning. The trial court judgment was affirmed by a split decision.[181] Judge Jerome Frank wrote the majority opinion, noting that the common law required a foundation showing that the makers of business records possessed no motive to misstate the facts before the shopbook could be admitted.[182] Judge Frank concluded that Congress intended to adopt this common law foundation requirement by including the words "regular course of business" in the Business Records Act.[183] He argued that Dean Wigmore and Professor Morgan, who were the co-authors of the act, knew the common law meaning of "regular course of business" and intended to keep the common law foundation of absence of motive to misstate as condition precedent to admitting business records under the act.[184]

Therefore, Judge Frank reasoned, the defendant would have had to show that the engineer lacked any motive to misstate the facts as condition precedent to admission of his statement, something that the defendant could not do.[185] Judge Frank disposed of the claim that the engineer's statement constituted a government record by noting that the defendant did not offer the document as a government record, did not lay a foundation showing the statement became a government record by

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181. Hoffman v. Palmer, 129 F.2d 976, 998 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

182. *Hoffman*, 129 F.2d at 980-81.

183. *Id.*

184. *Id.* at 986.

185. *Id.* at 991-93. Judge Frank took time to analyze Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), and Needle v. New York Railways, 237 N.Y.S. 547 (1929), and to compare these two cases with United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941). In *Mortimer*, a different panel of the Second Circuit had held admissible an accountant's recapitulations of the taxpayer's tax returns to show the taxpayer's delinquencies, despite the fact that the records were prepared for litigation. These records were admitted as business records under the act. In Judge Frank's view, all three cases could be harmonized because the issue in *Mortimer* concerned the need to call the accountant's aids to establish a foundation for admission. The issue in *Johnson*, concerned the admission of a police report including unidentified bystander statements not shown to have been made by eye-witnesses. In *Needle*, the issue concerned the admissibility of a police report containing a street car motorman's statement taken down by the police officer. The Appellate Division characterized the motorman as "interested" and therefore disqualified his hearsay statement. *Hoffman*, 129 F.2d at 984.

adoption, and thus waived any error on failure to admit as a government record.[186]

Judge Swan joined Judge Frank for the majority opinion. However, Judge Clark dissented on two grounds: (1) importation of the "no motive to misstate" rule into the Business Records Act, and (2) lack of proper foundation and offer of proof to show the statement had become a government record by adoption.[187] In Judge Clark's view, the Business Records Act specifically intended to make the declarant's self-serving interests a matter affecting credibility, not admissibility.[188] Without articulating what he was doing, Judge Clark had put himself in the trial judge's place. He began to weigh the relevance of the engineer's statement and to assess its probative value.[189] Judge Clark believed that the effect of the majority's decision would be to exclude all kinds of routine accident reports and log books prepared by businesses on the grounds that the business could not show a want of motive to misstate the truth.[190] Judge Clark would have admitted the engineer's statement.

## D. The Supreme Court Decision

Neither *Palmer* decision overtly reviewed the engineer's statement using the four-fold evaluation system discussed above, although both opinions picked up part of the system and articulated carefully analyzed views about the reliability of the engineer's statement.[191] These two

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186. *Hoffman*, 129 F.2d at 993. Judge Frank then volunteered in dicta that had the statement been tendered as a government record, it would have been disposed of like the police report in *Needle*. *Id.* at 994 n.41b.

187. *Id.* at 998-99.

188. *Id.* at 999. "As Wigmore says, the objection is, by the express provision of the second sentence of the statute, to affect the *weight*, but not the admissibility of the statement." *Id.* at 1000 n.4.

189. *Id.* at 999. "The engineer's statement is direct relevant testimony of the kind which any court of justice ought to desire to admit, particularly now that the accident of death otherwise seals his mouth." *Id.*

190. *Id.* at 999-1000. Judge Clark was also implicitly acknowledging the fact that the Commonwealth Fund Act was intended to replace the common law shopbook rule by preempting the field. Therefore, he opposed grafting the common law doctrine of "no motive to misstate" to the foundation criteria for admissibility, leaving that issue to weight and credibility alone. This dissenting opinion harmonizes well with Imwinkelried's view of the Federal Rules of Evidence. *See* Imwinkelried, *supra* note 33, at 881.

191. *Hoffman*, 129 F.2d at 976.

opinions, when compared to the 1943 United States Supreme Court decision, however, are supportable. The United States Supreme Court decision in *Palmer v. Hoffman*,[192] which has decisively influenced evidence law ever since, is a masterpiece of "hiding the ball."

Writing for the Court, Justice Douglas briefly restated a very truncated summary of the facts of the case. Mentioning the three issues of the bell, the whistle, and the tender light, Justice Douglas jumped to the engineer's statement and stated that the Supreme Court agreed with the lower courts' rulings in excluding the engineer's statement.[193] Justice Douglas offered a version of Judge Frank's view that "regular course of business" meant to import a common law standard excluding self-serving declarations from the business records exception to the hearsay rule.[194] Justice Douglas stated that the purpose of the Business Records Act was to admit records kept in a systematic way for "the systematic conduct of the business."[195] Although Justice Douglas recognized that businesses regularly collected accident reports from employees to assist them in assessing potential tort claims, he nonetheless refused to allow that entire class of records to be business records.[196]

He then argued that if any employee's self-serving declaration about the cause of an accident could be made admissible by regularly collecting the statements as a business practice, then a law firm could introduce statements of witnesses without producing the witnesses at trial for cross-examination by characterizing the records as "business records."[197] Justice Douglas added a second exclusionary reason that Judge Frank had carefully refused to adopt:

> In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.[198]

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192. 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

193. *Palmer*, 318 U.S. at 111.

194. *Id.* at 113.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Palmer*, 318 U.S. at 114.

He also noted that the Interstate Commerce Act that required monthly accident reports from all railroads expressly forbade the introduction of such reports in evidence in any later suit based on the same accident.[199] However, Justice Douglas made no comment on the alternative grounds for admission of the engineer's statement as a government report adopted by the Massachusetts Public Service Commission.

*Palmer* was considered and referred to by the Advisory Committee and Congress in enacting the Federal Rules of Evidence.[200] The supposed rule of the case was included in Rule 803(6) excluding certain kinds of regularly kept records on the ground that "the method or circumstances of preparation indicate lack of trustworthiness."[201] Rule 803(6) and 803(7) contain a confusing, specific modification of Rule 403 that applies only to regularly kept records. No wonder law students cannot grasp the meaning of Rule 803(6).

## E. Analysis

If the four-part evidence process analysis is applied to *Palmer*, the trial judge would have the discretion to admit or exclude the engineer's

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199. *Id.* at 115 (citing sections 38 and 40 of the Interstate Commerce Act, 36 Stat. 350, 45 U.S.C. §§ 38, 40 (1943)).

200. Advisory Committee Report, Fed. R. Evid., 56 F.R.D. 309-310 (1973).

201. FED. R. EVID. 803(6). The Advisory Committee's Note to Rule 803(6) contains the following explicit reference to *Palmer*:

> Problems of the motivation of the informant have been a source of difficulty and disagreement. In Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 654 (1943), exclusion of an accident report made by the since deceased engineer offered by the defendant railroad trustees at 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. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivation to misrepresent." Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L. Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002.

Advisory Committee Report, 56 F.R.D. 309-10 (1975).

statement based on balancing the probative value of the statement against its prejudice to the plaintiff. The way in which an evidentiary decision is made is more important than the outcome, so far as the development of evidence law is concerned.

## 1. Relevance

Applying the four-part evidence process analysis to this offer of proof, the engineer's statement has to be reviewed to determine the statement's relevance. The engineer stated that he was the engineer of the train backing down to State Line on Christmas night, 1940.[202] He was backing down to State Line. His locomotive was equipped with a back up tender headlight in good working order which was on at the time of the collision.[203] He also said his automatic bell was ringing from West Stockbridge through the collision scene.[204] The engineer said he could not see the west side of the grade crossing from his seat, but he set the brakes to emergency stop as soon as he heard the sound of impact and "the fireman hollered that we have got a car."[205]

The engineer's statement was relevant to prove that the locomotive headlight was on, its bell was ringing, and its whistle sounding at the collision scene, rebutting Hoffman's testimony and the testimony of plaintiff's bystanders and corroborating the testimony of the conductor, the brakeman, the flagman and the fireman, the surviving train crew members, and defendant's bystanders. Since at least seven of the defendant's incident witnesses were impeached at the outset on account of bias and interest in the outcome, the engineer's statement made so close to the events tended to corroborate the bystanders' stories and bolster their credibility.[206]

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202. Record at 431.

203. *Id.*

204. *Id.* at 432.

205. *Id.* at 432-33.

