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Evidence-Hearsay-Exclusion of Self-Serving Declarations

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COMMENTS

EVIDENCE—HEARSAY—EXCLUSION OF SELF-SERVING DECLARATIONS—One of the most venerable of all legal principles is the evidentiary rule excluding hearsay. This rule, which was first espoused by the English courts in the sixteenth century, arose when it became apparent that there was an inherent danger of untrustworthiness in a witness's uncorroborated recital of a prior declaration made outside the courtroom.¹ The courts gave several reasons for regarding hearsay as untrustworthy. First, these statements, offered into evidence for the truth of the matter asserted, were not made under oath.² Secondly, objection to such testimony was raised because the trier of fact had no opportunity to pass on the absent declarant's credibility, since it was unable to observe the declarant's demeanor on the stand. Also present was the danger that a witness orally reporting on an out-of-court statement might do so inaccurately. Finally, and most important, the adversary had no opportunity to cross-examine the declarant whose out-of-court statement was being offered in evidence.³ Although the exclusionary rule as to hearsay is firmly established in the law, there are also a number of well-established exceptions to it. Typically, these exceptions were formulated by courts faced with situations in which the hearsay nature of the evidence was outweighed by considerations of necessity and circumstantial probability of reliability.⁴ Many of the exceptions to the hearsay rule require that the declarant be insane, dead or otherwise unavailable.⁵ Under such circumstances, the hearsay testimony must be admitted if the trier of fact is to benefit at all from the declarant's knowledge. On the other hand, some of the most frequently invoked exceptions allow hearsay to be admitted in evidence even though the declarant is available.⁶ Despite the necessity of introducing a particular hearsay statement, it must have some degree of trustworthiness before it will be admitted. Indeed, the exceptions were developed for those situations in which the danger of intentional fabrication was thought to be minimal.

¹ See generally McCORMICK, EVIDENCE §§ 223-25 (1954) [hereinafter cited as McCORMICK]; 5 WIGMORE, EVIDENCE §§ 1360-65 (3d ed. 1940) [hereinafter cited as WIGMORE].

² Wigmore indicates that the absence of an oath is not really a proper objection, but merely an incidental feature accompanying cross-examination. 5 WIGMORE § 1362, at 7.

³ McCORMICK § 224, at 458-59; 5 WIGMORE §§ 1365, 1367-72.

⁴ 5 WIGMORE §§ 1420-22.

⁵ For example, the common-law exceptions for dying declarations and business records.

⁶ For example, the exception for spontaneous declarations.

Decisions involving the problem of hearsay evidence often contain statements to the effect that the declarations under scrutiny are "self-serving" and, therefore, incompetent.⁷ Moreover, many practitioners use the term "self-serving" as an indication of almost fundamental inadmissibility, on a plane with the general objection, "incompetent, irrelevant, and immaterial." This so-called rule, that a party's out-of-court declarations favorable to his case cannot be admitted in evidence, apparently arose as a corollary to the rule rendering parties incompetent as witnesses.⁸ The old rule of incompetency denied the parties to any lawsuit, civil or criminal, the right to testify on their own behalf, the rationale apparently being that such a rule was necessary to eliminate self-serving perjury. Fortunately, this rule was abolished during the nineteenth century. But its effects are still felt in the "dead man" statutes remaining in force in most states.⁹ In addition, a number of courts continue to articulate a separate evidentiary rule excluding self-serving hearsay. It is questionable, however, whether such a distinct rule in fact still exists. There is good reason to argue that the objection "self-serving" is epithetical only and does not state a unique exclusionary rule.

Obviously, much self-serving evidence finds its way into most trials, without an objection ever being raised, in the form of testimony given by the parties as witnesses on their own behalf. Out-of-court declarations offered in evidence, but not for the truth of the matter asserted, also escape exclusion in most cases even though in the declarant's interest.¹⁰ However, the so-called rule excluding self-serving statements has been applied by courts to a wide variety of hearsay statements. The large body of case law in this area suggests that any hearsay declaration which might bolster the declarant's case may be found to be "self-serving." In a majority of jurisdictions the application of the rule is limited, however, to statements which were in the declarant's interest at the time they were made.¹¹ On the other hand, a few courts have held that the

⁷ See, e.g., *Brown v. General Ins. Co. of America*, 70 N.M. 46, 369 P.2d 968 (1962), where the court stated: "That the declarations here are in the nature of purely self-serving statements is obvious. Self-serving declarations regardless of relevancy or materiality are incompetent." *Id.* at 51, 369 P.2d at 971.

⁸ *McCORMICK* § 275, at 588.

⁹ *Id.* § 65.

