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The Organization of the Evidence Course: The "Preliminaries" to Helping Students Develop the Skill of Identifying Nonhearsay

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THE ORGANIZATION OF THE EVIDENCE COURSE: THE "PRELIMINARIES" TO HELPING STUDENTS DEVELOP THE SKILL OF IDENTIFYING NONHEARSAY

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"The chief aid to [understanding] is order."[1]

I. INTRODUCTION

When the *Law Journal* kindly invited me to contribute to this special issue on teaching Evidence, my initial inclination was to write an article about the need to integrate teaching legisprudence, notably statutory interpretation, into the Evidence course. I strongly believe that as a general proposition, the academy does a woefully inadequate job of preparing our students to practice in the Age of Statutes.[2] Moreover, as a course, Evidence is uniquely well suited as a vehicle for teaching legisprudence. In most contemporary Evidence courses, the primary focus is on the Federal Rules of Evidence. They not only govern in federal practice, but in four-fifths of the states the legislature or judiciary has adopted an evidence code patterned directly after the Federal Rules.[3] Most Articles of the Federal Rules function as self-contained codes.[4] In its landmark 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[5] the Supreme Court approvingly quoted the late Professor Edward Cleary's statement that "[i]n principle, under the Federal Rules no common law of evidence remains."[6] In Justice Blackmun's words, "the Rules occupy

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1. SIMONIDES (c. 475 B.C.), *quoted in* THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES 1729 (1965).

2. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (Burton Stevenson ed., 1982); Edward J. Imwinkelried, *A More Modest Proposal Than a Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretative Intention*, 68 ALB. L. REV. 949 (2005).

3. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, *Table of State and Military Adaptations of Federal Rules of Evidence*, *in* WEINSTEIN'S FEDERAL EVIDENCE (Joseph M. McLaughlin ed., 2d ed. 2005).

4. *See, e.g.*, Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987).

5. 509 U.S. 579 (1993).

6. *Id.* at 588 (quoting United States v. Abel, 469 U.S. 45, 51–52 (1984)).

the field."[7] However, Rules 301 on presumption,[8] and 501 on privileges,[9] create windows to the common law. Those statutes explicitly empower the courts to continue to evolve those bodies of doctrine by common-law process. Hence, the statutory scheme affords the teacher a unique opportunity to contrast jurisprudence with legisprudence.

However, I resisted the temptation to write that article. On several occasions in the past, I have made my views on that subject clear.[10] I feel as strongly about the need to teach statutory interpretation in Evidence as I ever have, but I am afraid that I have beaten the subject to death. I probably sound like a broken record. Further, I would like to think that there is a growing realization of the need to teach legisprudence in the law school curriculum. Two of the earlier special teaching issues in this law review included articles on the wisdom of integrating statutory analysis into teaching Contracts[11] and Criminal Law.[12] I was gratified to see that Professor McMunigal's article on Criminal Law relied in part on one of my earlier pieces advocating increased stress in teaching on legisprudence.[13] In any event, I concluded that it was advisable to select a different topic. That topic is the challenge of teaching law students how to recognize nonhearsay.

II. THE DAUNTING CHALLENGE OF HELPING LAW STUDENTS DEVELOP THE ANALYTIC SKILL OF DETERMINING WHETHER TESTIMONY ABOUT AN OUT-OF-COURT DECLARATION AMOUNTS TO HEARSAY

Teaching law students how to identify nonhearsay may be the most daunting pedagogic challenge in the Evidence course. To begin with, each year law students taking Evidence complain about the difficulty of distinguishing between nonhearsay and hearsay. To be sure, the students appreciate the importance of the distinction. It is black letter law that

7. *Id.* at 587.

8. FED. R. EVID. 301.

9. FED. R. EVID. 501.

10. Edward J. Imwinkelried, *The Need to Integrate Legisprudence into the Evidence Course*, *in* TEACHING THE LAW SCHOOL CURRICULUM 193 (S. Friedland & G. Hess, eds. 2004); Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills*, 21 QUINNIPIAC L. REV. 907 (2003); Edward J. Imwinkelried, *Evidence Pedagogy in the Age of Statutes*, 41 J. LEGAL EDUC. 227 (1991). In part because of those beliefs, the Evidence course book, which I co-author, places special emphasis on legisprudence. See RONALD L. CARLSON, EDWARD J. IMWINKELRIED, EDWARD J. KIONKA & KRISTINE STRACHAN, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES (4th ed. 1997).