206. Testimony of the conductor's brother and sister is flawed because their brother was potentially liable for any rule book violations that could be imposed by the railroad on the train crew. Testimony by the engineer's wife is flawed because her late husband's conduct was the basis for the plaintiff's claim. The train crew could be demoted or discharged for safety violations.

## 2. Reliability

In reviewing reliability, the most orderly way to proceed is to consider the engineer's competence, the statement's authenticity, the best evidence rule, the hearsay rule, and finally, the opinion rule. Since the trial judge cut short the defendant's offer of proof, the reader has no way to determine how the defendant intended to lay a foundation. Without an offer of proof on the foundation issue, no one now knows who the sponsoring witnesses would have been. The defendant had to show that the statement was made by the engineer when he was competent, that the written statement was authentic, and that the secondary evidence was admissible because the original was lost or destroyed through no fault of the defendant. Finally, if the defendant wished to limit its offer of proof to a business record, the defendant had to show that the statement was taken in the ordinary course of business from a person with actual knowledge of the events and kept in file as a matter of ordinary business.[207]

### a. The Engineer's Competence

In 1941, the common law four-fold test for a witness's competence was applied to out-of-court hearsay declarants.[208] The engineer's

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207. For an example of an excellent modern-day business record foundation see EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 262-63 (2d ed. 1989).

208. Wigmore maintained that the ordinary rules applicable to witnesses applied to out of court declarants in hearsay situations. *See, e.g.*, 3 WIGMORE, *supra* note 12, § 1424. Wigmore actually went through competence analysis for several hearsay exceptions. *See, e.g.*, 3 *Id.*, §§ 1445 (testimonial issues, dying declarations); 3 *Id.* § 1471 (statements against interest); 3 *Id.* § 1485 (testimonial qualifications for declarations about family history); 3 *Id.* § 1510 (attesting witness must be competent when attesting wills); 3 *Id.* § 1530 (personal knowledge of entrant of business record supported by others); 3 *Id.* § 1555 (personal knowledge of person making entries in business records); 3 *Id.* § 1635 (government official acknowledgements). Although no cases said that hearsay declarants do not have to be competent to testify, the courts have often overlooked one or more elements of competence when admitting hearsay declarations. Lack of personal knowledge did not prevent a party's admission from being received as evidence. *See, e.g.*, Matthews v. Carpenter, 231 Miss. 677, 97 So. 2d 522 (1957); Scherffius v. Orr, 442 S.W.2d 120, 124-25 (Mo. Ct. App. 1969); Berkowitz v. Simone, 96 R.I. 11, 188 A.2d 665 (1963). Accusations made by child sexual abuse victims who were three or four years old and probably incompetent witnesses have been admitted as excited utterances. *See, e.g.*, State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Logue, 372 N.W.2d 151,159 (S.D. 1985).

statement showed that he had been a witness to the collision. He gave a detailed recollection of what he had seen and done at the time of the collision, and he had the ability to communicate his recollections. His statement was not under oath, but that requirement is usually waived for business or government records. The engineer's competence at the time was never challenged by the plaintiff. Hearsay declarants' competence may not be an issue under the Federal Rules of Evidence, because neither Rule 601 or 602 have been applied to out-of-court declarants; incompetent hearsay is routinely admitted.[209]

### b. Hearsay

The engineer's statement had to be taken as true to be relevant to the key issues in the case. Therefore, the statement was hearsay and, unless the hearsay met one or more recognized exceptions, the statement was inadmissible because hearsay is inherently unreliable.[210] The railroad lawyer had offered the statement as a New Haven Railroad business record, claiming that the statement was an exception to the hearsay rule. For some reason, the statement was not tendered as part of a government report, even though the Massachusetts Public Service Commission investigative report included the statement. The trial judge

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209. Although no cases have held that hearsay declarants need not be competent to testify, the courts have overlooked one or more elements of competence. For example, courts have overlooked a declarant's lack of first-hand knowledge and his lack of ability to know and appreciate the need to tell the truth. Lack of personal knowledge, which would make a witness incompetent to testify at common law and under Federal Rule of Evidence 602, does not prevent a party's admission from being received as evidence. *See, e.g.*, Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978) (admission by employee).

Uniform rule states have reached similar results. *See, e.g.*, State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985) (excited utterance); State v. Logue, 372 N.W.2d 151, 159 (S.D. 1985) (excited utterance). Commentators no longer include any exhaustive treatment of the competence of hearsay declarants. *See, e.g.*, 1 JOHN W. STRONG ET AL., EDS., MCCORMICK ON EVIDENCE §§ 10, 62 (4th ed. 1993); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 601[01]; 4 *Id.* ¶ 801[01] (1993). 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 260 does mention that a witness testifying to an out-of-court statement meets Rule 602's personal knowledge test if the witness has firsthand knowledge of the preparation of the out-of-court statement of another declarant. Chadbourne's 1974 revision of Wigmore does contain the original language of section 1424 restating that competence of hearsay declarants is still required, but only this lone treatise revisor is concerned with the competence of out-of-court declarants.

210. 3 WIGMORE, *supra* note 12, § 14.

cut the New Haven's lawyer short when he tried to make an offer of proof on the exhibit.[211]

In 1941, the judge was required to follow the Federal Business Records Act,[212] which defined a hearsay exception for memoranda prepared and retained in the ordinary course of business. Since the New Haven Railroad took statements from employees involved in on-line accidents as a regular part of its ICC-mandated accident safety program[213] and kept those statements in the regular course of business, the statement apparently qualified for the statutory exception. The statute was broadly drafted to do away with common law limitations on admissibility of shopbooks. The legislative history of the act indicated that the primary evil apprehended was the common law requirement that required each and every person having something to do with the making of a business record to appear in court and authenticate his or her portion of the record.[214] However, the act contained a clause that applied directly to the required common law foundation for admission of a shopbook, a showing that the makers had no conscious motive to falsify. It was relegated to a matter affecting credibility alone.[215]

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211. Record at 381, *Hoffman* (no. 300).

212. The Federal Business Records Act defined a hearsay exception for business records in the following manner:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind.

49 Stat. 1561 (1936), 28 U.S.C. § 695 (1940).

213. Railroads in the United States are required to prepare monthly accident reports involving personal injury and property damage and to forward them to the Secretary of Transportation. 49 U.S.C. § 20901 (1994). These reports are still inadmissible at trial against the railroad, as they were in 1941. 49 U.S.C. § 20903 (1994).

214. S. Rep. 1277 93d Cong. 2d Sess. 1974 U.S.C.C.A.N. 7051, 7063.

215. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. 49 Stat. 651 (1936), 28 U.S.C. § 695 (1940).

Second, although the trial judge blocked a complete offer of proof, the statement had been taken by a railroad employee in the presence of a Massachusetts Public Service Commission investigator who included it in his report to the Public Service Commission.[216] The investigator was acting under a statutory duty to make the investigation, thus qualifying the statement for admission as a government document under Rule 43, Federal Rules of Civil Procedure.

The limitations imposed on self-serving declarations by the common law shopbook rule had not been applied to documents offered as government investigative reports. State case law interpreting admissibility of police reports turned on the inclusion of unreliable unidentified hearsay within hearsay, not on the motive of the out-of-court declarants.[217]

The engineer's statement qualified for admission either as an employee business record made by a person with firsthand knowledge of the events or as part of an official government report prepared by the Massachusetts Public Service Commission. The trial judge should have considered any motivation issues as matters affecting weight and credibility, rather than bars to admission.[218]

### c. Other Reliability Issues

The engineer's statement presented no other reliability issues. The railroad lawyer had made an offer of proof suggesting that he could prove the document's authenticity by identification of the engineer's signature.[219] Since the railroad offered the original statement, no best evidence rule issue was before the court. The engineer's statement contained no third party hearsay within hearsay, other than the fireman's excited utterance when the car and tender collided. The engineer offered no opinions in his statement that would run afoul of the rule against lay opinion.

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216. Hoffman v. Palmer, 129 F.2d 976 (1942).

217. *See, e.g.*, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930); Needle v. New York Ry. Corp., 227 App. Div. 276, ___, 237 N.Y.S. 547, 549 (1929).