¹⁰ See, e.g., *Lowber v. State*, 29 Del. 353, 100 Atl. 322 (1917); *Charles G. Clapp Co. v. McLeary*, 89 N.H. 65, 192 Atl. 572 (1937). An illustration of evidence that is not introduced to prove that matter asserted would be a letter from one of the parties to a contract giving his interpretation of the agreement, where the purpose of the evidence was not to prove the obligations on the contract but rather what he thought they were.

¹¹ See, e.g., *Lebrun v. Boston & Me. R.R.*, 83 N.H. 293, 298, 142 Atl. 128, 132 (1928);

rule is applicable whenever the declaration would be in the interest of the party seeking to have it admitted, notwithstanding the fact that the declarant was disinterested at the time the statement was made.¹² This latter approach facilitates the application of the so-called rule excluding self-serving statements,¹³ but can be criticized for its exclusion of declarations whose trustworthiness has not been affected by the self-interest of the declarant. Typical of such an approach is the statement: "[W]e can see no ground for departing from the rule, that one cannot manufacture evidence for himself, although he may not be interested at the time."¹⁴ Referring to the "manufacture" of evidence seems to presume its unreliability, which is anomalous when one considers the lack of interest by the "manufacturer," the declarant, when the statement was made.

Normally, declarations which are excluded because of their self-serving nature are those made by one of the parties to the instant litigation; however, this is not always true. Some courts have shown an inclination to disallow self-serving statements made by non-parties. This extension of the rule has been limited, however, to the declarations of persons in a close personal or legal relationship with the party attempting to offer the declarations in evidence. For instance, the unsworn declarations of an agent have been held inadmissible on behalf of the principal because they were self-serving.¹⁵ And parties claiming ownership of property have been denied the use, as evidence in their own favor, of the self-serving declarations of their grantors.¹⁶

As has been indicated, the rule precluding the admission of self-serving declarations is applicable almost exclusively to hearsay statements. Moreover, it is often difficult to determine whether

In re Kempf's Estate, 138 Misc. 704, 248 N.Y. Supp. 247 (Surr. Ct. 1931); *Cowen v. T. J. Stewart Lumber Co.*, 177 Okla. 266, 58 P.2d 573 (1936); *Green v. Fuller*, 159 Wash. 691, 294 Pac. 1037 (1930).

¹² *E.g.*, *Stone v. Union Fire Ins. Co.*, 106 Colo. 522, 107 P.2d 241 (1940); *White v. Green*, 50 N.C. 58 (1857).

¹³ It is often difficult to determine the circumstances of the making of an out-of-court declaration, and to ascertain whether the declaration was affected by the declarant's interest at that time. A court following the latter approach need not concern itself with such a determination, but must determine only whether the statement is in the declarant's interest when sought to be introduced in evidence.

¹⁴ *White v. Green*, 50 N.C. 58, 60 (1857).

¹⁵ See, *e.g.*, *Bracken v. Cato*, 54 F.2d 457 (5th Cir. 1931); *McClure v. Middletown Trust Co.*, 95 Conn. 148, 110 Atl. 838 (1920); *Rice v. Armour & Co.*, 194 Iowa 144, 187 N.W. 588 (1922); *Harley v. Hartford Fruit Growers' & Farmers' Exch.*, 216 Mich. 146, 181 N.W. 507 (1921).

¹⁶ See, *e.g.*, *Durrell v. Bacon*, 119 Cal. App. 31, 5 P.2d 961 (Dist. Ct. App. 1931); *Cryer v. McGuire*, 148 Ky. 100, 146 S.W. 4 (1912); *Sallan Jewelry Co. v. Bird*, 240 Mich. 346, 215 N.W. 349 (1927); *Gorton v. Lane*, 208 App. Div. 833, 204 N.Y. Supp. 31 (1924).

a court is stating a distinct rule of exclusion when it refuses to admit a statement, obviously excludable as hearsay, because it is "self-serving."¹⁷ Some courts quite clearly take the view that any so-called rule excluding self-serving declarations is included within the general rule excluding hearsay. Evidencing such an attitude is the following statement made by the Wyoming Supreme Court: "[T]here is no principle of evidence especially excluding self-serving statements by an accused or anyone else. If they are inadmissible, it is because they are hearsay or because of some other reason."¹⁸ But other courts appear to recognize a statement's self-serving character as a ground for exclusion apart from the general hearsay rule. One court,¹⁹ for instance, while accepting the view that inadmissible hearsay received without objection is sufficient to sustain a verdict, held that the admission into evidence of a self-serving declaration was a basis for reversal even though no objection was raised to its introduction during trial.²⁰ Recognition of a distinction between the hearsay rule and a rule excluding self-serving statements frequently appears in cases involving declarations which are normally allowed in evidence under an exception to the hearsay rule. For example, in a suit by a son's wife for malicious alienation of affections, the defendant mother-in-law offered testimony by another son that she had asked him to attempt a reconciliation, as indicative of her beneficent state of mind.²¹ The testimony was rejected by the court because it "was a self-serving statement by the defendant, not made in the presence of the plaintiff, and falls within no one of the exceptions that might make such a statement admissible in evidence."²² Again, in a Texas homicide case,²³ the defendant was denied the opportunity to demonstrate his state of mind by having policemen testify that he had gone to

