1991

Improving the Procedure for Resolving Hearsay Issues

Richard D. Friedman
University of Michigan Law School, rdfrdman@umich.edu

Available at: https://repository.law.umich.edu/articles/178

Follow this and additional works at: https://repository.law.umich.edu/articles
Part of the Evidence Commons, and the Public Law and Legal Theory Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
IMPROVING THE PROCEDURE FOR RESOLVING HEARSAY ISSUES

Richard D. Friedman*

INTRODUCTION

William Twining has perceptively remarked that a reintegration of the laws of procedure and of evidence is long overdue. This article attempts to take a step in that direction. I argue that altered procedures, and a widened range of procedural choices, will improve the ability of courts to resolve hearsay issues in a satisfactory manner.

A hearsay issue arises when one party, the proponent, offers evidence of an out-of-court statement to prove the truth of a matter asserted in the statement, and the other party, the opponent, objects. Under current procedures, the court ordinarily resolves the issue wholly in favor of one party or the other. Either party, if he loses on the hearsay issue, may want to produce the maker of the statement, the declarant, as a witness. If the proponent is prevented from offering the declarant’s out-of-court statement, he may want to present her live testimony instead. Correspondingly, if the hearsay is admitted over the opponent’s objection, the opponent may want to subject the declarant to adverse examination; ordinarily, in such a case, the opponent must call the declarant as his own witness. Whichever party loses on the hearsay issue ordinarily must, if he does wish to present the declarant’s live testimony, bear the burden of producing the declarant as a witness. This burden is not a monolithic whole, but consists of numerous different aspects. The burden may be conceived in terms of various tasks that must be performed to produce the declarant: she must be identified, located, brought to court (by compulsion if necessary), and persuaded to testify. The burden of producing the declarant may also be broken down into physical and financial burdens. The physical burden is the onus of actually performing all the tasks necessary to produce the declarant, while the financial burden is...

* Professor of Law, University of Michigan Law School. At various points in the preparation of this article, numerous people offered helpful advice, comments, and criticisms. My thanks to Ron Allen, Bob Axelrod, Jerry Israel, Arthur Jacobson, Avery Katz, Rick Lempert, Mike Malinowski, Al Moore, and Roger Park. I apologize to anyone I may have overlooked. Thanks also to David Goodhand for valuable research assistance and to Vivian James and John Loyd for stalwart work on the diagrams.

the responsibility for paying the costs associated with satisfying the physical burden.

In this article, I propose two changes in the way hearsay issues are usually resolved. First, in some circumstances courts should divide the burdens of producing the declarant—for example, by imposing the physical burden on the proponent and the financial burden on the opponent. Second, no matter how the declarant is produced as a witness, she should ordinarily testify as part of the proponent’s case, subject to cross-examination by the opponent. If the declarant does become a witness, the admissibility of her out-of-court statement should not be resolved until her current testimony about the underlying events is received.

These changes might well support a fundamental reform of the law of hearsay—and in a subsequent article, I will suggest that they should. 2 I will not argue for such a reform here. 3 The purpose of this article is merely to present the procedural changes just summarized and to suggest how they may be useful. The proposed changes are, for the most part, compatible with current hearsay doctrine, and I believe that they would improve the way in which that doctrine is implemented. But, because my eventual aim is to propose a wholesale overhaul of hearsay doctrine, I will not assume in presenting the changes that the current doctrine—or any alternative doctrine—prevails. 4 In short, I am trying to establish an ideal law of hearsay, and a first step in that enterprise is to improve the procedural context in which courts decide hearsay issues.

For simplicity’s sake, however, the analysis here will focus on evidence that fits within the core of the standard definition of hearsay.

---

2 R. Friedman, Toward a Partial Economic, Game-Theoretic Analysis of Hearsay (unpublished manuscript, to be published in a forthcoming issue of the Minnesota Law Review) [hereinafter Analysis of Hearsay].


4 Anticipating the later article, however, I will sometimes assume as part of the hypotheticals presented here that the court uses as a benchmark for decision its perception as to whether the particular hearsay evidence before it is more probative than prejudicial. That is, if the court believes that the evidence is indeed more probative than prejudicial, it will be inclined to admit the evidence; this inclination may be altered, however, by taking into account such factors as the relative abilities of the parties to produce the declarant and the time when the proponent gave notice of intention to offer the hearsay. I believe that the arguments presented in this article would be valid, and the procedural suggestions presented here valuable, whether this general approach to hearsay is accepted or not. Moreover, the assumption is not essential to any of the hypotheticals.
That is, I will assume that the evidence being considered is proof of a statement made out of court, and that the evidence is offered to prove the truth of a matter asserted in the statement. Most of the analysis presented here could, I believe, apply equally well to evidence just outside the standard hearsay definition—for example, to evidence of a person’s conduct offered to prove the truth of a belief apparently reflected in the conduct—or even to evidence further removed from the usual reach of hearsay law. But the subject of this article is the procedures surrounding resolution of a hearsay issue, rather than the scope of hearsay; the latter subject can be put aside by dealing only with evidence that is clearly hearsay.