218. Judge Clark's dissenting opinion made both of these points. *Hoffman*, 129 F.2d at 998-99.

219. Record at 381, *Hoffman* (no. 300).

### 3. Policy Analysis

If the judge paused to examine public policy issues before ruling, he would have noted that the statement was not privileged. The statement was not prohibited by the character evidence rule or under any housekeeping rules. In short, no public policy objections could be made against admission.[220]

### 4. Probative Value and Prejudice Calculus

#### a. Probative Value

Ultimately, the engineer's unsworn statement could have been rejected only on the ground that the probative value of the statement was considerably less than its prejudice to the opponent and the confusion, waste of time, and delay involved in proving the statement admissible. Turning first to probative value, the statement was the only source of information from the engineer giving his viewpoint on the collision because the engineer was dead. The engineer was an eye-witness to most of the collision events, and in particular, he was responsible for engine safety, including all warning devices. A Massachusetts Public Service Commission investigator also took part in the statement-taking process and added credibility to what otherwise appeared to be an event staged by the railroad to keep its employees from forgetting the version of events most favorable to the railroad.[221] The Public Service Commission investigator was under a statutory duty to investigate fatal railroad accidents and make a report to the whole Public Service Commission.[222] At the close of the defendant's case, the evidence for and against the proposition that locomotive 438 was giving a proper warning signal

220. To be sure, section 40 of the Interstate Commerce Commission Act provided that ICC railroad accident reports prepared for the ICC could not be used as evidence against the railroad in later litigation. 45 U.S.C. § 40 (1943). However, that policy rule did not bar the engineer's statement made to the New Haven and the Massachusetts Public Service Commission.

221. Judge Clark also mentioned this factor in his dissent. *Hoffman*, 129 F.2d at 998.

222. Unfortunately, the original Massachusetts Public Service Comm'n Report on this accident was destroyed after five years' time. Letter of Brian F. Christy, Director, Transportation Division, Mass. Public Service Dep't to Thomas J. Reed dated Feb. 3, 1994.

to motorists was about evenly balanced and depended upon the jury's assessment of the credibility of the witnesses for an ultimate verdict.

However, nagging doubts weighed against probative value. Because it was hearsay, the engineer could not be cross-examined, his demeanor could not be observed by the jury, and the statement was unsworn. Second, the engineer's statement was self-serving because he was in charge of engine 438 when Hoffman's Ford struck the tender, and the engineer could have been sued as a principal tortfeasor. Third, the statement was also a self-serving protective measure for the railroad. The railroad had to anticipate a claim against it and its liability insurer by Hoffman and his wife's estate arising from the collision. That claim could result in a lawsuit. The railroad took steps to minimize its economic loss by getting the statements of the train crew on the record two days after the collision before the crew members forgot what happened. No one representing the Hoffmans' interests was present at the investigation. The above factors reduce the probative value of the engineer's statement.

### b. Prejudice, Confusion and Waste of Time

However, admitting the engineer's statement would have caused few substantial hazards. First, the plaintiff was not unduly prejudiced by admission of the statement. However, the engineer's statement was cumulative on the three main issues of the headlight, bell, and whistle. The plaintiff and four other witnesses had already testified that the engine's headlight was off, its bell silent, and its whistle not blowing at the time of the collision, while the defendant had produced three train crewmen and four bystanders who testified that all three devices were operating at the time of the collision.[223]

The actual decision to exclude the engineer's statement could be justified as an exercise of the trial judge's discretion to exclude evidence of relatively low probative value and relatively great prejudice. However, the factors for and against probative value balance out as more favorable to admission, given the context of the case at the time the statement was offered.

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223. *See supra* notes 143-79 and accompanying text.

Had the trial judge and the appellate judges followed a systematic examination of evidentiary principles when they reviewed the railroad's offer to prove the engineer's statement, *Palmer v. Hoffman*[224] would not have become part of the vocabulary of the business records exception to the hearsay rule.

## V. *Beech Aircraft Corp. v. Rainey*[225]

Navy Lieutenant Commander John Rainey, the surviving spouse of Lieutenant Commander Barbara Rainey, and Rondi Knowlton, surviving spouse of Navy Ensign Donald Knowlton, filed wrongful death actions against Beech Aircraft Corp., Beech Aerospace Services, and Pratt and Whitney Aircraft of Canada.[226] The lawsuits were based on a training accident in which a T-34C Mentor turboprop crashed while practicing landings at an outlying airstrip near Pensacola.[227] Barbara Rainey, the instructor, and Knowlton, her student, were killed. The court consolidated the claims for trial in the United States District Court for the Northern District of Florida in Pensacola.

The plaintiffs' suit was based on a perceived design defect in the T-34C.[228] The plaintiffs asserted that, even though the Navy did not require it, the T-34C should have had a manual fuel control so that the pilot could increase or decrease fuel flow to the jet engine.[229] The plaintiffs believed the crash was caused by a low air speed stall that could not be corrected by the pilots because of "rollback." "Rollback" is an uncommanded power loss not brought about by anything done

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224. 318 U.S. 109, 63 S. Ct. 447, 87 L. Ed. 645 (1943).

225. 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).

226. Cause No. 83-4084 and 83-4085, United States District Court, Northern District of Florida, Pensacola Division.

227. *Rainey*, 488 U.S. at 156.

228. *Id.*

229. The manual override was in fact added after the August, 1982 crash. The parties to the case did not reach a stipulation that it was feasible to put a manual fuel control override on the T-34C when it was originally delivered to the Navy in 1976-77, thus keeping the subsequent remedial measure from the jury. Record Vol. I at 5-8. The parties did finally stipulate that the aircraft involved in the accident was not delivered with a manual fuel control override. Record Vol. VII at 70.

to the fuel control by the pilot in flight.[230] The plaintiffs argued that, because the T-34C's fuel flow is regulated automatically by pneumatic pressure, contaminates in the aircraft's pneumatic pressure system could cause a precipitous decline in fuel flow and result in a drastic loss of power.[231] The propeller would then go automatically into idle, acting as a huge brake on the aircraft.[232]

## A. The Plaintiffs' Case

The plaintiffs produced depositions from other pilots who were flying in the Middleton Field pattern at the time of the crash.[233] The plaintiffs also submitted the deposition of the flight duty officer on July 13, 1982.[234] According to the plaintiffs' witnesses, at approximately 10:20 a.m. on July, 13, 1982, several T-34Cs were circling the airfield.[235] Knowlton was flying one of these T-34Cs from the front seat and Rainey, his instructor, was in the rear seat coaching Knowlton on landing and take off.[236] Rainey and Knowlton were completing what was known as familiarization flight four.[237] Lieutenant Colonel David Habermacher USMC and his student pilot, Lieutenant Barry Pearson USMC; Captain Charles Guthrie USMC and his student pilot; and Lieutenant Craig Colley USN and Ensign W.P. Arrington were also flying the same flight.[238]

The T-34Cs were circling Middleton in the local landing pattern in order to make "touch and go" landings and take-offs.[239] Aircraft number 3E955 was in the landing pattern just ahead of Guthrie's aircraft.[240]

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230. Record Vol. III at 77, testimony of former Marine Captain Richard Howie.

231. *See* Record Vol. IV at 143-46.

232. Rainey v. Beech Aircraft Co., 784 F.2d 1523, 1526 (11th Cir. 1986). See also transcript Vol IV at 135-36, 143-46, testimony of David S. Hall, plaintiffs' aircraft safety expert.

233. *See* Joint Appendix at 5, *Beech Aircraft* (No. 87-981).

234. *Id.* at 5.

235. *Id.* at 145-46.

236. *Id.* at 111.

237. U.S.N. Joint Appendix at 9, *Beach Aircraft* (No. 87-981).

238. *Id.* at 5, 9. The statements of all four officers were attached to the original report.

239. *Id.* at 10.

240. *Id.*

Rainey and Knowlton's aircraft had completed at least two "touch and go" landings[241] and were climbing in order to rejoin the pattern when the aircraft appeared to lose power and fall back in the pattern.[242] The normal interval between aircraft in the Middleton pattern was 3,000 feet, but Rainey and Knowlton had slowed airspeed to a near stall and closed the distance to 500 feet, cutting off Guthrie's aircraft. Guthrie radioed Rainey and Knowlton that they were cutting him off, and Habermacher warned them to get out of the way in order to avoid a mid-air collision.[243] Pearson saw Rainey and Knowlton's T-34C bank sharply right, stall, and crash into a nearby woodlot. Watching the aircraft explode, Pearson asked Habermacher, "Sir, they stalled that airplane out, didn't they?" Habermacher replied, "Yes, they sure did."[244] Rainey and Knowlton were killed on impact.[245]

The plaintiffs called three employees of Pratt & Whitney and Beech Aerospace Science, Inc. as hostile witnesses. One Pratt & Whitney engineer testified that Pratt & Whitney knew the rollback problems had occurred with the T-34C power plant.[246] Two Beech Aerospace mechanics testified that Rainey and Knowlton's aircraft had been "fixed" by replacing a fuel flow divider the day before the crash without bothering to follow the prescribed Pratt & Whitney engine trouble shooting check list.[247]

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241. *Id.*

242. Testimony of Capt. Charles Guthrie, *Pensacola Journal*, Friday, July 13, 1984, at 4C.

243. "Aircraft turning cross-wind you're cutting somebody out" and "Aircraft turning cross wind, you're cutting us out. Heads up." Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1525 (11th Cir. 1986).