¹⁷ Even more uncertain are cases where statements are excluded because "self-serving" and "hearsay."

¹⁸ *Worth v. Worth*, 48 Wyo. 441, 468, 49 P.2d 649, 659 (1935). See also *Caplan v. Caplan*, 83 N.H. 318, 326, 142 Atl. 121, 127 (1928), where the court stated: "While in many cases it is pronounced that there is a general rule 'which precludes a party from supporting his cause by giving evidence of his own sayings' . . . as a rule it is merely a part of, and embraced within, the hearsay rule."

¹⁹ *W. W. Connor Co. v. McCollister & Campbell*, 9 Wash. 2d 407, 115 P.2d 370 (1941).

²⁰ See *id.* at 413, 115 P.2d at 372, where the court stated: "Though self-serving declarations are sometimes characterized as hearsay, we think there is sound reason for limiting the application of the rule to what is generally understood and characterized as hearsay evidence. . . . The vice of according probative value to . . . [a self-serving statement] is not obviated nor diminished because it may have been admitted without objection."

²¹ *Jacobs v. Jacobs*, 281 Mass. 198, 183 N.E. 147 (1932).

²² *Id.* at 199, 183 N.E. at 147.

²³ *Woods v. State*, 115 Tex. Crim. 373, 28 S.W.2d 554 (1930).

them, told them that the deceased had threatened to kill him and asked them for protection. The court stated: "It appears that the declarations in question were made the day before the homicide. They were self-serving and properly rejected."²⁴ If the statements in these two cases had been "normal" hearsay statements, not self-serving in nature, it seems certain that they would have been admitted under the "state of mind" exception.²⁵

Although the language used by the courts in such cases is broad, the evidence does not appear to have been excluded solely because it was self-serving. A principal consideration in deciding whether evidence is admissible pursuant to the standard exceptions to the hearsay rule is the testimony's trustworthiness—its circumstantial probability of reliability. And the self-serving nature of the statements may have been only one factor considered by the courts in determining whether the testimony in these cases was sufficiently trustworthy to be allowed under a hearsay rule exception. Indeed, substantial judicial authority supports this idea: there is only one exclusionary rule affecting hearsay evidence, and the self-serving nature of a statement is important merely in determining the applicability of an exception to that rule. This characterization, however, tends to oversimplify the results reached by the courts. These results perhaps are best presented by examining the approach taken by the courts in situations normally within specified exceptions to the hearsay rule.

A party's out-of-court declarations as to his present mental impressions are usually admissible under an exception to the hearsay rule. When such statements refer to a state of mind existing as of the time of the statement and are made under circumstances indicating apparent sincerity, the declarations are regarded as being sufficiently reliable to be admitted in evidence. Although a distinction exists between statements directly describing the declarant's thoughts or feelings and statements from which the declarant's state of mind can only be inferred,²⁶ the courts tend to treat both types of declarations as hearsay admissible under the "state of mind" exception.²⁷

When self-serving elements appear in these declarations, courts tend to show concern, in varying degrees, about their admissibility.

²⁴ *Id.* at 376, 28 S.W.2d at 555.

²⁵ See text accompanying note 27 *infra*.

²⁶ A statement of this latter type is actually not hearsay. MCCORMICK § 228, at 465-66; 6 WIGMORE § 1715.

²⁷ MCCORMICK § 228, at 467-68.