One further limitation will also help simplify matters: this article is not concerned, except where otherwise noted, with the context in which a criminal prosecutor offers hearsay evidence against the accused. That, of course is the context in which the Confrontation Clause of the sixth amendment to the United States Constitution comes into play. The confrontation right raises considerations not present with respect to other hearsay. Under current doctrine, the ordinary law of hearsay and the law of the Confrontation Clause are closely linked. I am convinced that unless this link is broken neither subject can be developed in a satisfactory manner: the need to protect criminal defendants’ confrontation rights will make hearsay law more restrictive than it ought to be, while the need for a practical law of hearsay will make the confrontation guarantee less protective than it ought to be. I believe the link can be broken by articulating the confrontation guarantee in terms that have nothing to do with hearsay doctrine, and under which some hearsay offered by the prosecution would not even present a confrontation issue. But that is not the case.

5 See FED. R. EVID. 801(a)-(c). This rule provides the basic definition of hearsay.
6 See, e.g., infra note 21 and accompanying text to Hypothetical 7 at pp. 909-10.
7 The Confrontation Clause provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.
8 Under the test articulated in Ohio v. Roberts, 448 U.S. 56 (1980), hearsay offered by the prosecution is not admissible unless the declarant is unavailable and the evidence demonstrates sufficient “indicia of reliability”; the second branch of this test may be satisfied “without more” if “the evidence falls within a firmly rooted hearsay exception.” Id. at 66. I do not believe the test is a workable one, and the Supreme Court has treated it rather poorly. See United States v. Inadi, 475 U.S. 387 (1986) (holding that Roberts did not intend to establish the reliability test for hearsay other than prior testimony); Lee v. Illinois, 476 U.S. 530, 543-44 n.5 (1986) (refusing to consider whether a confession should be considered to fit within the “firmly rooted” exception for declarations against interest, so as to satisfy the reliability test “without more”). Nevertheless, the Court continues to insist that it adheres to the Roberts test. See Idaho v. Wright, 110 S.Ct. 3139, 3146-47 (1990).
9 In rough terms, I believe that the Confrontation Clause should be construed to exclude evidence of an out-of-court statement offered by the prosecution, regardless of the declarant’s
subject I want to concentrate on here. Thus, to avoid a great deal of complexity, this article will not deal, except briefly, with prosecution evidence. Where I do consider such evidence, I will assume that the Confrontation Clause presents no problem, for reasons peripheral to the focus of this article.

Part 1 of the article uses the techniques of elementary decision theory to lay out the current procedural context of hearsay decisions. Parts 2 and 3 then present my proposed changes.

I. THE BASIC HEARSAY SITUATION IN TREE AND MATRIX FORM

Throughout this article, I examine a variety of scenarios fitting a common pattern. One party, the proponent, wishes to introduce evidence of a hearsay statement made by an out-of-court declarant. If the declarant were to testify at trial to the substance of her out-of-court statement, the testimony would have sufficient probative value to warrant admissibility. Evidence from this particular declarant—that is, either her out-of-court declaration or her in-court testimony—is irreplaceable, in the sense that even if the proponent produced all the other relevant evidence that he could, the declarant’s evidence would have substantial probative value. The proponent’s adversary, the opponent, raises a hearsay objection to the evidence. The opponent points out that the evidence is deficient, as compared to live testimony, in several respects: the prior statement was not made under oath; he cannot cross-examine the declarant; the jury cannot witness her demeanor; and there may be doubt as to whether the declarant even made the statement.

Figure 1 shows the hearsay game tree, albeit in somewhat simplified form. Note that before the judge has to move, the two parties each make a move. The proponent has three choices. He may select PRODUCE—production of the declarant as a live witness—assuming this is an available alternative. If he does that, or if he selects DO NOTHING (meaning that he offers neither the live testimony nor the hearsay), the hearsay problem will not be presented to the court.

availability, if the declarant made the statement with the anticipation that it might be used in the investigation or prosecution of a crime. Cf. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 593-95 (1988) (suggesting a similar test, but applicable only to available declarants). I would apply this test absolutely, though the accused might forfeit his confrontation right if he wrongfully rendered the declarant unavailable—by acts such as intimidating, kidnapping, or killing her. Under this approach, if a hearsay statement did not fit within the confrontation protection, the accused might still assert a constitutional right to have the statement excluded unless the prosecution produced the declarant (at least if the declarant was available), but such assertions should be decided under general and flexible standards of due process.
Only if he chooses OFFER, seeking to introduce the hearsay, might the issue arise. Furthermore, if in response to OFFER the opponent responds with either PRODUCE or DO NOTHING, there is no dispute for the court to resolve.