244. Testimony of Lt. Barry Pearson, *Pensacola Journal*, Friday, July 13, 1984, at C4, col. 2-5.

245. Joint Appendix at 10-15, *Beech Aircraft* (No. 87-981).

246. Record Vol. I at 132.

247. The plaintiffs were forced to put on most of their incident witnesses by deposition because they had been transferred to other duty stations and were unavailable for trial. Colley, the runway duty officer at Middleton field on July 13, 1982, stated he saw Rainey and Knowlton's aircraft lose power while in a left-hand climbing turn off the duty runway to rejoin the pattern, monitored the two transmissions warning the aviators of a near mid-air collision, and saw the aircraft bank right, go nose up into a stall and crash. The plaintiffs also deposed Lieutenant Roland Kolakowski USN and Marine Capt. Guthrie who supported the plaintiffs' contention that the stall and crash was not due to pilot error. Pearson and Habermacher were also deposed

The plaintiffs also played the video deposition of a Coast Guard commander who testified to a 1979 forced landing on the Pensacola golf course caused when his T-34C experienced a sudden uncommanded power loss at low altitude while taking off.[248] He stated he did not have time to raise his flaps and landing gear before making an emergency forced landing on the golf course.[249] This was followed by the live testimony of former Marine Captain Richard Howie who offered an eye witness account of two similar, uncommanded rollbacks that happened after the Rainey crash.[250] Howie, a test pilot, routinely check-flew all aircraft that were sent to the repair facilities for maintenance. He had personally experienced two rollbacks while test flying repaired aircraft.[251] The first rollback occurred six months after the Rainey crash. While climbing out of the Whiting Field pattern at 4,000 feet he experienced a sudden reduction to idle power. Since his aircraft had been equipped with a manual emergency power lever, he overrode the automatic control and landed safely.[252] The second incident occurred six days later. The T-34C is an aerobatical aircraft and a normal maintenance check flight requires the pilot to fly the aircraft upside

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and related the story of their intercom statement that was admitted without objection despite the fact that the statement was arrant hearsay. (Videotape depositions were not available for examination by the author). *Pensacola Journal*, Thursday, July 12, 1984, at C1, col. 1, Friday, July 13, 1984, at C4, col. 1-5, and Tuesday, July 17, 1984, at C4, col. 2-5.

The plaintiffs' first three live incident witness were hostile employees of Beech Aircraft and Pratt & Whitney. Bobby Johnston, a Beech Aerospace Industries mechanic assigned to U.S. Naval Station, Pensacola on the day of the crash, testified that he had "corrected" the fuel flow problem by replacing the fuel divider, ignoring the Pratt & Whitney engine check list for fuel problems. Record Vol. 1 at 64-66. His superior, Larry Blake, admitted that BASI mechanics were supposed to follow the Pratt & Whitney check list when making engine repairs. Record Vol. I at 114. However, Blake said that "Johnson's vast experience" permitted him to deviate from the engine check list and fix what he thought was the heart of the problem. *Pensacola Journal*, Thursday, July 12, 1984, at C1, col. 1, at C4, col. 1-5.

A Pratt & Whitney engineer acknowledged receiving more than 40 complaints from U.S. Navy aviation units on rollback problems experienced with the T-34C. He also admitted that the same engine had been equipped with manual override controls when produced in 1963 for the DeHavilland Beaver. Record Vol. I at 133-34, 154-56.

248. Record Vol. IV at 80; *see also* Record Vol. VII at 161.

249. Record Vol. IV at 80; *see also* Record Vol. VII at 161.

250. Record Vol. III at 68.

251. *Id.* at 80.

252. *Id.* at 82-85, 95-99.

down to make sure that the oil and fuel systems function while inverted.[253] Howie rolled the aircraft he was testing on its back and the engine immediately went to idle. He recovered by righting his aircraft, but since he could not regain power, he glided to a forced landing at Whiting Field.[254]

John "Mack" Bowers, Beech Aerospace's chief of maintenance at the T-34C repair facility at NAS Pensacola, testified that he had received approximately forty to seventy separate field service reports of unexplained T-34C in-flight power losses between 1979 and August 1982.[255] He was interrogated on twenty-four separate field service reports detailing sudden power loss to idle, which Bowers admitted could have been rollbacks. Bowers noted that each report listed the power loss as "unexplained."[256] Bowers admitted that on twenty-four previous occasions, when T-34Cs had suffered similar idling problems, the entire fuel control system, not the fuel flow divider unit, was replaced. Bowers agreed that a manual override control was necessary for flight safety in a T-34C.[257]

One Pratt & Whitney design representative, who was also a former Beech engineer, testified in a video deposition. He testified that Rainey and Knowlton's aircraft had been operating at fifty-five percent of power on impact, indicating the aircraft lacked sufficient power to fly before crashing. An aerospace engineer at NAS Pensacola Air Rework Facility testified that he thought the stall had been caused by a fuel flow problem but admitted on cross-examination that limited disassembly of the engine from the wrecked aircraft did not disclose any parts failures.[258]

The plaintiffs produced two expert witnesses. Dr. Andrew Craig, an expert on aircraft stalls and spins, testified that he was able to reconstruct the flight path of Rainey's aircraft from the time it took off after the final touch-and-go landing until it crashed.[259] He believed

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253. *Id.* at 95-99.

254. *Id.* at 100-02.

255. Record Vol. IV at 50-56.

256. *Id.*

257. *Id.* at 71.

258. *Id.* at 34-37.

259. Record Vol. III at 30-39.

the aircraft had an initial air speed of seventy to seventy-five knots and went into a stall at 400 feet above ground level due to a sudden increase in drag. Craig stated the most probable cause for the sudden increase in drag was power loss.[260] David Hall, an aircraft safety consultant, testified that the most probable cause of the crash was a fuel line malfunction, that is, rollback before the stall and the extreme maneuver executed to avoid a mid-air collision.[261]

The court refused to grant a motion for directed verdict and the defendants produced some surprising witnesses of their own. The defendants intended to show that Rainey and Knowlton died as a result of their own negligent handling of the aircraft.

## B. The Defendants' Cases

John Rainey did not testify for the plaintiffs.[262] He was the defendants' first witness. During the course of a JAG investigation into the crash conducted by Lieutenant Commander William Morgan, Rainey had written Morgan a letter disputing some of his findings.[263] The letter was not dated but was probably written near the end of 1982. Portions of that letter could be construed as adopting statements made

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260. *Id.* at 39. Dr. Craig said the pilot could not have avoided the stall at such low altitude on climb out.

261. Hall, an aeronautical engineer and engine expert, testified that he believed the power loss experienced by Knowlton and Rainey was caused by a contaminate in the pneumatic line that was sucked into the pneumatic control unit on the T-34C's engine. He based his opinion in part on the fact that the aircraft had been sidelined for an engine idling problem the day before. The aircraft maintenance record, which had also been reviewed by Lt. Commander Morgan during the course of the JAG investigation, showed that the pilot on the previous day had experienced engine idling problems and failure to come to full power for takeoff, a highly dangerous situation for a turboprop jet engine. Hall further said that Pratt & Whitney, the engine maker, produced a defectively designed engine in 1963 for the Canadian Dehavilland Beaver. In that configuration, Hall said, the engine had a manual override installed to permit the pilot to override the pneumatic fuel system for full power in emergencies. The override was not installed in the T-34C. Testimony of David Hall, Record Vol. IV at 135-47.

262. The trial was bifurcated. The issue of damages would only be tried if the plaintiffs prevailed on liability, and John Rainey's testimony would have been relevant only to the issue of economic loss and loss of consortium, because he was absent from NAS Pensacola at the time of his wife's death.

263. Beech Aircraft v. Rainey, 488 U.S. 153, 153, 109 S. Ct. 439, 441, 102 L. Ed. 2d 445, 446 (1988).

by other officers during the investigation that Barbara Rainey tried to cancel the training flight because Knowlton was tired and emotionally drained.[264] At trial, John Rainey was examined on the portions of his letter that could have been admissions by adoption.[265] On cross-examination, plaintiffs' counsel attempted to introduce statements John Rainey made in the letter that were inconsistent with his spouse having been pressured to fly the training mission over her better judgment.[266] The court sustained the defendant's objection that the plaintiffs asked the witness to give an inadmissible lay opinion on the cause of the crash.[267] The plaintiffs' counsel did not invoke the doctrine of completeness set out in Rule 106 as the basis for his questions to John Rainey.[268]

The defendant's second witness, a civilian engineer employed by the Navy at NAS Pensacola, testified he saw Rainey and Knowlton studying a flight manual just before their fatal flight.[269] This defense witness was actually called to give an opinion on the quality of Beech Aerospace maintenance at NAS Pensacola. He testified that Beech Aerospace's general level of aircraft maintenance at NAS Pensacola was "as good as [he'd] ever seen"[270] but that, in his opinion, Beech Aerospace's mechanics were not required to follow the Pratt & Whitney engine check list. Another witness, a former Marine major, testified

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264. Joint Appendix at 73-74.