11. H. Miles Foy, III, *Legislation and Pedagogy in Contracts 101*, 44 ST. LOUIS U. L.J. 1273 (2000).

12. Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285 (2004).

13. *Id.* at 1289 n.13 (citing Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills*, 21 QUINNIPIAC L. REV. 907, 908 (2003)).

nonhearsay is admissible without the necessity to identify an applicable hearsay exception while hearsay is admissible only if the proponent can persuade the trial judge that the testimony falls within the scope of an exception.[14] However, understanding the importance of a distinction does not make it any easier to grasp the distinction or to apply it in practice. The typical law student can easily master most of the hearsay exceptions, since for better or worse, mastery to a large degree consists of memorizing the essential elements of the foundations for the various exceptions. Many students struggle, though, in making the threshold determination of whether the testimony constitutes hearsay in the first instance.

Moreover, Evidence teachers acknowledge the magnitude of the challenge. Evidence teachers often remark that perennially one of the most disappointing facets of the students' performance on the final examination is their frequent inability to discern that although testimony in an examination question related to an out-of-court statement, nevertheless the testimony was not hearsay. To address that problem, many, if not most, Evidence teachers spend a full class on an extended discussion of the hearsay definition and then devote at least one additional class session exclusively to analyzing problems posing the question of whether the proffered testimony constitutes hearsay. Some employ Professor Morgan's classic 1946 Summer Term Harvard Law School examination, including 75 fact situations prefaced by the question, "Which of the following items is hearsay?"[15] Others have developed their own hearsay drills.[16]

Finally, trial judges complain loudly about the bar's lack of understanding of the narrow scope of the definition of hearsay. Many a trial judge has told me that he or she hates to preside at a case with a "jack in the box" attorney who leaps up to object on hearsay grounds whenever the proponent's question calls for an out-of-court statement—even when it is patent that the testimony will qualify as nonhearsay. Of course, if that type of attorney wears on the judge's patience, the average juror will similarly find the attorney irritating. The attorney is wasting the jury's time by constantly interrupting to interject hearsay objections and regularly being overruled by a sometimes obviously exasperated judge.

In sum, every affected constituency—law students, Evidence teachers, and judges—would likely agree that in Evidence, we must do a better job of teaching students how to differentiate between hearsay and nonhearsay. Many trial attorneys have an inadequate understanding of the scope of the hearsay

14. FED. R. EVID. 802–04, 807.

15. JON R. WALTZ & ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 133–37 (10th ed. 2004).

16. CARLSON ET AL., *supra* note 10, at 457–61 (problems 18–13(a)–(w)).

definition, and to some extent that reflects the difficulty of the teaching challenge.

In this short Article, I do not intend to discuss what to teach about the hearsay definition or how to teach it. Rather, I would like to discuss when to teach that subject. In general, should the Evidence teacher discuss the hearsay definition early or late in the course? More specifically, what evidentiary topics ought to precede that discussion in the Evidence course?

III. THE TEMPTATION TO TEACH THE HEARSAY DEFINITION EARLY IN THE EVIDENCE COURSE

There are exceptions to the rule,[17] but for the most part, Evidence coursebooks tend to take up the subject of hearsay relatively early.[18] For several reasons, that tendency is understandable.

One reason is that the hearsay coverage tends to be the lengthiest topic in the course and it makes sense to try to get that topic out of the way early on. Once the teacher has finished the discussion of that topic, the teacher has a better sense of how much is left for the rest, residue, and remainder, that is, the shorter discussions in the course. The typical Evidence coursebook devotes more pages to the topic of hearsay than to any other subject.[19] One coursebook includes more than 500 pages on the various aspects of the hearsay doctrine.[20] Another sets aside almost 350 pages to the topic.[21] Especially given the difficulty of teaching the skill of recognizing nonhearsay, at the beginning of the course it can be hard to predict how many class hours will have to be spent on hearsay. Since by far hearsay is the largest topic in the course, it would be

17. RONALD J. ALLEN, RICHARD B. KUHNS & ELEANOR SWIFT, EVIDENCE: TEXT, PROBLEMS, AND CASES ch. 8 (3d ed. 2002); KENNETH S. BROUN, ROBERT P. MOSTELLER & PAUL C. GIANNELLI, EVIDENCE: CASES AND MATERIALS ch. 13 (6th ed. 2002); RICHARD O. LEMPERT, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES ch. 6 (3d ed. 2000); JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A. BERGER, EVIDENCE: CASES AND MATERIALS ch. 4 (9th ed. 1997).

18. DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH ch. 3 (2004); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS ch. 3 (5th ed. 2004); PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE ch. 4 (5th ed. 2005); PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, EVIDENCE: CASES, MATERIALS, AND PROBLEMS ch. 3 (2d ed. 1998); WALTZ & PARK, *supra* note 15, at ch. 3; OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE ch. 2 (3d ed. 2003).

19. *See, e.g.*, ALLEN ET AL., *supra* note 17; GEORGE FISHER, EVIDENCE (2002); ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE (2d ed. 1994).

20. RICE & KATRIEL, *supra* note 18, at 283–784.

21. DENNIS D. PRATER, DANIEL J. CAPRA, STEPHEN A. SALTZBURG & CHRISTINE M. ARGUELLO, EVIDENCE: THE OBJECTION METHOD 509–850 (2d ed. 2002).

foolish to leave that topic to the very end of the course. The teacher could easily run out of time and have to altogether forego the discussion of a number of important evidentiary topics.

Further, students are eager to reach the topic of hearsay because it is perhaps the evidentiary doctrine that television and the movies have given them the most exposure to. By the time they enroll in law school, students have probably seen several depictions of trials in which an attorney made a technical hearsay objection to obstruct the search for truth. The experienced Evidence teacher wants to begin the course with a high level of student interest, and he or she can do so by capitalizing on the students' interest in the topic of hearsay.

Finally, from a selfish perspective, raising the topic of hearsay allows the Evidence teacher to discuss constitutional law decisions that the teacher finds intellectually stimulating. In their heart of hearts, most law teachers fancy themselves as constitutional law scholars, and more than any other evidentiary topic, hearsay interfaces with constitutional law. Many of the foremost modern Evidence scholars such as Professors Richard Friedman and Robert Mosteller write frequently about that interface.[22] The Supreme Court's celebrated 2004 decision in *Crawford v. Washington*[23] is only the most recent in a long line of Confrontation Clause[24] cases imposing restrictions on the admissibility of prosecution hearsay.[25] The *Crawford* Court's theory of "testimonial statements" can potentially have a broad impact on the general admissibility of hearsay in criminal cases.[26] In addition, there are constitutional constraints on several other aspects of hearsay doctrine, such as tacit admissions,[27] vicarious admissions,[28] and the unavailability standard for the former testimony hearsay exception.[29] Some Evidence coursebooks have separate chapters discussing the interface between hearsay doctrine and

22. *E.g.*, Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4; Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005).

23. 541 U.S. 36 (2004).

24. U.S. CONST. amend. VI.

25. *E.g.*, White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968).

26. *See generally* Crawford *Symposium*, 20-SUM Crim. Just. 5 (2005). The various articles identify a number of constitutional law issues that are left unresolved after *Crawford*. Needless to say, those issues are fodder for class discussion.

27. Doyle v. Ohio, 426 U.S. 610, 617–18 (1976).

28. Bruton v. United States, 391 U.S. 123, 135–37 (1968).

29. *Mancusi*, 408 U.S. at 204.

constitutional law.[30] What would the typical Evidence scholar more enjoy teaching: the interpretation of the dead men's statutes or the growing controversy over the application of *Crawford* to dying declarations? The Evidence teacher is probably correct in thinking that the latter topic will lend itself to a livelier class discussion.[31]

For all of these reasons, it is tempting for the Evidence teacher to take up the topic of hearsay, including the recognition of nonhearsay, sooner rather than later.

IV. THE CASE FOR COVERING THE HEARSAY RULE SOMEWHAT LATER IN THE EVIDENCE COURSE—THE HELPFUL "PRELIMINARIES" TO ATTEMPTING TO TEACH THE STUDENTS HOW TO RECOGNIZE NONHEARSAY

The thesis of this Article is that on balance, it is advisable for the Evidence teacher to turn to the topic of hearsay somewhat later in the course. More specifically, this Article argues that there are several topics that are natural "preliminaries" to the discussion of nonhearsay. It is submitted that if the Evidence teacher covers these topics before shifting to hearsay, his or her students will be in a markedly better position to master the analytic skill of making the threshold determination whether testimony about an out-of-court statement constitutes hearsay. Those four "preliminary" topics are: the competency of prospective witnesses; the authentication of evidence; logical relevance, notably non-character theories; and the best evidence rule.

A. The Competency of Prospective Witnesses

Many Evidence coursebooks cover the topic of witness competency after the analysis of hearsay.[32] However, reversing that sequence can make it easier for the students to develop the skill of determining whether testimony falls within the definition of hearsay.