If, however, the opponent chooses OBJECT, the judge must decide whether to ADMIT the hearsay or EXCLUDE it. As is frequently recognized, if the judge decides to exclude the hearsay, the proponent may decide to produce the declarant as a witness at trial, assuming the declarant can be brought to court. Indeed, this inducement to produce "better evidence" is one possible justification for some applications of the ban on hearsay.\textsuperscript{10} A companion point is also apparent, but I believe less consistently borne in mind: if the judge decides to admit the hearsay, the opponent may also wish to produce the declarant as a trial witness, so that the defects about which he complained in the hearsay testimony may be eliminated. In other words, when the declarant is available, whichever party loses on the hearsay motion must decide whether to select PRODUCE or DO NOTHING.

Figure 1 indicates the outcome at each end node, in terms of the resulting state of evidence and the costs incurred. The evidence may include live testimony of the declarant (LT), only the hearsay (H), or

\begin{footnotesize}
\end{footnotesize}
no evidence at all from the declarant (NE). The notation LT* indicates that, under usual practice, the procedure for presenting the testimony differs depending on whether the proponent or the opponent produces the declarant. (Part 2 will suggest that this difference should ordinarily be eliminated.) As for the costs, the diagram indicates either 0, no outlay if the proponent is not produced, whether the hearsay is introduced or not; -$pp, a payment by the proponent of his costs of producing the declarant; or -$oo, a corresponding payment by the opponent of his costs of producing her. The first subscript in this notation indicates who bears the cost, while the second indicates which party is producing the declarant. The two parties do not necessarily have the same production costs. The double subscripts are necessary because, as we shall see in part 3, it may be possible for one party to bear the costs of the other's producing the declarant.11

For now we will assume that the proponent has made his intention to offer the hearsay, and that the opponent has objected, sufficiently well in advance of trial that, whichever way the trial judge rules on the hearsay motion, the losing party will not be prejudiced in producing the declarant by the passage of time since the beginning of the litigation; any super-saver flights that were available then are assumed to be available still. This assumption will be relaxed in Part 2.

Although Figure 1 is not terribly complex,12 for now I will use a

---

11 Figure 1 does not indicate the payoffs—that is, the value of each outcome—either to the court or to the parties. For this reason, a game theorist speaking rigorously would probably say that Figure 1 is only a game tree, and not a representation of the extensive form of the game. See E. Rasmusen, Games and Information: An Introduction to Game Theory 46 (1989). I do not believe the distinction has any significance for the purpose of this article. The payoffs will, of course, differ from case to case. An attempt to determine the court's optimal course of decision may be complicated by difficulties in assessing the payoffs to the court for each possible outcome. See Analysis of Hearsay, supra note 2.

12 Figure 1 is simplified in at least four respects.

First, once the parties have made their preliminary moves, but before the court rules on the objection, the parties, and perhaps the court, must decide what information the parties will provide to the court. A party may, for example, decide to tell the court whether it intends to produce the declarant in the event of an adverse decision on the hearsay motion. I will address this complexity in a separate article. See Analysis of Hearsay, supra note 2.

Second, the court is not limited to the two rulings of ADMIT and EXCLUDE. Part 3 suggests other types of rulings that the court might issue, in which the burden of producing the declarant is divided.

Third, once the court rules, the parties may agree to alter the outcome prescribed by the court. This possibility will be addressed in Analysis of Hearsay, supra note 2.

Fourth, Figure 1 does not show the possibility that a party will make a failed attempt to produce the declarant. For now, we can assume that possibility away. In other words, if the party losing on the hearsay motion is not going to produce the declarant—whether because he cannot or will not—he will, by assumption, make that decision without spending significant resources; if the party decides to make a genuine effort to produce the declarant, the effort will succeed. In reality, a range of failed efforts is possible. For the most part, we would simply
IMPROVING HEARSAY PROCEDURE

Figure 2

<table>
<thead>
<tr>
<th>Court</th>
<th>ADMIT</th>
<th>EXCLUDE</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRODUCE</td>
<td>$LT^*$</td>
<td>$LT$</td>
</tr>
<tr>
<td>OPPONENT</td>
<td>$-SO$</td>
<td>$-SP$</td>
</tr>
<tr>
<td>DO NOTHING</td>
<td>$H$</td>
<td>$NE$</td>
</tr>
<tr>
<td>PROONENT</td>
<td>$\beta$</td>
<td>$\beta$</td>
</tr>
</tbody>
</table>

Diagram that is even simpler and that will present much of the analysis more effectively. Figure 2 shows the subgame that begins with the court’s decision. It essentially reproduces the bottom part of Figure 1, arranging the outcomes in matrix form. In this diagram, the court picks a column, ADMIT or EXCLUDE, and the losing party picks a row, PRODUCE or DO NOTHING. This diagram does not show the sequence of moves. It is easy enough to remember, however, that the court moves and then the losing party decides, in light of the court’s move, whether or not to produce the declarant.