265. *Id.* at 72-75.

266. *Id.* at 73-75, 104-18.

267. Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528-29 (11th Cir. 1986). The defendant's asserted basis for objection was improper lay opinion. The objection was sustained by the court on that basis. Joint Appendix at 77-78. *See also* Record Vol. V at 85-89.

268. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. *See* FED. R. EVID. 106

The defendants called a number of minor witnesses to establish foundations for exhibits, whose testimony will not be analyzed. A surveyor was called to authenticate a drawing of Middleton Field and the crash site he had prepared for Beech Aircraft and BASI. Record Vol. V at 89-93. A forester and realtor was called to authenticate photographs of sheared trees at the crash site. *Id.* at 94-102. A Pratt & Whitney statistician was called to authenticate statistics on air safety for T-34C aircraft kept by Beech. Record Vol. VI at 43-51. An employee of the maker of the prop on the T-34C was called to authenticate photos of the disassembled prop from aircraft 955. *Id.* at 54-69.

269. Record Vol. IV at 168.

270. *Id.* at 151.

that Beech Aerospace had a higher-than-average aircraft readiness record for T-34C aircraft at NAS Pensacola.[271]

One defense witness, who was a flight instructor in the late 1970s and had flown about 800 hours in the aircraft that had crashed,[272] conducted a simulated flight patterned after the last minutes of the Rainey flight.[273] He stalled the aircraft out when he took a violent 90 to 110 degree right turn at 75 knots airspeed. This time the pilot had enough altitude to recover the plane and avoid a crash.[274]

One Pratt & Whitney project engineer also approved of the mechanic's actions. He stated that the mechanics correctly replaced the fuel flow divider because the engine had what was known as a "hang start" below thirty percent engine power, and the automatic fuel control unit did not begin to function until the engine was running at more than thirty percent power.[275]

On the last day of testimony, the defense called a test pilot who was also an aeronautical engineer and a crash investigator. The witness blamed this accident on pilot error and stated that Rainey had intentionally stalled her aircraft and could have recovered from the stall had she reacted properly.[276]

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271. Record Vol. V at 190. The major testified that he was maintenance officer for a Marine UH1N helicopter squadron in the early 1970s that used a similar Pratt & Whitney jet engine. He stated that when the "Huey" had a hung start, the mechanics always replaced the fuel divider to cure the problem. He also admitted that the UH1N had a manual fuel control override similar to that eventually installed on the T-34C. Record Vol. IV at 182-84, 191. The major testified that Howie reported his two 1983 rollbacks to him immediately after landing, but that he did not agree that Howie had experienced a rollback, because the engine did not go below 62% power. Record Vol. V at 187.

272. Record Vol. V at 218.

273. *Id.* at 219.

274. *Id.* at 226-29. Workman also volunteered his own professional opinion that Rainey's aircraft was in no danger of a midair collision with Habermacher's, thus making the violent right turn in nose up attitude unnecessary. *Id.* at 240. Workman backed away from an opinion he suggested on direct examination that Rainey and Knowlton had been involved in a conflict over who was in control of the aircraft that led to the abrupt right turn that in his view caused the crash. *Id.* at 230-31.

275. Record Vol. V at 260-62, 268. This engineer said he saw nothing improper in a mechanic with 20 years' experience disregarding the published engine check list and installing a fuel divider if his experience led him to believe that the engine malfunction was caused by a fuel divider acting up. *Id.* at 288-89.

276. Record Vol. VI at 223. This test pilot witness put a video camera in the rear seat of a T-34C at Wichita, Kansas, and repeated the last few minutes of the Rainey aircraft flight before the crash, taking a videotape of the sequence. The jury was shown an edited version

The day after the accident, Habermacher appointed Morgan to conduct an informal investigation into the crash.[277] Morgan's official report was finished September 1, 1982 and contained a jurisdictional note, thirty-one findings of fact, nine opinions, and four recommendations.[278] Morgan, an experienced naval aviator, ruled out any aircraft maintenance failure, command or supervisory mistakes as the cause of the crash.[279] Although he was unable to identify the exact cause, Morgan reconstructed what he believed to be the most plausible scenario for the crash: one or both pilots put in too much up elevator on the trim tab, making the T-34C unstable unless physically held down by the pilot.[280] When Rainey or Knowlton took violent evasive action to prevent a mid-air collision with Guthrie's aircraft, the T-34C stalled. Before the T-34C's

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of the in-flight video, which was intended to simulate what Rainey would have seen from the rear seat during the fatal flight. The test pilot stated he believed that Rainey intentionally went into a right stall turn because she was disgusted. Record Vol. VII at 33.

The defendants called other experts or employees with special knowledge about components of the T-34C whose testimony was essentially cumulative when compared to the leading experts. A civilian Navy employee from NAS Patunxent River, the Navy's aircraft development center, testified on the initial project tests on two T-34B aircraft with turboprop engines that were the prototypes for the T-34C. His testimony disclosed no fuel control problems. Record Vol. VI at 101-29. A Beech engineer who was involved in the original development of the T-34C was called. Although no one noticed it at the time, the witness testified that Beech knew about the manual override control only recently, and not when he was originally designing the fuel system for the aircraft. Record Vol. VI at 131-40. An expert in aircraft fuel systems testified that, after reviewing documents in the file including the propeller tear down photographs, the Rainey aircraft had impacted with some engine power, although he could not state how much power. *Id.* at 70-95. Beech aeronautical engineer Ashok Agni-Hoti appeared to authenticate his flight simulator print out that gave Beech's version of the last few minutes of flight of the Rainey aircraft. *Id.* at 150-58.

Finally, a set of Beech employees and former employees who negotiated the original contract with the Navy appeared to authenticate the contract and specifications. A former Beech Vice President testified he took part in the negotiations with the United States Navy and authenticated the original contract and specifications, the SB 24 form. *Id.* at 180-205. Two Beech employees testified to meetings they had attended with the Navy on the fuel system for the T-34C and that the Navy did not request a manual fuel override control. Record Vol. VII at 38-52, 54-56.

277. This investigation is entitled "an informal investigation" lacking the legal status of a Naval Court of Inquiry. A single officer, in lieu of an officer acting under Art. 32 Uniform Code of Military Justice, may investigate any alleged offense or incident occurring in the line of duty. The officer reports to the commanding officer who can determine (a) whether to prefer charges against any service member, or (b) take any appropriate administrative action. U.S. Navy Dep't, JUDGE ADVOCATE GENERAL'S MANUAL, ch. VI & IX. *See also* R.C.M. 405 *Pre Trial Investigation*, MANUAL FOR COURTS MARTIAL II-37 (1984).

278. Joint Appendix at 1-16.

279. *Id.* at 13.

280. *Id.* at 14-15.

engine and control system could respond to correction for the stall, the aircraft hit the ground.

Morgan was not called as a witness.[281] At pre-trial, the court ruled that the factual portion of Morgan's investigative report was admissible, although his opinions would be excluded.[282] The plaintiffs objected to admitting any of Morgan's hearsay opinions, particularly the scenario reconstruction and the opinion that the crash was caused by pilot error.[283] Counsel cited *Smith v. Ithaca Corp.*,[284] a leading Fifth Circuit case adopted by the Eleventh Circuit, in which the court held that only factual statements contained in the reports should be admitted.[285] The trial judge ruled that all thirty-one findings of fact and all but three opinions could be admitted at trial.[286] After a confusing

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281. As of July 18, 1984, the plaintiffs had acquiesced in a pre-trial motion in limine ruling that permitted defendant to introduce only the findings labeled "findings of fact" in Morgan's report, excluding all his opinions. Morgan had not been deposed. The trial judge suddenly reversed his original ruling and allowed the defendants to put in most of the opinions, including the opinion that the stall was due to pilot error. Teleconference with Dennis Larry, Esq., Pensacola, Florida, Feb. 18, 1994.

282. Petition for Writ of Certiorari at App. 5 n.5, Beech Aircraft (No. 87-981).

283. *Id.* at App. 5.

284. 612 F.2d 215 (5th Cir. 1980). The *Smith* court had held that Rule 803(8), the hearsay exception for government reports, did not permit introduction of evaluative conclusions or opinion contained in evaluative reports.