Some jurisdictions have been quite liberal in admitting statements even though they were in the declarant's self-interest.²⁸ These jurisdictions flatly reject a rule excluding all self-serving declarations, and treat self-interest as but one of several factors to be considered in determining whether the statement was sufficiently sincere to fall within the "state of mind" exception. Other courts have been more reluctant to admit declarations indicating a state of mind favorable to the declarant's position.²⁹ The latter approach is best summarized by the following statement:

"[T]he danger that declarations may have been made for a purpose, when they are sought to be introduced as evidence in favor of the person making them, has led to the exclusion of them, even on the issue of what was the intention or the state of mind of the declarant, unless they are made under circumstances as to give them corroboration. In general, such corroboration is found in the fact that they accompany and explain acts which of themselves would be competent evidence on the issue involved. They are admissible as a part of the *res gestae*."³⁰

Although similar reasoning can be found in a variety of cases, it is particularly prevalent in the criminal law area, which apparently is why McCormick concludes that these courts apply a general rule excluding self-serving declarations when they are offered to prove a criminal defendant's peaceful intentions or his fear of the victim.³¹ It is true that the application of such a rule effects the exclusion of self-serving declarations of intent or state of mind which are not closely connected in time with the alleged illegal act. But no court appears to have adopted a strict rule of exclusion of self-serving utterances offered in evidence to show a declarant's state of mind.³² Even the Texas court, which refused to allow self-serv-

²⁸ See, e.g., *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944); *Smith v. Smith*, 364 Pa. 1, 20 A.2d 530 (1950); *Parsons v. Commonwealth*, 138 Va. 764, 121 S.E. 768 (1924); *Worth v. Worth*, 48 Wyo. 441, 49 P.2d 649 (1935).

²⁹ See, e.g., cases cited in notes 21 and 23 *supra*. See also *Cranmore v. State*, 129 So. 2d 121 (Ala. Ct. App. 1961); *State v. Barnett*, 156 Kan. 746, 137 P.2d 133 (1943); *Commonwealth v. Binkiewicz*, 342 Mass. 740, 175 N.E.2d 470 (1961); *State v. Gadwood*, 342 Mo. 466, 116 S.W.2d 42 (1938).

³⁰ *Viles v. Waltham*, 157 Mass. 542, 543, 32 N.E. 901, 902 (1892).

³¹ McCormick § 275, at 589.

³² Although the language in the cases cited in note 29 *supra* indicates a reluctance to allow self-serving declarations in evidence, in several of these cases there are indications of other shortcomings in the evidence in question contributing to its inadmissibility. For instance, in *State v. Gadwood*, 342 Mo. 466, 116 S.W.2d 42 (1938), involving a speech made by the defendant to political subordinates two days prior to the homicide, the court distinguished a previous Missouri case, *State v. Young*, 119 Mo. 495, 24 S.W. 1038 (1894),

ing statements made by a defendant one day before the homicide,³³ had admitted, in an earlier case, a defendant's statement suggesting his apprehension over some difficulty with the deceased made two or three hours before the homicide.³⁴

Legal scholars have criticized those courts which are prone to exclude a criminal defendant's declaration because of its self-serving nature. Wigmore³⁵ has objected to the exclusion of any self-serving statements which, if made under the same circumstances but against the declarant's interest, would be allowed as an admission against the defendant. He has indicated that a decision based on the idea that a defendant could not "make evidence for himself" was begging the question, since the result is grounded on the assumption that the statements were false. Further, he argued that a court which based its reasoning on the premise that the accused, if guilty, would be likely to make false utterances was making an assumption contrary to the general doctrine that an accused is presumed to be innocent until proved guilty. However, hearsay statements allowed in evidence under the "state of mind" exception are regarded as trustworthy for reasons other than hearsay introduced as an admission against interest, and there is no compelling reason to equate a self-serving declaration of intent with an admission against interest. Admissions are allowed in evidence as an exception to the hearsay rule because it is felt that a party should not be allowed to question the trustworthiness of his own declarations.³⁶ Probably there is also a general feeling that one who speaks against himself is not likely to fabricate. The very fact that a statement is against interest provides the requisite reliability for this type of hearsay. On the other hand, several factors, of which the self-serving nature of the declaration is one, may be important in deciding whether there is sufficient trustworthiness for the "state of mind" exception to be invoked.

which had allowed in evidence a self-serving statement made by the defendant a month before the homicide. The court went on to state: "Neither did it [the self-serving speech] have such a connection with the unanticipated events that transpired during the election as to make it relevant and material." *Id.* at 484, 116 S.W.2d at 52.

³³ Woods v. State, 115 Tex. Crim. 373, 28 S.W.2d 554 (1930).

³⁴ Poole v. State, 45 Tex. Crim. 348, 76 S.W. 568 (1903). Evidence was held admissible "for what it was worth," as tending to shed light on appellant's frame of mind as to decedent at the time of the difficulty and the killing. See also Nelson v. State, 58 S.W. 107 (Tex. Crim. App. 1900), where testimony was allowed to show the defendant's intentions, his desire for peace, and apprehension of danger.

³⁵ 6 WIGMORE § 1732.