Today the conventional wisdom is that the primary rationale for the hearsay rule is safeguarding the opportunity for cross-examination.[33] Modernly, we limit the scope of the definition of hearsay to assertive statements.[34] That limitation generally excludes exclamatory, imperative, and interrogatory sentences from the definition:

30. LEMPERT ET AL., *supra* note 17, at ch. 7; PRATER ET AL., *supra* note 21, at ch. 15; ROTHSTEIN ET AL., *supra* note 18, at ch. 7.

31. Please pardon the weak pun.

32. MUELLER & KIRKPATRICK, *supra* note 18, at ch. 6; RICE & KATRIEL, *supra* note 18, at ch. 6; ROTHSTEIN ET AL., *supra* note 18, at ch. 9; WALTZ & PARK, *supra* note 15, at ch. 9; WELLBORN, *supra* note 18, at ch. 4.

33. 2 MCCORMICK ON EVIDENCE § 245, at 94–95 (John W. Strong ed., 5th ed. 1999).

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

> The justification for the [hearsay] rule is guaranteeing the opposing party an opportunity to cross-examine to expose latent weaknesses in sincerity, perception, memory, or narration. Certain types of sentences are usually immune to such weaknesses. For example, if upon observing [a] collision . . . a bystander utters the exclamation "My God!", there is little reason to be concerned about latent weaknesses in testimonial qualities. Realistically, this type of statement is not testable by cross-examination; there is ordinarily no serious question about the person's perception or memory when the testimony takes the form of an exclamatory, imperative, or interrogatory sentence.[35]

Similarly, the hearsay definition does not encompass testimony about out-of-court statements when the statement is logically relevant for a nonhearsay purpose, that is, on a theory of logical relevance that does not depend on the truth of the assertion for its probative worth.[36] Again, that restriction on the scope of the definition is traceable to cross-examination policy. When the statement is relevant regardless of its truth, there is no need to cross-examine the out-of-court declarant.[37] On a nonhearsay theory such as a verbal act, it is logically relevant that the statement was made; and for that purpose, it is sufficient to afford the opposing attorney an opportunity to question the in-court witness who heard the statement.

The student will grasp the cross-examination policy underlying the definition of hearsay much more readily if he or she has already been exposed to the topic of competency of witnesses. At common law, to be a competent witness, a person had to possess four testimonial qualities: perception, memory, narrative ability, and sincerity.[38] The common law imposed those requirements because it viewed those qualities as the most fundamental determinants of the reliability of a witness's testimony. Of course, the value of cross-examination lies in its ability to expose "latent weaknesses"[39] in those qualities, which were not evident during the witness's direct examination. If the student has already studied the competency standards, the student can discern that cross-examination is a tool for revealing a witness's deficiencies with respect to the most fundamental guarantees of the trustworthiness of the witness's testimony.

Moreover, in studying the definition of hearsay, it is an advantage if the student has already learned not only that there were common-law competency criteria but that those criteria were rather lax.[40] As the Advisory Committee's Note accompanying Federal Rule of Evidence 601 observes, "few witnesses"

35. CARLSON ET AL., *supra* note 10, at 435.
36. FED. R. EVID. 801(c).
37. CARLSON ET AL., *supra* note 10, at 441.
38. 1 MCCORMICK ON EVIDENCE, *supra* note 33, § 62, at 245–46.
39. CARLSON ET AL., *supra* note 10, at 435.
40. 1 MCCORMICK ON EVIDENCE, *supra* note 33, § 62, at 247.

were disqualified under the common-law standards.[41] If expert testimony clearly established that the prospective witness was suffering from retrograde amnesia that affected the time period of the relevant events, the witness might be ruled incompetent. However, if the person's recollection was merely very hazy, the trial judge is likely to overrule any objection and hold that the witness's deficiencies cut to the weight of the witness's testimony rather than rendering the witness altogether incompetent. In other words, even at common law the competency standards did not screen out all witnesses with serious deficiencies in perception, memory, narrative ability, or sincerity. Even if there was grave doubt about the prospective witness's testimonial qualities, in all probability the person would be permitted to take the witness stand. If the student realizes that persons with severe deficiencies in their testimonial qualities are routinely allowed to testify, the student will view the chance to cross-examine as all the more critical. In turn, that view will help the students understand why cross-examination policy largely dictates the various elements of the definition of hearsay.