285. *Smith*, 612 F.2d at 222.

> The language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the records of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses". Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

*Id.* at 221-22 (citations omitted).

286. Joint Appendix at 40-43. The transcript here is highly interesting.

> Court: At this hearing, it is the ruling of the Court that, notwithstanding the failure of compliance with the pre-trial order in some respects, that this court should nevertheless allow the defendants to place in evidence before the Jury the findings of fact, 31 in number, that were in the JAG report. What was the date of it? September 1st?
> Harrell: September 1st is stamped on it.
> Court: That's shown as Exhibit 266 in the file. It's stamped September 1st, 1982.

At this hearing, the court also, in light of the authorities it has considered and pursuant to its discussion at this hearing, holds that the opinions attached to those 31 findings may also

exchange between counsel on just exactly what portions of the report were to be excised, the exhibit was admitted and published to the jury. Morgan's damning opinion that the collision had been caused by failure to keep proper interval was admitted.[287]

The jury returned a special verdict on July 23, 1984, finding that the T-34C's fuel system was not defective at the time of the crash and that the defendants were not negligent.[288] The plaintiffs appealed from the judgment entered on the verdict to the Eleventh Circuit Court of Appeals.[289]

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be admitted, to the extent that they are opinions and conclusions. In that connection, various matters in there would not be allowed in.

Paragraph five is nothing but a possible scenario as it's called and would not be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

All of this is done over the objections of plaintiffs, whose objections are noted on the record as follows:

> Partington: If it please the Court, the plaintiffs object to the order; first, on the basis that the specific regulation which provides for the JAG investigation requires the investigator to make separate findings of fact and opinions, and to carefully distinguish those; and that under the applicable law in the Fifth Circuit, which is the *Smith* case, the Fifth Circuit very carefully delineated the difference between findings and evaluations. . . .
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> . . . .
>
> Court: All that, I took into consideration in my ruling. I point that out for you.
>
> Partington: I understand that. Also, the other basis, of course, is that the plaintiffs feel they have been unduly prejudiced by the failure of the defendants to comply with the pretrial order. . . .
>
> In that connection, Judge, we would respectfully request that the Court allow the plaintiff an opportunity in light of its findings and rulings made at the time, to review the JAG report for purposes of anything we might consider that we might wish to offer that might go to the conclusions—
>
> Court: Go to the conclusions?
>
> Partington: To the opinion, which the Court referred to, which is that the most probable cause was a failure to keep proper interval and that we be given leave, in the event we so decide, to call as a witness, such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion and the trustworthiness of it.

Mr. Partington meant to depose Morgan, or call that officer as a witness, to undermine his credibility as an accident reconstruction expert. Telephone conversation with Dennis Larry, Feb. 18, 1994.

287. Joint Appendix at 79-86.

288. Petition for writ of certiorari at 3-6, *Beech Aircraft* (No. 87-981).

289. *Id.*

## C. The Appeal

The Eleventh Circuit reversed and remanded *Rainey* for a new trial. The majority wrote a per curiam opinion finding that the trial judge had erroneously admitted Morgan's opinions contained in his investigative report.[290] Although the thirty-one factual findings were admissible, Morgan's opinions were not, and admitting those opinions was reversible error.[291] The majority also found that the trial court erred in sustaining objections to the plaintiffs' cross-examination questions put to John Rainey about his opinion on the most probable cause of the crash being rollback.[292] The majority held that John Rainey's letter could have been introduced either under Rule 106, following the rule of completeness, or as a prior consistent statement by the witness offered to rebut a charge of recent fabrication under Rule 801(d)(1)(B).[293]

Judge Johnson wrote a special concurring opinion in which he described *Smith*[294] as "an anomaly among the circuits" that should be overruled on the ground that "broad admissibility [of hearsay government reports] releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question."[295]

The entire Eleventh Circuit then took the case *en banc*.[296] This hearing produced another per curiam opinion that did little to shed light on how to handle hearsay government investigative reports. The full court was evenly divided on whether to overrule *Smith*.[297] The court's division, in effect, affirmed the panel's decision to reverse and remand to the Northern District of Florida.[298] Judge Tjoflat wrote a separate

290. Rainey v. Beech Aircraft, 784 F.2d 1523, 1527-28 (11th Cir. 1986).

291. *Id.* at 1527-28.

292. *Id.* at 1529.

293. *Id.* at 1529-30 nn.11 & 12.

294. 612 F.2d 215.

295. *Rainey*, 784 F.2d at 1530.

296. Joint Appendix at 134.

297. Rainey v. Beech Aircraft, 827 F.2d 1498 (11th Cir. 1981).

298. *Id.* at 1500-01.

concurring opinion in which Judge Johnson joined. Judge Tjoflat printed Morgan's entire report in his opinion.[299] Turning to Rule 803(8), which the court assumed was the only basis for offering the exhibit, Judge Tjoflat stated that the burden fell on the plaintiffs to show that Morgan's report relied on untrustworthy sources in making his findings of fact and opinions, because Rule 803(8) assumes admissibility of governmental evaluative reports.[300] Since the plaintiffs failed to challenge the basis for Morgan's findings and opinions in court, the plaintiffs failed to demonstrate that the report was untrustworthy. The report met the threshold test of Rule 803(8).[301]

Judge Tjoflat then analyzed the legislative history of Rule 803(8), concluding that the House Judiciary Committee's "somewhat tortured reading" of Rule 803(8) was not adopted by the Senate nor affirmed by the Joint Conference Committee and should not control interpretation of Rule 803(8).[302] Although Judge Tjoflat conceded that the legislative

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299. *Id.* Judge Tjoflat included opinions 5, 8 and 9 excised by the trial judge. *Id.* at 1502-06.

300. *Id.* at 1508.

301. *Id.*

302. *Rainey*, 827 F.2d at 1510. Judge Tjoflat referred to the following committee report commentaries on Rule 803(8):

> (1) The [House Judiciary] Committee approves Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

H.R. Rep. No. 650 1593, 93d Cong., 2d Sess. 14 (1973).

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are not admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b) bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are

history of Rule 803(8) was equivocal, he believed that the Senate's version of the reason for the exception was more consistent with the *zeitgeist* of the Federal Rules of Evidence.[303] To illustrate his point, he turned to Rule 803(6), the business records exception, in which specific provision was made for admission of opinion and diagnoses.[304] According to Judge Tjoflat, the Advisory Committee used "opinions" and "diagnoses" in Rule 803(6) because opinions were not often encountered in traditional business records, but are now commonplace.[305] The Commonwealth Fund Act and the Uniform Business Records as Evidence Act did not explicitly provide for admission of opinions and diagnoses; therefore, Rule 803(6) expressed a trend toward free admissibility of diagnoses and opinions contained in business records.[306]

According to Judge Tjoflat, since evaluative reports made by public officials under a duty to conduct investigations contain sufficient circumstantial guaranty of trustworthiness to merit admission, evaluative reports should be presumed trustworthy.[307] Similarly, since Rules 702 through 705 express a principle of broad admissibility of opinion evidence given in court, Rule 803(8) ought to be consistent with the

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not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

S. Rep. No. 1277, 93d Cong., 2d Sess. 18 (1973).

(3) The Senate [Conference Committee] amendment adds language not contained in the House bill, that refers to another rule that was added by the Senate in another amendment (Rule 804(B)(5)—Criminal law enforcement records and reports).

In view of its action on Rule 804(b)(5) (Criminal law enforcement records and reports), the Conference does not adopt the Senate amendment and restores the bill to the House version.

H.R. Fed. R. Evid. Conf. Rep. No. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7104. *Rainey*, 827 F.2d at 1510-11.

303. *Rainey*, 827 F.2d at 1511. The legislative history as to the admissibility of evaluative conclusions is indeed equivocal. Nevertheless, the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence and is easily justified on policy grounds. *Id.*

304. *Id.* at 1511-12.

305. *Id.* at 1512.