³⁶ See, e.g., MCCORMICK § 239, at 503; MAGUIRE, EVIDENCE; COMMON SENSE AND COMMON LAW 143 (1947). See generally 4 WIGMORE §§ 1048-87; Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921).

Courts continue to distinguish between admissions and self-serving declarations, even though the latter were made under circumstances in which there was no apparent motive to deceive. For instance, subsequent declarations regarding intent or motive for committing a prior act are generally inadmissible when self-serving, but are allowed as admissions when against interest.³⁷ Moreover, statements made after the act which are relevant to a determination of the state of mind at the time of the statement, from which the state of mind at the time of the act may be inferred, are often treated similarly.³⁸ Considering all the relevant arguments, the better rule seems to be to admit a defendant's declarations of fear or peaceful intentions, and those jurisdictions which hesitate to do so would be well advised to follow the lead of the more liberal courts.

The *res gestae* exception³⁹ to the hearsay rule has been maligned for its vagueness by writers⁴⁰ and courts⁴¹ alike. It is discussed here because it is frequently invoked in cases involving self-serving statements. Since the term *res gestae* is now used in such a wide range of situations, it is difficult to determine the reason behind the exception. McCormick states that the exception is based on "the notion that evidence of a concededly relevant act or condition may bring in likewise the words which accompanied it."⁴² Whatever its *raison d'être*, the circumstantial probability of reliability certainly seems to stem from the spontaneity of the statement made as part of the *res gestae*. Spontaneity, as used in this context, refers to an almost involuntary exclamation. A judge must deter-

³⁷ See, e.g., *Moss v. State*, 208 Ark. 137, 185 S.W.2d 92 (1945) (defendant told witness, some five minutes after the killing: "I shot that fellow—I had to kill him—he threw something at me"); *State v. Crouch*, 339 Mo. 847, 98 S.W.2d 550 (1936) (defendant told group of bystanders: "Boys, you know I had to do it in self-defense to save myself"); *State v. Davis*, 104 Tenn. 501, 58 S.W. 122 (1900).

³⁸ See, e.g., *People v. Perkins*, 8 Cal. 2d 502, 66 P.2d 631 (1937); *State v. Brooks*, 192 Iowa 1107, 186 N.W. 46 (1922); *Richardson v. State*, 123 Miss. 232, 85 So. 186 (1920). But see *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944); *Kelly v. Bank of America*, 112 Cal. App. 2d 388, 246 P.2d 92 (Dist. Ct. App. 1952); *People v. Strewl*, 246 App. Div. 400, 287 N.Y. Supp. 585 (1936).

³⁹ See generally MCCORMICK § 274; 6 WIGMORE §§ 1766-86.

⁴⁰ See, e.g., 6 WIGMORE § 1767; Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

⁴¹ See, e.g., *United States v. Matot*, 146 F.2d 197, 198 (2d Cir. 1944), where Judge Learned Hand stated, "as for 'res gestae', it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms"; *Cox v. State*, 64 Ga. 375, 410 (1879). See also *Viles v. Waltham*, 157 Mass. 542, 543, 32 N.E. 901, 902 (1892).

⁴² MCCORMICK § 274, at 586.

mine, as best he can, whether the declaration was one made spontaneously or was the product of reflection and deliberation. The court's task is rather difficult when there is a substantial interval of time between the event and the statement. It is in such instances that the courts talk of the self-serving aspect of a statement.

Although several decisions involving the *res gestae* exception have pointed out that the statement was in the declarant's self-interest, in a significant number of these cases this aspect of the declaration was not the basis for exclusion; rather, the important factor was apparently that an extended period of time between the act and the declaration affords ample opportunity for contrivance.⁴³ This is perhaps best seen in those cases which hold that the self-serving quality is of no importance if the declaration is admissible as a part of the *res gestae*.⁴⁴ However, this is not to say that in all instances a court will disregard a statement's tendency to enhance a litigant's position. Indeed, McCormick indicates that under the "prevailing view" the self-serving nature of a statement, while not a conclusive reason for exclusion, is a factor to be considered in determining whether the statement was appropriately spontaneous so as to be a part of the *res gestae*.⁴⁵ Illustrative of this position is a case in which a question arose as to the admissibility of plaintiff's statement, "I wish Austin hadn't been driving so fast," addressed to the testifying witness some four hours after an automobile accident.⁴⁶ The court found that the record contained no offer of proof that the plaintiff's declaration arose out of the excitement of the accident and that the self-serving character "was properly to be considered under the circumstances."⁴⁷ On the other hand, one court expressed the view that any self-serving statement, no matter how closely tied to an event, should be excluded.⁴⁸ The court in this latter case felt that allowing such statements to be introduced as evidence would so strongly tempt a party "to make evidence for himself" that there would be little chance that such testimony would be reliable. This strict view seems to have little, if any, following.