B. The Authentication of Evidence

The first element in defining hearsay is that the testimony must concern an assertive out-of-court statement.[42] Federal Rule of Evidence 801(a) provides: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[43]

Introducing the student to the authentication doctrine before discussing hearsay assists the student in mastering this element of the hearsay definition. What is the authentication doctrine, and how does one go about determining whether an item of evidence is authentic? In the final analysis, authentication is not establishing that an item of evidence is what it *purports* to be but, rather, proving that the item is what the proponent *claims* it to be.[44] By way of example, consider a forgery prosecution. Suppose that at trial, the prosecutor proffers the alleged forged document. The last thing that the prosecutor wants to do is to prove that the document is what it purports to be. The document might purport to be a genuine promissory note. If the prosecutor proved that the document was what it purported to be, the prosecutor would prove himself or herself out of court and establish the accused's innocence. Under the substantive law of forgery the prosecutor has to claim that the document is not what it purports to be, and the prosecutor may have to offer foundational testimony such as a questioned document analysis[45] to prove up the claim. Of

41. FED. R. EVID. 601 Advisory Committee's Note.
42. FED. R. EVID. 801(a).
43. *Id.*
44. FED. R. EVID. 901(a).
45. FED. R. EVID. 901(b)(3).

course, even in these cases the proponent's analysis begins by studying the facial aspect of the evidence. In order to prove forgery, the prosecutor must demonstrate that the writing has a certain facial appearance due to the defendant's forgery.

In more typical cases, the starting point for authentication analysis, careful examination of the facial aspect of the item of evidence, is even more important; this examination is both the starting point and the terminus of the analysis. The proponent usually claims that the item is what it purports to be. To determine the item's purport, the proponent must subject the facial aspect of the item to a painstaking analysis. In many instances, the authentication of a writing boils down to proof of the document's authorship. Who is the purported author of the writing? Was the writing purportedly issued by the parent corporation or a subsidiary?[46] In some instances, the proponent attempts to establish the authorship of an unsigned writing by proving that the contents of the writing disclose information known only to the claimed author.[47] When the proponent relies on this authentication technique, the proponent must closely scrutinize the facial aspect of the writing: Precisely what information does the writing contain?

Most Evidence coursebooks cover the authentication doctrine after hearsay.[48] However, covering authentication before hearsay can help the students learn how to determine whether an out-of-court statement is assertive. In most cases, the key to making the determination is painstaking analysis of the facial aspect of the out-of-court statement. The analysis is strikingly parallel to the analysis in authentication.

As in authentication, the starting point is a careful study of the face of the out-of-court statement. For the most part, exclamatory, imperative, and interrogatory statements fall outside the scope of the hearsay definition because, as previously stated, they cannot meaningfully be tested by cross-examination.[49] On their face, these types of sentences usually do not declare any fact that is susceptible of being true or false.[50]

46. FED. R. EVID. 803(6). That distinction could determine whether the witness called to lay the authentication foundation is a "qualified witness" within the intendment of that expression in this subsection of Rule 803.

47. FED. R. EVID. 901(b)(4) ("contents"); 2 MCCORMICK ON EVIDENCE, *supra* note 33, § 225, at 49.

48. FISHER, *supra* note 19, ch. 10; MICHAEL H. GRAHAM, EVIDENCE: AN INTRODUCTORY PROBLEM APPROACH, ch. 10 (2002); GREEN & NESSON, *supra* note 19, ch. 9; MUELLER & KIRKPATRICK, *supra* note 18, ch. 13; RICE & KATRIEL, *supra* note 18, ch. 7; ROTHSTEIN ET AL., *supra* note 18, ch. 15; WELLBORN, *supra* note 18, ch. 6.

49. United States v. Wright, 343 F.3d 849, 865 (6th Cir. 2003) ("[A] question is typically not hearsay because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content."); United States v. Daniels, 48 F. App'x. 409, 412 (3d Cir. 2002) ("[T]he federal courts of appeal are in agreement that interrogative statements cannot constitute hearsay because they do not assert the existence of facts . . . ."); Servants of the