306. *Id.*

307. *Id.*

spirit of the opinion rules.[308] Therefore, opinions included in investigative reports such as that prepared by Morgan, were just as admissible as findings of fact. Since the weight of authority in all circuits is against *Smith*, Judge Tjoflat stated that he believed it should be overruled.[309]

Beech Aircraft filed a petition for writ of certiorari before the United States Supreme Court, which was granted on February 29, 1988.[310]

## D. The Supreme Court Decision

Upon review of the Eleventh Circuit's decision, the United States Supreme Court decided that *Smith v. Ithaca Corp.*[311] was inconsistent with its view of Rule 803(8). The Court held that Morgan's evaluative report was properly admitted at trial.[312] However, it sustained the Eleventh Circuit's reversal to permit plaintiffs' counsel to put before the jury facts in John Rainey's letter to Morgan that were inconsistent with Rainey's adoption of Morgan's opinion that the crash was due to the pilot of aircraft 3E955's failure to keep proper interval in the traffic pattern.[313]

Justice Brennan, writing for the majority, set forth a summary of the salient facts of the case and portions of Morgan's report that the Justices felt were significant.[314] He then turned to the Federal Rules of Evidence and to its legislative history to determine whether or not Rule 803(8)(c) intended to allow the courts to admit opinions contained in investigative reports.[315] His summary of the legislative history was similar to that of Judge Tjoflat in the Eleventh Circuit *en banc* hearing. Justice Brennan concluded that the legislative history of the rule was equivocal and that neither the express language of Rule 803(8) nor the intent of the people who originally wrote Rule 803(8) mandated

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308. *Rainey*, 827 F.2d at 1514.

309. *Id.* at 1515.

310. Joint Appendix at 1.

311. 612 F.2d 215 (5th Cir. 1980).

312. *Beech Aircraft*, 488 U.S. at 170.

313. *Id.* at 171-74.

314. *Id.* at 156-61.

315. *Id.* at 161-70.

any distinction between the "facts" and the "opinions" contained in an evaluative report otherwise admissible under Rule 803(8).[316] Therefore, the Justice concluded that there should be no distinction between admissibility of "facts" and "opinion" in evaluative reports. Applying this rationale to Morgan's report, the Justice stated that the entire report was admissible.[317]

## E. Analysis

The four-part evidence analysis system really helps to make sense out of a very confusing hearsay case. The patent similarities between *Rainey* and *Palmer*[318] are apparent only after a complete analysis.

### 1. Relevance

Considering only Morgan's findings of facts, his report was relevant to establish the following points at issue:

(1) the time and location of the crash;
(2) the identity of the persons in the T-34C that crashed;
(3) the aircraft maintenance record of the T-34C that crashed;
(4) the physical and mental conditions of Barbara Rainey and Knowlton at the time of the crash;
(5) Barbara Rainey's qualification to serve as a flight instructor, principally her NATOPS classification;
(6) the overall operational condition of the T-34C that crashed;
(7) the T-34C that crashed was not equipped with a manual fuel indicator that would have permitted the pilots to override the automatic pneumatic fuel control in emergency situations.

When Morgan's opinions are reviewed, the report is relevant to prove the following additional points at issue:

316. *Id.* at 163-68.

317. *Beech Aircraft*, 488 U.S. at 169-70.

318. 318 U.S. 109.

(8) the crash was not caused by a maintenance failure on the part of NAS Pensacola personnel;
(9) the crash was not due to any command or control breakdown either at NAS Pensacola or at Middleton Field;
(10) the possibility that the T-34C crashed due to fuel rollback in its fuel line during the evasive maneuver cannot be ruled out;
(11) the most probable cause of the crash was Rainey's and Knowlton's failure to keep a proper interval in the landing pattern at the time of the crash; and
(12) the most likely scenario that explained the crash was that the T-34C stalled as either Rainey or Knowlton executed a steep right turn to avoid a mid-air collision with Lt. Colonel Habermacher's aircraft in the landing pattern.

Morgan's report went to the heart of the case, since it proved an alternative explanation for the crash that undid the plaintiffs' theory that the T-34C crashed due to a design defect in its fuel supply system, that is, rollback.

### 2. Reliability

Turning to the reliability of the report, substantial issues about the competence of out-of-court declarants, hearsay and opinion need to be examined.

#### a. Competence

It has been noted previously that modern evidence commentators ignore the competence of hearsay declarants when hearsay is offered.[319] This change has probably been caused by Rule 601. That rule may be interpreted as a burden shifting provision that abolishes the initial burden of establishing a witness's competence by the party calling the witness, and shifts to the opponent the burden to show some evidence that the witness does not meet the competency qualifications spelled out in Rules 602 and 603, that is, first hand knowledge and appreciation

319. *See supra* note 210.

of the duty to tell the truth. In short, the competence of witnesses in court is presumed. The same presumption applies by inference to out-of-court declarants. Unless the competence of out-of-court declarants is attacked under Rule 806, they are likewise presumed competent.[320]

### b. Hearsay

Morgan's report was written in September, 1982, long before trial, and was offered for the truth of his findings of fact and opinions. The report met the definition of hearsay. Furthermore, since Morgan's findings and opinions were based on the sixty attachments that were not offered into evidence, his findings and conclusions were hearsay within hearsay. Defendant offered only the report itself without attachments under the government records exception to the hearsay rule. Defense counsel could equally well have offered the report as a business record under Rule 803(6). The report was prepared by a person with knowledge, using information in the sixty attachments prepared by other persons with knowledge. Morgan was conducting an investigation in the regular course of naval business to determine why an aircraft crashed during a routine basic training flight. His report was kept and maintained by his squadron commander in the ordinary course of naval business. The primary purpose for making the investigation was to assist in operational efficiency and air safety, not in anticipation of future litigation against the United States.[321] His incidental references to damage claims made by the landowners where the aircraft crashed did not convert the report into a litigation document. The circumstances of making of the report did not raise any substantial concerns about Morgan's motivation to misstate the facts.

Turning to the issue that the plaintiffs raised at pre-trial and on appeal, Rule 803(8) was a legislative compromise as were most of the Federal

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320. The almost total absence of case law since 1975 on the competence of out-of-court declarants is evidence itself of the change of law wrought.

321. This analysis shows that the situation in *Palmer* and *Rainey* were similar. In both cases, the hearsay offered was contained in a governmental evaluative report. In *Palmer*, the hearsay was offered as a business record kept by one of the parties, the New Haven, rather than as a government report. In *Rainey*, the report was offered as a government report, since neither Beech Aircraft nor Beech Aerospace was involved in the investigation. The situation would have been identical had a Beech Aircraft investigator assisted in the investigation and kept a copy of Morgan's report as part of Beech's aviation safety records.

Rules of Evidence. Rule 803(8) was not a theoretical analysis of the conditions of admissibility for government documents. Subdivision (c) permits admission of "factual findings resulting from an investigation made pursuant to authority granted by law" in civil cases, "unless the sources of information or other circumstances indicate lack of trustworthiness."[322] Morgan's investigation was authorized by his commanding officer pursuant to appropriate provisions of the JAG Manual. It was offered in a civil action, after the plaintiffs had waived any objections to Morgan's status as an expert in air accident investigation cases.[323] The plaintiffs also waived any objections to the trustworthiness of the information sources relied on by Morgan or to any other aspect of the investigation.[324]

The only debatable issue was whether the report as admitted consisted of "factual findings" or something else. The Eleventh Circuit and the United States Supreme Court struggled with the meaning of "factual findings" in the course of three different opinions. The courts resorted to legislative history and the *zeitgeist* of the Federal Rules in order to come up with a plausible interpretation of "factual findings." Justice Brennan's final solution was to authorize admission of any hearsay conclusions or opinions in government reports "based on factual information" that "satisfies the Rule's trustworthiness requirement."[325]

The real analytical problem here was the attempt made by the framers of the Federal Rules of Evidence to blend distinct reliability issues into a single rule that also asked the court to apply a special weighing of probative value against prejudice, that is, the *Palmer* requirement that the entry be made by someone free from suspicion of untrustworthiness.[326] Whether or not opinion evidence should be received has nothing to do with whether the opinion is delivered *ex cathedra* from the witness stand or via a hearsay document of some kind. A hearsay document that is opinion is subject to attack on weight and credibility issues under Rule 806.

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322. FED. R. EVID. 803(8).

323. *Beech Aircraft*, 488 U.S. at 156-61.

324. *Id.*

325. *Id.* at 170.

326. *Palmer*, 318 U.S. at 114.

The report was alternatively admissible under either Rule 803(6) or 803(8), assuming a proper foundation was laid for both exceptions by defense counsel.