If the judge selects the EXCLUDE column, the opponent is satisfied; that, after all, is the result he sought by making his objection. But now the proponent, the party that lost on the hearsay motion, has to determine his alternatives. The proponent would have preferred to introduce the hearsay evidence; otherwise, there never would have been a dispute presented to the court. Now that the court has denied him that possibility, he has to pick between the PRODUCE row (if it is available) and the DO NOTHING row. In other words, he has to decide whether to produce the declarant as a witness in court (assuming that is feasible) or to do without any evidence from the declarant at all.

The proponent may face competing considerations in making his decision. On the one hand, evidence from the declarant may be important, perhaps even essential, to the proponent’s case. On the other hand, producing the declarant at trial may be expensive and difficult, and perhaps not worthwhile. Indeed, occasionally production may even be counterproductive. The proponent may be uncertain that the declarant would adhere at trial to the substance of her prior statement; he may also fear that the declarant would have a very bad de-

treat failed efforts as a negative consequence of the court’s prescribed evidentiary result. As discussed in Part 3, however, if the court does not wish simply to ADMIT or EXCLUDE, the possibility of a failed effort may complicate the decision. See infra text following note 53; note 57 and accompanying text.

13 This is not a standard game-theory matrix, because the identity of the party picking the row depends on what column the court picks.
meanor or crumble under cross-examination. In some cases, such concerns may even account for the proponent’s initial decision to offer the hearsay rather than the live testimony.

If the judge picks the ADMIT column, it is the proponent who has gotten what he wants, and the opponent who has to select a row. The opponent may prefer that the declarant testify in court so that the opponent may examine her under oath and with her demeanor visible to the factfinder. On the other hand, the opponent knows that the proponent will not produce the declarant: if the proponent wanted to present her testimony and was able to do so, he would have done so on his own initiative, and given that the hearsay objection has been denied, he is under no additional pressure to do so. Thus, the declarant will testify only if the opponent bears the trouble and expense of producing her (assuming again that producing her is feasible). The opponent might not find that burden worthwhile.

Furthermore, even putting aside the opponent’s burden of producing the declarant, he may actually prefer introduction of the hearsay to live testimony by the declarant. His objection might have reflected not a preference for live testimony over hearsay but rather the hope that, if the objection prevailed, the proponent would decide not to produce the declarant, thus forgoing the opportunity to produce evidence from her. Perhaps, also, the opponent—if he is litigating in a nasty manner—had the subsidiary hope that if the proponent did decide to produce the declarant he would have to incur costs in doing so. Thus, the opponent may select the DO NOTHING row, even if producing the declarant would be cost-free for him.

In this basic model, then, the court has to decide between two procedures, the ADMIT and EXCLUDE procedures.\textsuperscript{14} Whichever procedure the court chooses, the losing party has to decide (assuming there is a feasible choice) whether to produce the declarant. Under the usual practice, the choice between ADMIT and EXCLUDE carries several consequences:

1. \emph{The Presumptive Evidentiary Result.} First, and most obviously, the court’s choice determines the presumptive evidentiary result—that is, the result that will prevail if neither party does anything more. If the decision is ADMIT, that result will be evidentiary state \( H \)—the hearsay is admitted without the declarant being present. And

\textsuperscript{14} This article does not analyze the possibility of introducing the declarant’s testimony by deposition. That is sometimes an important possibility. But, because a party has a right to introduce the deposition of a person in most circumstances in which testimony of the person would be admissible but it would be difficult to produce her, see \textsc{Fed. R. Civ. P.} 32(a), we may, for present purposes, consider introducing a deposition as a form, albeit inferior, of producing the declarant as a witness.
if the court's decision is EXCLUDE, the immediate result is NE—neither the hearsay nor live testimony of the declarant is presented to the factfinder.

2. The Burden of Producing the Declarant. Second, because the party losing on the hearsay issue—the opponent under ADMIT and the proponent under EXCLUDE—may alter the presumptive evidentiary result by producing the declarant, the court's decision determines which party has the burden of doing so. Failure to satisfy that burden means that the party losing on the hearsay issue must abide by the evidentiary result he fought the hearsay dispute to avoid—H if he is the opponent and NE if he is the proponent.