⁴³ See, e.g., *Wescott v. Waterloo C.F. & N. Ry.*, 173 Iowa 355, 155 N.W. 255 (1915); *Burke v. Enders*, 305 Mich. 270, 9 N.W.2d 918 (1943); *Lange v. Auto Interurban Co.*, 28 Wash. 2d 343, 183 P.2d 188 (1947).

⁴⁴ See, e.g., *Hiatt v. Trucking, Inc.*, 122 Ind. App. 411, 103 N.E.2d 915 (1952); *Shirks Motor Express v. Oxenham*, 204 Md. 626, 637, 106 A.2d 46, 50 (1954).

⁴⁵ *McCORMICK* § 272, at 582.

⁴⁶ *Bennett v. Bennett*, 92 N.H. 379, 31 A.2d 374 (1943).

⁴⁷ *Id.* at 386, 31 A.2d at 380.

⁴⁸ *Fisher v. Chicago & N.W. Ry.*, 193 Minn. 73, 78, 258 N.W. 4, 6 (1934).

Records compiled in the course of conducting a business are hearsay when they are offered as evidence of the truth of the matter stated. Yet, because situations often arise where there is a special need for the information contained in such records, they have long been admitted in evidence under an exception to the hearsay rule.⁴⁹ Although at common law this exception was generally restricted to the admission of standard accounting entries, modern statutes extend the exception to almost any statement or record made in the ordinary course of business.⁵⁰ Obviously, a great variety of self-serving statements are admitted under the business records exception,⁵¹ but the exception has been restrictively applied. In *Palmer v. Hoffman*⁵² the United States Supreme Court affirmed a decision excluding an accident report of a railroad engineer involved in a grade-crossing accident. The report had been compiled from an interview conducted by an assistant superintendent of the defendant railroad and a representative of the Massachusetts Public Utilities Commission. While it was the regular practice of the railroad to take such statements, the Court held that the report was not a regular business entry since it was not essential to the "systematic conduct" of the business, but had its "primary utility . . . in litigating, not in railroading."⁵³ The Court stated further that the federal statute⁵⁴ required not only regularity of preparation but also records with "earmarks of reliability . . . acquired from their source and origin and the nature of their compilation,"⁵⁵ suggesting that the self-serving nature of the report was the real reason for its exclusion. The Second Circuit had excluded the report because it was "dripping with motivations to misrepresent."⁵⁶ The court of appeals also stated that the words "regular course of business," as contained in the statute, "according to the jargon of lawyers and judges . . . have always meant writings made in such a way as to afford *some* safeguards against the existence of any *exceptionally* strong bias or *powerful* motive to misrepresent."⁵⁷

⁴⁹ See generally McCORMICK §§ 281-90; 5 WIGMORE §§ 1517-58.

⁵⁰ E.g., the Commonwealth Fund's Model Act and the UNIFORM BUSINESS RECORDS AS EVIDENCE ACT.

⁵¹ For example, the typical books of account offered from a party's own files.

⁵² 318 U.S. 109 (1943).

⁵³ *Id.* at 114.

⁵⁴ 28 U.S.C. § 1732 (1958). The federal statute adopted the provisions of the Model Act proposed by a committee of the Commonwealth Fund, whose conclusions were published in MORGAN *et al.*, THE LAW OF EVIDENCE; SOME PROPOSALS FOR ITS REFORM (1927).

⁵⁵ 318 U.S. at 114.

⁵⁶ *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942).

⁵⁷ *Id.* at 984.

The approach indicated by the Supreme Court in the *Palmer* decision has been widely criticized.⁵⁸ The language of the federal statute leaves to the trial judge the question of whether an entry "was made in the regular course of . . . business," but limits his discretion by requiring that "all other circumstances of the making of such a writing of record . . . may be shown to affect its weight, but they shall not affect its admissibility."⁵⁹ Writers, in denouncing an interpretation calling for the consideration of a business entry's self-serving character, have pointed to this statutory language and to the intention of the drafters of the Model Act, which was the prototype for the federal statute, that a declarant's self-interest was to affect the weight, but not the admissibility, of the declaration.⁶⁰

Nevertheless, several of the lower federal courts have indicated that the self-serving nature of a report is something to be considered in deciding whether or not to admit it.⁶¹ Nor is the import of the *Palmer* decision limited to the federal court system. Several state legislatures have joined the federal government in adopting the Model Act.⁶² Moreover, several other states have enacted the Uniform Business Records as Evidence Act, which, though similar to the Model Act, by its very language vests the trial judge with the discretionary power to exclude a business record if "the sources of information, method and time of preparation" are not "such as to justify its admission."⁶³ Courts in states which have adopted the Uniform Act have refused to allow in evidence records which would qualify under this statutory exception but for their self-serving nature.⁶⁴ Illustratively, in a case involving an action for payment of an account, the defendant was not allowed to place in evidence a check stub, purportedly filled out when a check was

⁵⁸ See, e.g., MAGUIRE, *op. cit. supra* note 36, at 156; Morgan, *The Law of Evidence 1941-1945*, 59 HARV. L. REV. 480 (1946).