The parallel to authentication analysis continues, though. As we have seen, in some authentication cases an examination of the facial aspect of the item of evidence does not conclude the analysis. In the forgery prosecution, the prosecutor begins by subjecting the purported promissory note to that mode of analysis; but the prosecutor must go beyond the face of the exhibit to develop the claim that the writing is a forgery. For purposes of hearsay analysis, the starting rule of thumb is that purportedly exclamatory, imperative, and interrogatory sentences are not hearsay assertions. However, as in authentication analysis, the hearsay analyst must sometimes go beyond the facial aspect of the out-of-court statement to make the threshold determination of whether the out-of-court statement is hearsay. Ultimately, the question is whether the statement that the proponent is eliciting is functionally a declarative assertion.[51] Assume, for example, that in a drug prosecution, the prosecutor called a percipient witness to a drug transaction. The prosecutor attempts to elicit the witness's testimony that one of the alleged drug traffickers said, "Hand me the baggie of marijuana." On its face, the sentence is imperative, not declarative; the declarant is ordering the listener to perform an act. However, what the prosecutor is really interested in is the elliptical assertion embedded in the imperative sentence: "[T]he baggie [contains] marijuana." At trial, the prosecutor might not even try to elicit the complete sentence. Rather, the prosecutor might ask: "How did Ms. Folsom describe the bag that she pointed to?" The only words the prosecutor is interested in are "the baggie of marijuana."

While studying authentication, the student learns the importance of pausing to painstakingly analyze the facial aspect of the item of evidence. Concededly, in some cases, that is not the end of the analysis; but it is always the starting point. The student can profitably apply that same lesson in hearsay analysis. To decide whether the out-of-court statement is hearsay, once again the student ought to begin by carefully examining the facial aspect of the evidence. As under authentication, that examination may not be the end of the analysis; but it should always be the starting point. A student who has already learned the value of facial analysis in authentication should be able to more quickly discern its parallel importance under the hearsay doctrine.

Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1567 (D.N.M. 1994) ("[I]nquiries are not hearsay because . . . they are not assertions."); CARLSON ET AL., *supra* note 10, at 435. *See generally* Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783 (1990).

50. Craig v. State, 630 N.E.2d 207, 211 (Ind. 1994).

51. CARLSON ET AL., *supra* note 10, at 436.

C. Logical Relevance, Including Non-character Theories of Logical Relevance

There is virtual unanimity that the Evidence teacher should introduce the students to the concept of logical relevance before turning to hearsay.[52] That is certainly a sound sequence. After deciding that the out-of-court statement is assertive, the student must next resolve the question under Federal Rule 801(c) of whether the testimony about the statement is being offered for a hearsay purpose, that is, to prove the truth of the assertion. Of course, that question is simply another way of asking whether the proponent is offering the testimony on a theory of logical relevance which requires an assumption of the truth of the assertion. The student cannot intelligently address the Rule 801(c) question unless he or she understands logical relevance under Rule 401.

However, there is a particular application of the logical relevance doctrine that is strikingly parallel to the logical relevance component of hearsay analysis: the determination of whether evidence of uncharged misconduct proffered under Federal Rule 404(b) possesses genuine non-character logical relevance. In pertinent part, Rule 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .[53]

The first sentence of the statute codifies the traditional character evidence prohibition. That sentence forbids the proponent from (1) offering testimony about a person's other misdeeds to prove the person's propensity or disposition for misconduct and (2) then inferring that on the occasion in question, the person acted "in character," consistently with his or her character trait. However, the second sentence allows the proponent to introduce the evidence so long as he or she can point to a tenable theory of non-character logical relevance. Every federal court of appeals has construed the second sentence as codifying the inclusionary conception of the uncharged misconduct doctrine. By virtue of that conception of the doctrine, the proponent may rely on any noncharacter theory even if it is not one of the enumerated theories such as "motive."[54] Thus, in studying Rule 404(b), the student quickly learns that there is a huge reward for imaginative logical relevance analysis. If the proponent is creative enough to articulate a non-character theory of logical

52. ALLEN ET AL., *supra* note 17, ch. 3; FISHER, *supra* note 19, chs. 1–3; GRAHAM, *supra* note 48, ch. 2; GREEN & NESSON, *supra* note 19, ch. 2; MUELLER & KIRKPATRICK, *supra* note 18, ch. 2; RICE & KATRIEL, *supra* note 18, ch. 2; ROTHSTEIN ET AL., *supra* note 18, ch. 2; WALTZ & PARK, *supra* note 15, ch. 2.

53. FED. R. EVID. 404(b).

54. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:31 (2003).

relevance, the proponent can ordinarily easily defeat a character evidence objection.