The burden of producing the declarant may be broken down into two parts: the physical burden, the actual work required to procure the declarant's testimony; and the financial burden, the costs of producing the declarant. The burden may also be broken down another way, by the various tasks that must be performed to procure the declarant's testimony. The party who wishes the declarant to testify must: identify the declarant; locate her; assure her continued availability for trial; compel her to appear and testify, or use means of persuading her to do so voluntarily (which may include, for example, compensation for travel expenses or inducements to waive a privilege); and assure logistical arrangements for her travel to and appearance in the courthouse.

How expensive and difficult each aspect of the burden is will vary greatly from case to case. Often, for example, there will be no doubt as to who and where the declarant is; on the other hand, if the declarant was a casual bystander to an accident who made a brief utterance shortly afterwards, identifying and locating her may be very difficult.

Though the burden of producing the declarant may thus be conceived as having various severable aspects, under prevailing practice the burden is placed entirely on one party or the other. The court selects either H or NE as the presumptive evidentiary result, and if the losing party fails to produce the declarant that result will stand.

3. Procedure for Examining the Declarant. The third consequence of the choice between ADMIT and EXCLUDE is determination of the procedure for examining the declarant if she is, in fact, produced as a witness. Assuming the court selects EXCLUDE and the pro-

---

15 See, e.g., Comment to MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-109(c)(1)-(2) (1980); H. DRINKER, LEGAL ETHICS 75-76 (1953).
16 Hypothetical 7, infra p.909, provides an illustration of a case in which one party may, if it wishes, use inducements to persuade a potential witness to testify.
ponent does produce the declarant, the result is LT: The proponent presents the declarant's live testimony as part of his case, and immediately after the direct the opponent has a chance to cross-examine. By contrast, if the court chooses ADMIT, the procedure usually implemented allows the proponent to offer evidence of the out-of-court statement as part of his case; if the opponent produces the declarant, he must wait until his case to examine her, which he must then do on direct. This procedural result is what I have labeled LT*.

II. IMPROVING THE PROCEDURE FOR EXAMINATION OF THE DECLARANT

We have just seen that the choice between ADMIT and EXCLUDE has three important consequences. This Part and Part 3 suggest that these consequences can be unbundled. The discussion is presented in a reverse order. This Part shows that LT*, the procedure usually followed when the opponent produces the declarant after the court selects ADMIT, is inferior to LT, the procedure used when the proponent produces the declarant after the court selects EXCLUDE. It also shows that LT is usually best implemented if, before admissibility of the hearsay is decided, the proponent is required to ask the declarant for her current testimony concerning the underlying event or condition. Accordingly, this procedure should ordinarily be used no matter how the declarant has been produced as a witness. Focusing on earlier stages, I suggest in Part 3 that the burden of producing the declarant should not always be imposed entirely on one party or the other. Various allocations of portions of the burden may vary depending on the circumstances.

A. The Order of the Parties' Examination

1. The Ordinarily Preferred Order: Testimony by the Declarant as Part of the Proponent's Case

Assuming the declarant testifies at trial, the procedure for examining her is substantially more disadvantageous to the opponent under LT*, the procedure yielded by ADMIT-PRODUCE, than under LT, the procedure yielded by EXCLUDE-PRODUCE.

This would be especially true if the court adhered rigidly to the presumptive rule that a party cannot use leading questions to examine its own witness. Under LT*, if the opponent wishes to examine the declarant, he must call her as a witness himself. But, as reflected in Fed. R. Evid. 611(c), a party should be allowed to ask leading questions, the presumption notwithstanding, when he calls "a hostile witness, an adverse party, or a witness identified with an adverse party."
This doctrine does not guarantee absolutely that the opponent's ability to ask leading questions of the declarant will be unaffected by who brought the declarant to the witness stand.\(^{17}\) However, if applied sensibly, it goes a substantial way to that end.

Other disadvantages to the opponent posed by LT* are more tenacious. One of these disadvantages is that under LT* there is a delay, perhaps substantial, between the introduction of the statement during the proponent's case and the testimony of the declarant during the opponent's case. This delay means that for some time "the declarations will be unrebutted in jurors' minds."\(^{18}\) Furthermore, calling the declarant to the stand forces the opponent to interrupt the presentation of his own version of events, shifting the focus back to the proponent's version. Indeed, calling the declarant to the stand is likely to result in a repetition of the prior statement, thus increasing its impact on the jury.\(^{19}\)

The opponent may also be reluctant to be perceived by the jury as calling the declarant to the stand.\(^{20}\) Under LT, when the witness-declarant delivers testimony on direct that is damaging to the opponent, the opponent's counsel can attempt, with relatively little risk, to undercut the testimony on cross-examination. Simply rising to cross-examine a witness already on the stand will not necessarily raise jury expectations very much as to what she expects the cross to yield. If she makes any headway at all she can often give the impression that she is not particularly disturbed by the direct testimony and is satisfied by the cross. By contrast, LT* forces counsel, if she wants to examine the declarant, to act affirmatively in calling her to the witness stand. This is bound, first, to give the jury the impression that counsel