### c. Opinion

Morgan's opinions were based on his own examination of the crash site and wreckage and upon sixty enclosures to his report, which were all hearsay documents commonly relied upon by Air Accident Investigators in reaching a conclusion as to the cause of a crash.[327] The labeling process identifying some of Morgan's opinions as "findings of fact" and some as "opinions" is fundamentally misleading. Morgan was not an eyewitness to the crash. Most of his knowledge about the crash was derived from reports of others. Had Morgan been called as a witness, he was not qualified to give a lay opinion about the cause of the crash or any underlying factors involved in the crash. Unless defense counsel showed that Morgan was qualified by special knowledge, education, training or experience to formulate conclusions about aircraft crashes, he was unqualified to make any conclusions or to speculate about the cause of the crash.[328] Since Morgan did not testify, there is no record

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327. Without spending excessive time on petty details, the report included the following attachments:

(1) aviator qualification records extracts for Rainey and Knowlton,
(2) the medical records for both aviators,
(3) the autopsy reports on the cause of their deaths,
(4) the aircraft maintenance history for the T-34C that crashed,
(5) various Naval airworthiness directives pertinent to equipment aboard the T-34C,
(6) written statements taken under oath from the six officers who were flying aircraft in the Middleton Field pattern at the time of the crash
(7) Written statements under oath from the air rescue helicopter crew that went to the site from NAS Pensacola,
(8) written statements under oath from crash crew personnel at Middleton, and
(9) extracts from the tower officer's duty log at NAS Pensacola. Joint Appendix at 3-7.

All of these attachments were hearsay that Morgan used to formulate his findings of fact and his opinions. *See* FED. R. EVID. 703. The attachments were not admitted at trial, and as Morgan was not called as a witness, he was not cross-examined on the basis for his opinions, nor did the plaintiffs' counsel take advantage of Rule 806 that would have allowed the plaintiffs to impeach the findings of fact and opinions in that report based on the foundational weaknesses displayed in the attachments.

328. Rule 701 requires that lay opinion evidence be received only when it is founded on first hand observation. Morgan lacked that qualification for most of his findings. Rule 702

evidence showing his qualifications to give opinion evidence. However, the plaintiffs did not object to Morgan's qualification to give opinion evidence when the report was offered in evidence.[329] The plaintiffs conceded Morgan's qualifications as an expert in air accident reconstruction.

The plaintiffs did not object to any of the basis materials relied upon by Morgan. Therefore, the plaintiffs conceded that the sixty attachments to Morgan's report were of the type usually relied upon by experts in formulating opinions, even though many of the attachments could not be admitted in their own right.[330]

Although there were serious obstacles to receiving Morgan's opinion evidence, the plaintiffs waived the major objections and instead confined its objection to a narrow, technical point raised by case law interpreting Rule 803(8). Unless the Supreme Court wished to relieve the plaintiffs of the duty to make a pertinent objection under Rule 103, the trial judge was not obliged to discern what the real objections might have been to the report.[331]

### 3. Public Policy

Morgan's report was not excluded by any claim of state secret privilege by the United States nor by another policy or housekeeping rule.

### 4. Probative Value Calculus

#### a. Probative Value

Returning to the first step, the report was relevant to prove twelve different disputed issues. First, some of the findings of fact in Morgan's

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requires that a preliminary foundation showing that a person possess special knowledge, education, training or experience be laid before a person is qualified to give an opinion based on information not derived from first hand knowledge.

329. Joint Appendix at 42-43. The plaintiffs' objection was based solely on the hearsay rule and the distinction between facts and opinion admitted under Rule 803(8) allegedly made in the *Smith* case.

330. FED. R. EVID. 703.

331. *See* FED. R. EVID. 103(a)(1).

report were not available from any other source at the time of trial, particularly the evaluation of aircraft wreckage on site before the victims were removed. Second, Morgan, an experienced Naval aviator, had special expertise with respect to the behavior of instructors and student pilots during Navy flight training. Morgan's explanation of the probable scenario contained in opinion 5 is based on his peculiar knowledge of the way in which a junior officer and novice pilot interacts with a senior officer who is a very experienced pilot.

Morgan's appraisal of the cause of the crash was entitled to some weight, although the support for his opinions could not be assessed by the jury since the attachments to the report were not admitted, and only a handful of the incident witnesses who gave statements to the investigating officer were called as witnesses at trial. Furthermore, the probative value of the report was reduced by the usual risk of hearsay. Morgan's conclusions were never tested by cross-examination nor was his demeanor observed by the judge and jury. The sixty attachments to his report that were not admitted at trial—and therefore not heard by the jury—formed the bases for his conclusions. The jury could not evaluate the bases for his conclusions. The probative value of the JAG report was fairly low.

**b. Prejudice**

Morgan was no longer stationed at NAS Pensacola, and defense counsel chose not to depose him, relying on the plaintiffs' consent to introduce the factual portion of his report.[332] Furthermore, John Rainey had been called as a hostile witness and not allowed to testify to the full text of his letter to Morgan that seemed to agree with defendants' theory of the case. Defense counsel chose to rely on Rule 803, which permitted hearsay matter to be introduced without a showing of absence of the out-of-court declarant. Under these circumstances, the plaintiffs suffered substantial prejudice because they could not attack Morgan's opinions by bringing out the lack of factual basis for his conclusions from any available witness. The plaintiffs could not rebut this late-breaking hearsay. Although introduction did not waste the court's time, the jury

332. *Beech Aircraft*, 488 U.S. at 156-61.

was likely to be confused by the introduction of the report and that confusion may have led the jury to conclude they had to find for the defendants on liability because an official government report said the accident was a result of pilot error.

In conclusion, Morgan's opinions in his report had relatively low probative value because of the nature of hearsay evidence and lack of explanation given for the bases of his opinions. Also, the report was admitted with substantial prejudice to the plaintiffs, who had no chance to rebut the JAG report with other evidence. The report might very well have been excluded by the trial judge on Rule 403 grounds. At any rate, admission or exclusion would be a close call using probative value calculus, and well within the trial judge's discretion as currently interpreted. Nonetheless, *Rainey* became a hearsay cause celebre, resulting in further judicial attempts to fix the hearsay rules. That attempt is bound to fail when the real problems with evidence lie not with hearsay issues but with other reliability issues and probative value analyses.

## VI. Conclusion

This Article demonstrates that evidence law can be dynamically organized around the mental processes of the trial judge and counsel. Whenever data are challenged, the trial judge goes through a four-step process before determining to admit or exclude the data. The process may not be articulated in every case by words "on the record" or by analysis in a later appellate decision, but the process is fundamental to understanding evidence law.

When lawyers and judges ignore a complete four-step analysis over disputed evidence, they are likely to do more harm than good to orderly admission or exclusion issues. Certainly, that proved true in the fictional trial of Charles Darnay. *Palmer v. Hoffman*[333] and *Beech Aircraft v. Rainey*[334] are real world examples for application of the four-step process because each is a botched case.

*Palmer* incorporated the doctrine of subjective motive to misstate facts into the business records exception to the hearsay rule, when the

333. 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

334. 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).

real problem with the engineer's hearsay statement lay in its overall probative value as a piece of cumulative evidence given by a person whose conduct was suspect, the engineer in charge of the locomotive that rammed Harold Hoffman's Ford. *Rainey* misinterpreted the government documents hearsay exception because Congress, in its infinite wisdom, had tied Rule 803(8)(c) to a separate special examination of any opinion evidence contained in a hearsay government report. The real issue in *Rainey* was the probative worth of an expert opinion delivered via a hearsay document without any exposure of the bases of the opinion to the trier of fact. Indeed, when the case came up for retrial, Morgan was deposed, and the entire JAG report was proved to be unreliable. The case was settled without a second trial.[335]

The reason that the real issues in these cases were not perceived may have been the failure to grasp that evidence is a dynamic process that yields only one conclusion, admission or exclusion. Since none of the judicial opinions about admitting the engineer's statement or Morgan's report expressly stated all four factors of the evidence equation and examined each in detail, no one can tell whether all four factors relative to admission were considered by anyone involved in the case. The results in the *Darnay* and *Palmer* cases were massive conglomerate failures of the trial process. Darnay was convicted on unsubstantiated evidence. The plaintiff's verdict in *Palmer* was sustained on very dubious grounds where the weight of the evidence would have favored the defendant had the engineer's contemporaneous report been admitted.

*Rainey*, on the other hand, is a curious example of an evidentiary failure that reached a defensible result. It allowed facts and opinion contained in a government investigative report to be part of the record, although the report was, in fact, unreliable. However, the court recognized that the trial court's evidentiary failure also included the failure to allow John Rainey to explain what he meant by his letter to Morgan. As it turned out, Morgan's original JAG report lacked an adequate factual basis to support his opinion, and would have been excluded on re-trial. In *Rainey*, systemic failure ultimately worked against itself to produce a defensible result.

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335. Telephone interview with Dennis Larry (Feb. 18, 1994).

The four-part evidentiary analysis presented in this Article is a remedy for the massive, conglomerate evidentiary failures in Darnay's trial and in *Palmer* and *Rainey*. Lawyers who relentlessly follow this Article's four-step analysis in the preparation of their cases could virtually eliminate evidentiary failures produced by improper planning. If trial judges and appellate judges also employed the four-part analysis to deal with evidentiary issues, the amount of error written into the rules of evidence by decisional law would be greatly reduced.