Of course, there is a direct parallel to hearsay analysis under Rule 801(c). If the proponent offers the out-of-court statement on a theory of logical relevance requiring an assumption of the truth of the assertion, the proponent walks right into a hearsay objection. However, when the proponent is imaginative enough to find an alternative theory of logical relevance, the proponent can turn aside the hearsay objection. Rule 404(b) analysis teaches the student the practical value of wracking one's brain to develop multiple theories of logical relevance. If the student comes to Rule 801(c) analysis with that mindset, the student is much more likely to work harder to find viable nonhearsay theories. As previously stated, modern Evidence coursebooks broach the general topic of logical relevance before taking up the hearsay doctrine.[55] However, several of them delay a consideration of non-character theories until after the discussion of the hearsay doctrine.[56] Reversing that sequence would ensure that even before studying the Rule 801(c) component of the hearsay definition, the student has begun to form a mindset to develop multiple theories of logical relevance for an item of evidence. The student would already know that doing so is the best method of defeating a character evidence objection. The student can then more readily understand that this is also often the most effective method of surmounting a hearsay objection.

D. The Best Evidence Rule

If the teacher covers witness competency early, the student will have a better appreciation of the cross-examination policy which helps shape the definition of hearsay. By studying authentication, the student learns the importance of facial analysis that is so critical under Rule 801(a). Next, if he or she has already studied non-character theories of logical relevance, the student will come to the study of Rule 801(c) with an understanding of the practical importance of identifying multiples theories of logical relevance. Sequencing the course to cover those topics early should shorten the student's learning curve on the challenge of determining whether testimony is nonhearsay. However, there is one other topic that the teacher ought to seriously consider covering before hearsay: the best evidence rule. The overall flow of best evidence analysis is quite analogous to the sequence of hearsay analysis. If the teacher exposes the student to the flow of best evidence analysis before turning to hearsay, the student should find it much easier to grasp the sequence of hearsay analysis. The vast majority of Evidence

55. *See supra* note 51 and accompanying text.

56. GRAHAM, *supra* note 48, ch. 9; LEONARD & GOLD, *supra* note 18, ch. 4; ROTHSTEIN ET AL., *supra* note 18, ch. 8; WALTZ & PARK, *supra* note 15, ch. 4; WEINSTEIN ET AL., *supra* note 17, ch. 5.

coursebooks discuss the best evidence rule after the hearsay doctrine,[57] but there is a strong case for reversing that sequence.

Consider the series of questions that the student must grapple with in order to assess a best evidence objection:

First, the student must address the *what* question: What evidence is the proponent offering, and does that evidence relate to a "writing" under Federal Rule 1001(1)? If the testimony does not relate to documentary subject-matter, the trial judge overrules the objection.

Second, assuming that the testimony relates to a writing, the student must consider the *why* question: Is the proponent offering the testimony "[t]o prove the content of [the] writing" under Rule 1002? The proponent can offer testimony to prove the existence, execution, or delivery of a writing without triggering the best evidence rule.[58] So long as the proponent can advance a theory of logical relevance that does not necessitate proof of the contents of the writing, the best evidence rule does not come into play.

Of course, when the testimony relates to a writing and the proponent's purpose is proving the contents of the writing, the best evidence rule is triggered. The general procedural consequence is that the proponent must produce the writing. However, there are exceptional situations in which the proponent can dispense with the writing. In those situations, the proponent must do two things: (1) establish an excuse for the non-production of the writing;[59] and (2) offer an acceptable type of secondary evidence such as a certified copy of a public record[60] or the testimony of a witness who previously read the reading and presently recalls its substance.[61] The excuse for non-production establishes the necessity for resorting to the secondary evidence, and the testimony about the secondary evidence demonstrates its authenticity or reliability. In other words, the common denominators in these exceptional situations are the factors of necessity and reliability.

The flow of hearsay analysis is essentially the same. As in best evidence analysis, initially the student poses the *what* question: Does the testimony relate to an out-of-court assertion? If that question is answered in the affirmative, the student next takes up the *why* question: Why is the proponent offering this testimony? What is the proponent's theory of logical relevance? Does that theory require the assumption of the truth of the assertion? When

57. ALLEN ET AL., *supra* note 17, ch. 9; CARLSON ET AL., *supra* note 10, ch. 24; FISHER, *supra* note 19, ch. 10; GRAHAM, *supra* note 48, ch. 7; GREEN & NESSON, *supra* note 19, ch. 9; MUELLER & KIRKPATRICK, *supra* note 18, ch. 14; RICE & KATRIEL, *supra* note 18, ch. 7; ROTHSTEIN ET AL., *supra* note 18, ch. 15; WALTZ & PARK, *supra* note 15, ch. 8; WELLBORN, *supra* note 18, ch. 7.