\(^{17}\) If the proponent produces the declarant, the court is almost certain to allow the opponent to use leading questions. \textit{Fed. R. Evid.} 611(c) provides: "Ordinarily leading questions should be permitted on cross-examination." If the opponent produces the declarant, though, the court might disregard its discretion to alter the presumption against allowing a party to lead his own witness, or it might hesitate to hold that, simply because the witness has made a statement helpful to the proponent, the witness should be considered hostile to the opponent or identified with the proponent. Indeed, sometimes the witness may be more closely identified with the opponent.

\(^{18}\) United States v. Inadi, 475 U.S. 387, 410 (1986) (Marshall, J., dissenting). This article generally does not consider prosecution evidence. But Justice Marshall's dissent in \textit{Inadi} is cited because it is a useful statement of why, assuming the declarant testifies, the procedure for examining her is less advantageous to the opponent under \textit{ADMIT} than under \textit{EXCLUDE}.

\(^{19}\) \textit{Id.}

\(^{20}\) Part of his reluctance may arise from fear that the jury will tend to regard the declarant as associated with the opponent, and will therefore count especially heavily evidence given by the declarant that is adverse to the opponent. \textit{See id.} at 409. Usually, though, the opponent would be able to minimize this problem by making clear his relationship or lack of relationship, with the declarant.
finds the testimony sufficiently damaging to be worth the trouble of calling the declarant as a witness. Calling the declarant will also tend to create higher jury expectations for what counsel hopes to accomplish. If the examination does not yield any significant concessions, the jury is likely to regard it as a failure, and may put increased reliance on the initial declaration. In short, the opponent must recognize a substantial danger that calling the declarant will be counterproductive.

Thus, LT* makes examination of the declarant substantially less attractive to the opponent than does LT. In many cases, the difference will be a decisive factor in dissuading the opponent from producing the declarant, even if he would bear no substantial burden in doing so and even though he would gladly, and perhaps beneficially, cross-examine the declarant under LT. And, a fortiori, if there is a significant burden in producing the declarant, the opponent will be less willing to bear it if only the less attractive form of examination provided by LT* procedure is available.

If proof were needed that the procedure for examining the declarant is substantially less attractive to the opponent under ADMIT than under EXCLUDE, it can be provided informally by answering two simple questions. First, after a party finishes examining his witness on direct, how often does the opponent rise to ask at least a few questions on cross? Most often. Second, when a party introduces the hearsay statement of a declarant, even one readily available, how often does the opponent call the declarant to the stand as his own witness? It does happen, but rather infrequently.

The loss of the opponent's examination of the declarant, because the opportunity offered is too ineffective and risky as compared to another opportunity that might have been offered, is an unambiguous loss of potentially useful information for the truth-determining process. Thus, insofar as the choice of procedure affects whether and how the opponent examines the declarant, LT* is inferior to LT.

21 In his dissent in Inadi, 476 U.S. at 410, Justice Marshall pointed out an additional drawback of the ADMIT procedure to the accused in a federal criminal prosecution. Under 18 U.S.C. § 3500(b) (1989), "[a]fter a witness called by the United States has testified on direct examination," the accused has a right to obtain any prior statements of the witness in the government's possession. The accused has no such right with respect to his own witnesses. Justice Marshall did not consider the possibility that, if the defense calls the declarant as a witness solely to impeach a statement offered by the prosecution, the declarant should be considered a Government witness for purposes of 18 U.S.C. § 3500. This interpretation would be plausible, and would serve the same purpose as FED. R. EVID. 806. Rule 806 recognizes that, when one party introduces an out-of-court declaration for the truth of what it asserts, the other party should be able to challenge the credibility of the declarant as if the declarant had testified for the proponent.
But that is only half the story. We must also consider the effect on the proponent. If LT applies, the proponent may sometimes decline to produce an easily available declarant, even though the proponent would gladly introduce the out-of-court declaration if LT* applied. The proponent may hesitate—even assuming production of the declarant would create no significant burden—because he fears that live testimony would be counterproductive, either because the witness will have an unpersuasive demeanor or fail to adhere to the prior statement, or because the more potent form of examination available to the opponent under LT may prove to be effective. In short, the proponent may decline to produce the declarant because he fears that too much exposure will reveal the weakness of the evidence. The loss of evidence for such a reason seems to be no loss to the truth-determining process.

This means that the manner of examining the declarant under LT, the procedure yielded by EXCLUDE-PRODUCE, is ordinarily superior to that under LT*, the procedure usually yielded by ADMIT-PRODUCE. But that does not mean that if the court wishes to impose on the opponent the burden of producing the declarant, as under ADMIT, it must also conduct an inferior procedure for examination if the opponent does produce the declarant. The placement of the burden of production and the procedure for examining the declarant may be unbundled.