⁵⁹ 28 U.S.C. § 1732(a) (1958).

⁶⁰ E.g., Note, *Business Entry Statutes*, 48 COLUM. L. REV. 920, 925 (1948); Note, 56 HARV. L. REV. 458, 467-68 (1942) (Maguire commenting on the Second Circuit's decision).

⁶¹ See, e.g., *Hartzig v. United States*, 217 F.2d 706 (4th Cir. 1954); *NLRB v. Sharples Chems., Inc.*, 209 F.2d 645 (6th Cir. 1954); *Korte v. New York, N.H. & H.R.R.*, 191 F.2d 86 (2d Cir. 1951); *Pekelis v. Transcontinental & W. Airlines, Inc.*, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951). *But see* *Nutting v. Reading Co.*, 235 F.2d 546 (3d Cir. 1956).

⁶² E.g., MASS. ANN. LAWS ch. 233, § 78 (1956); MINN. STAT. ANN. §§ 600.01-.04 (1947); OHIO REV. CODE ANN. § 2317.40 (Page Supp. 1962).

⁶³ UNIFORM BUSINESS RECORDS AS EVIDENCE ACT § 2.

⁶⁴ See, e.g., *Terrel v. Missouri-Kan.-Tex. R.R.*, 327 S.W.2d 230 (Mo. 1959); *Dickson v. Gastl*, 64 Ohio App. 346, 28 N.E.2d 688 (1940); *Williams v. Caples*, 342 Pa. 230, 20 A.2d 302 (1941).

drawn and delivered to plaintiff's agent.⁶⁵ Defendant's managing partner had testified that the stubbing of checks was a procedure used in the course of conducting the business, and a regular practice, of the defendant firm. The court stated, however, that the legislature, in adopting the Uniform Act, "did not intend thereby to make . . . competent in evidence that which theretofore had been repeatedly held to be incompetent for various unassailable reasons," the "unassailable reason" in this particular case being the self-serving nature of the check stub.⁶⁶

Although deemed an appropriate restriction on the business records exception in many instances, it is quite evident that the courts have not applied a strict exclusionary rule to every entry which is made in the regular course of business and which might prove useful to the entrant. Indeed, in those jurisdictions which have enacted the Model Act, it appears that in order to be excluded an entry must not only be self-serving but it must have been made under circumstances where there would be a substantial motive to misrepresent. Even the Court of Appeals for the Second Circuit, which seems to interpret the *Palmer* decision as having excluded a record because it was self-serving,⁶⁷ has admitted a trust company's history sheets on two of its trust accounts in a suit based on the trustee's alleged bad faith, over an objection that these documents were self-serving and not made in the regular course of business.⁶⁸ Although the sheets were obviously compiled with some motive of protecting the trustee in case of a subsequent complaint by a beneficiary, the court did not mention their self-serving quality, but instead found them to be records which are kept in the regular course of a trustee's business. Courts in jurisdictions which have adopted the Uniform Act are more likely to exclude self-serving entries than are courts subject to the Model Act. But even the former courts have recognized an intent by those who promulgated the Uniform Act "to broaden the scope of admissibility of records made in the regular course of business" and have admitted records of a self-serving nature.⁶⁹

Although some language in opinions indicates that there is a

⁶⁵ *Zeigler Milling Co. v. Denman*, 79 Ohio App. 250, 72 N.E.2d 686 (1946).

⁶⁶ *Id.* at 253, 72 N.E.2d at 688.

⁶⁷ See, e.g., *Pekelis v. Transcontinental & W. Airlines, Inc.*, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951).

⁶⁸ *Waters v. Kings County Trust Co.*, 144 F.2d 680 (2d Cir. 1944).

⁶⁹ *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 581, 149 P.2d 133, 139 (1944). See also *Arque v. National Superior Co.*, 67 Cal. App. 2d 763, 777, 155 P.2d 643, 651 (Dist. Ct. App. 1945).