58. 2 MCCORMICK ON EVIDENCE, *supra* note 33, § 233, at 66.

59. FED. R. EVID. 1004.

60. FED. R. EVID. 1005.

61. 2 MCCORMICK ON EVIDENCE, *supra* note 33, § 241, at 83.

testimony relates to a writing and the proponent is offering the testimony to prove the contents of the writing, the best evidence rule comes into play, generally mandating that the proponent produce the writing in court. Its production enables the jury to read the writing with its own two eyes. When testimony relates to an assertion and the proponent is attempting to introduce the testimony to establish the truth of the assertion, the hearsay rule comes into play, generally mandating that the proponent produce the declarant in court. The production of the declarant in court enables the jurors to hear the witness's statements with their own ears and simultaneously to gauge the witness's honesty and intelligence.

Just as the preference for the original writing in best evidence sometimes yields, allowing the proponent to introduce secondary evidence, the preference for the declarant's production can give way, permitting the proponent to introduce testimony about an out-of-court assertion under a hearsay exception. In the final analysis, the policy rationale for the recognition of most hearsay exceptions is the same as the justification for the admission of secondary evidence under the best evidence: a combination of the factors of necessity and reliability. One of the most important insights underlying Dean Wigmore's synthesis of hearsay doctrine was that those factors rationalized the vast majority of the recognized hearsay exceptions.[62] The upshot is that drilling the students on the sequence of best evidence analysis is excellent preparation for employing essentially the same sequence of analysis required by the hearsay doctrine.

V. CONCLUSION

It is understandable that so many Evidence teachers cover hearsay relatively early in their course. It makes administrative sense to get the largest instructional block out of the way early. Moreover, there is a certain eagerness to get to hearsay quickly because of the exciting, related constitutional law controversies.

However, the fundamental question is which sequence of coverage makes the most sense pedagogically. The premise of this Article is that the most daunting challenge for the Evidence teacher is to help students develop the analytic skill of differentiating between hearsay and nonhearsay. On that premise, it may be wiser to position the hearsay rule a bit later in the course. More specifically, before taking up the hearsay rule, it seems advisable to cover topics which will give the students understandings and skills that will later enable them to more effectively meet the challenge of identifying nonhearsay.

62. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 202–03 (3d ed. 1940).

As previously stated, prior exposure to the common law criteria for witness competency teaches the students the fundamental importance of cross-examination policy. Understanding this policy enables students to better appreciate the contours of the definition of hearsay. When they apply that definition, the students must initially inquire whether the out-of-court statement is assertive. Their best starting point for this step is painstaking examination of the facial aspect of the testimony—a skill they learn in studying the authentication doctrine. The student's next step in applying the definition is identifying all the possible theories of logical relevance for the evidence and deciding whether every theory requires an assumption of the truth of the assertion. If even one theory of logical relevance does not entail that assumption, there is an available nonhearsay theory that can overcome a hearsay objection. Lastly, if the testimony falls within the hearsay definition, the student must search for an applicable hearsay exception founded on reliability and necessity. The overall sequence of hearsay analysis is strikingly similar to the flow of best evidence analysis, and the student may be more comfortable following the flow of hearsay analysis if he or she has already mastered the best evidence rule.

The point of this Article is not to recommend one coursebook over any other.[63] A professor using a particular coursebook does not have to begin on page one and mechanically cover the pages in order. The professor can vary the sequence. Whenever I have used a coursebook, I have always deviated from the order of the chapters. The point of this Article simply relates to the sequence of the class discussions. Again, my assumption is that the thorniest pedagogical problem for the Evidence teacher is helping the students identify nonhearsay. The reader's experience might well be different. If the reader has found another aspect of the Evidence course to be more troublesome, the reader can summarily dismiss this Article. However, during the past thirty years, my conversations with colleagues, students, and judges lead me to conclude that many share my belief that differentiating between hearsay and nonhearsay is the most difficult challenge for our students. If that belief is correct, to a significant degree the Evidence course ought to be sequenced to better equip our students to meet that challenge. To borrow a phrase from Simonides, "[t]he chief aid" in teaching nonhearsay can be the right "order."[64]

63. I must confess that in one respect, even the coursebook which I co-author does not follow the sequence recommended in this Article. In our coursebook, the chapters on the hearsay doctrine precede the single chapter devoted to the best evidence rule. *See* CARLSON ET AL., *supra* note 10.

64. *See supra* note 1 and accompanying text.