Even if the court decides to impose the burden of producing the declarant on the opponent, it may—and ordinarily should—provide that if the opponent does produce the declarant, the testimony will be presented in the manner of LT. Thus, a decision to ADMIT the hearsay should usually be taken as provisional only, indicating that the hearsay will be admitted if the opponent does not produce the declarant in timely fashion. If the proponent does timely produce the declarant, the proponent must put the declarant on the stand as part of his case, or forgo the right to use the out-of-court declaration. If the declarant does take the stand, then, as suggested below, her testimony given from her current memory might render admissibility of the prior declaration unnecessary. In any event, once the declarant testifies on direct for the proponent, the opponent may cross-examine her in ordinary course.²²

²² This proposal bears some resemblance to the so-called rule of completeness. That rule, as expressed in Fed. R. Evid. 106, provides that "[w]hen 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." One aspect of the proposal presented here is that, if the court decides to admit the hearsay but the opponent timely produces the declarant as a
In other words, the modification proposed here alters LT*, the evidentiary result of ADMIT-PRODUCE, making it identical to LT, the evidentiary result of EXCLUDE-PRODUCE. And this means that the outcome of the ADMIT-PRODUCE cell of the basic matrix, Figure 2, is identical to the outcome of the EXCLUDE-PRODUCE cell, except that in the former case the opponent bears the burden of producing the declarant and in the latter case the proponent does.\(^2\)

Because it removes artificial barriers to the production of probative evidence, this rather simple modification makes ADMIT substantially more appealing to the court and the opponent than it is as now usually implemented. I will therefore generally assume that the procedure yielded by ADMIT-PRODUCE is LT rather than LT*.\(^3\)

Furthermore, if LT is appropriate when the opponent bears the entire burden of producing the declarant, it is, a fortiori, appropriate when only part of the burden is imposed on the opponent, as under procedures to be suggested in Part 3. In short, if the declarant testifies at trial, then however that came about—however the burden of producing her was allocated, and whoever brought her to court—it is ordinarily the proponent who should examine her first. The opponent should then be given the opportunity to cross-examine.\(^4\)

This is not necessarily good news to the opponent. If the court knows that it is not compelled to relegate the opponent to an inferior mode of examination simply because it imposes on the opponent all or

---

\(^2\) That, of course, may be a significant difference. Under the ADMIT procedure, whether modified or not, the opponent—rather than the proponent as under the EXCLUDE procedure—bears not only the risk of being unable to produce the declarant but also the cost of a successful or unsuccessful attempt to produce her.

\(^3\) This modification may appear to be less necessary for bench trials, because the inadequacies of the ADMIT procedure for examination of the declarant may be less damaging to the opponent. On the other hand, even in a bench trial, the opponent might be hesitant to call the declarant to the stand without high expectations that doing so will be productive. If the opponent had to ask for the modified procedure, the request might be self-defeating, because it would tend to reveal the opponent's concerns to the trial judge. It is better to give the opponent the benefit of the modified procedure as a matter of standard practice, without his needing to ask.

\(^4\) If the opponent does not object in a timely fashion to the hearsay, or is unreasonably slow in producing the declarant after the court rules ADMIT, the proponent should not be prejudiced; he should be allowed to introduce the hearsay as part of his case. But if the opponent later produces the declarant—say, in the middle of his own case—he probably still ought to have the option of having the proponent put her on the stand and examine her first. Occasionally, the proponent might decline, saying that had he been given the choice he would have forgone use of the hearsay statement rather than put the declarant on the stand. In such a case, the proponent probably should be taken at his word. He should not be compelled to put the declarant on the stand—but the hearsay should be stricken from the record.
part of the burden of producing the declarant, then imposing that burden on the opponent becomes a more appealing choice for the court. And this makes it less likely that the court will simply exclude the hearsay.

2. Nonuniversality of the Ordinarily Preferred Rule

I have not suggested that LT always replace LT*, because sometimes little would be gained but some extra bother. Consider this hypothetical:

HYPOTHETICAL 1: Paul, in litigation against Otto, introduces his testimony of a statement made by Otto himself. Otto objects, saying that before the statement is admitted, Paul should put Otto himself on the stand. The court is confident that Otto will testify in his own behalf in any event, and that, whatever his testimony will be, the hearsay statement should be admitted.