"rule" excluding self-serving declarations, separate from the hearsay rule, the self-serving element seems to be actually little more than one of a variety of factors considered by a judge in deciding whether evidence meets the requirements of a standard hearsay exception and so may be given to the jury. Yet, this latter characterization has not been clearly stated in judicial opinions. What appears to be needed is a lucid statement by the courts to the effect that the element of self-interest is only one of several factors to be considered before admitting a hearsay statement into evidence.

Despite the frequency with which the phrase "self-serving" appears in the reported decisions, it is uncertain how heavily the fact of self-interest weighs in a determination of a statement's admissibility. Too often statements are excluded as self-serving without any further discussion of the matter. Nevertheless, it is apparent that, in circumstances where a party attempts to use his own out-of-court statements to bolster his case, the judiciary is reluctant to relinquish to the jury its power to screen hearsay statements. Admittedly, some courts are quite liberal in the manner in which they allow such statements to go to the jury, giving to the jury most statements that fall within a hearsay exception, notwithstanding their self-serving nature. However, even in such jurisdictions complete control has not actually been relinquished to the jury; the self-serving nature of a statement is still properly considered before the statement is admitted as an exception to the hearsay rule. Other jurisdictions are even more restrictive, and are less likely to give a jury the chance to determine the importance of the fact that a statement was made in the declarant's interest.

Perhaps the jury should be shielded from some, if not most, of the self-serving, out-of-court utterances made by the litigants. After all, the hearsay rule itself was adopted to keep inherently untrustworthy statements from the jury, the feeling evidently being that the jury could not give proper consideration to the fact that the statements were made out of court, and are not subject to cross-examination.⁷⁰ No attempt is here made to assess the capabilities of the modern jury. But it is worthwhile to give at least some consideration to a proposal whereby the jury, rather than the judge, would weigh the self-serving nature of a statement otherwise within an exception to the hearsay rule. Wigmore ar-

⁷⁰ Contrast jury trial with cases tried before a judge or an administrative tribunal where hearsay is admitted, its unreliable nature to be taken into consideration by the trier of fact.

gued for this kind of arrangement in criminal cases.⁷¹ And, if a statement is deemed to be otherwise within an exception and sufficiently trustworthy, there seems little reason for withholding it from the jury merely because it is self-serving.⁷² This is particularly true in those jurisdictions where the judge is allowed to comment on the evidence, and could instruct the jury to consider a statement's self-serving character.

On a broader plane, there is some merit in the contention, set forth by one writer,⁷³ that the testimony of a party on the witness stand as to his own self-serving, out-of-court statement is not even subject to the hearsay rule because he is now under oath and subject to cross-examination with respect to that statement. Although this argument incorrectly transforms a statement made outside the courtroom into non-hearsay, it recognizes the presence of elements which may obviate some of the reasons for the hearsay rule. These elements are present even when a non-party provides the testimony. Since the objection of "self-serving" almost always arises with respect to statements made by a party, the declarant is normally in the courtroom and available for cross-examination, under oath, as to his prior out-of-court statements. However, some problems may arise as to whether the party can be cross-examined about his prior statement when the testimony reciting that statement comes from another witness; such practice is particularly questionable when the party is a criminal defendant who does not voluntarily take the stand. In addition, it must be realized that an in-court cross-examination of a previous out-of-court statement is not completely satisfactory from the standpoint of the declarant's opponent.⁷⁴

Although cross-examination may lack some of its normal effectiveness when conducted in this manner, the objections to a self-serving statement, otherwise within an exception to the hearsay rule, are reduced in such a situation to a point where the statement could be given to a jury. If the party seeking admission of the statement were willing to take the stand to be cross-examined

⁷¹ See text accompanying note 35 *supra*.

⁷² See McCORMICK § 275. See also *Deeb v. State*, 131 Fla. 362, 383, 179 So. 894, 903 (1938), where the court stated: "It was competent for the accused to testify as to the nature of the prior encounter and its relation, if any, to the homicide; even though it be not proper to testify to the merits or the details of the prior difficulty. . . . *The weight and credibility of the testimony are for the jury to determine*" (Emphasis added.); *Parsons v. Commonwealth*, 138 Va. 764, 121 S.E. 768 (1924).

⁷³ Hardman, *Hearsay: "Self-Serving" Declarations*, 52 W. VA. L. REV. 81, 93 (1950).

⁷⁴ See 5 WIGMORE § 1368, at 34. See also *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939).

as to the truth of his out-of-court declaration, the statement should be allowed in evidence. While the trial judge should have broad discretion in deciding whether or not such cross-examination will adequately compensate the declarant's adversary for any prejudice resulting from the admission of self-serving hearsay, it would seem that this technique would sufficiently protect the opposing party in most cases.

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