The court might still decide that it is better to hear promptly "from the horse's mouth," rather than to let Paul's version of Otto's statement remain unrebuted, except by cross-examination, for an extended period. On the other hand, in this case Otto's counsel presumably will not be dissuaded from putting the declarant on the stand, nor from asking crucial questions, by fear that the examination will be unproductive or even counterproductive; here, the declarant is her client, and he will testify in his own behalf in any event. In such a case, the issue is essentially whether the proponent can introduce the hearsay immediately, in the way he wishes, or whether he must first put the adverse party on the stand in the middle of his own case. The court might well decide that it is better to let each party present his own version in sequence, and in the way he wishes, rather than to interrupt Paul's presentation—and perhaps even his testimony—by testimony of his adversary, albeit limited in scope. Thus, the court might adhere in this case to the LT* procedure.

This hypothetical includes at least two conditions that seem generally essential for LT* to be preferable: first, that the hearsay statement would be admissible irrespective of what the declarant might reasonably be expected to testify; and second, that use of the procedure would not seriously hinder the opponent's counsel in examining

26 I do not necessarily disagree with the categorical rule, skillfully defended in Park, The Rationale of Personal Admissions, 21 IND. L. REV. 509 (1988), exempting personal admissions of party opponents from the hearsay rule. But it is a separate question whether the statement should be introduced before the party who made the statement has testified from current memory, and perhaps long before that party has had a chance to deny the earlier statement or to attempt to explain it away. As to this question of procedure, at least, it seems to me that a categorical rule may be unwise.
the declarant. Because I am interested here in how altered procedures may affect the resolution of hearsay issues, I will assume that these conditions do not both hold; when they do not, LT is almost always preferable.

3. The Problem of Notice

The ADMIT procedure, as modified to incorporate the LT procedure for examining the declarant, is more attractive to the court than is the ordinary ADMIT procedure. Thus, the proponent may find himself under pressure to give ample notice of his intention to use the hearsay, long enough before trial so that the opponent could produce the declarant in time for her to testify during the proponent’s case. The proponent might want to give enough notice that denial of the hearsay objection—imposing on the opponent the burden of producing the declarant—is as attractive an option as possible to the court. And if the result is that the opponent does indeed produce the declarant, the proponent will often be well pleased; often the proponent would prefer the declarant’s live testimony to her hearsay statement, but offers the hearsay statement because he does not want to incur the cost and difficulty of producing her.27 In some other cases, however,

27 The proponent might try a game-playing maneuver in an attempt to shift costs from himself to the opponent. Suppose that the proponent would prefer the live testimony of the declarant to evidence of her hearsay statement, even after taking into account the costs of producing her as a witness, but that he is sure that if he announced his desire to offer the hearsay the court would rule the evidence admissible and that the opponent would produce the declarant. The proponent might thus decide to offer the hearsay, wait for the opponent to produce the declarant, and then offer the declarant’s testimony, without having to incur the cost or trouble of production. I do not find this prospect particularly troubling. The ploy would work only if the opponent has a conflicting perception—believing that it is he (rather than the proponent) for whom live testimony would be preferable to admission of the hearsay, and so believing strongly enough to warrant the cost of producing the declarant. If the opponent does not make this calculation, then he would do nothing, allowing the hearsay to be admitted and so rendering the proponent’s gambit counterproductive. Only rarely could the proponent have enough confidence in the opponent’s calculation as to justify taking the chance.

The proponent might, however, try an apparently cost-free variation—first announcing an intention to offer the hearsay, and then, if the opponent does not take the bait by producing the declarant, producing her himself. This variation still will not help the proponent unless the opponent decides that he, not the proponent, is better off with live testimony than with the hearsay, and by enough to warrant the extra cost. If the opponent does make that calculation, then he has been bluff’d into bearing costs of producing the proponent’s evidence that the proponent would have been willing to bear; if the opponent does not make that calculation, the proponent has lost nothing. This tactic might be considered disingenuous, because the initial offer of the hearsay conveys an intention not to produce the declarant. If the court were to find this tactic disturbing, it might prevent the tactic from being effective by barring the proponent, who had purportedly sought to introduce the hearsay, from introducing the live testimony unless he is able to show good reason for his change of mind. Indeed, the court, in issuing an anticipatory ruling that the hearsay is admissible, might require the proponent, before the
the proponent prefers to “stand pat” with the hearsay statement, rather than risk the live testimony. In such a case, the proponent might hesitate to give sufficient notice, because it might make victory on the hearsay objection less valuable to him—that is, the opponent might take advantage of the notice and produce the declarant. And this, of course, tends to be precisely the type of case in which it is most important that the proponent give sufficient notice.

The court might strengthen the proponent’s incentive to provide notice. Perhaps the most effective way the court could do this is by imposing on the proponent any loss or risk created by the insufficiency of notice. Consider a second hypothetical.

HYPOTHETICAL 2: Paul Proponent is at trial against Otto Opponent. On Tuesday afternoon, without giving prior notice, Paul offers evidence of a hearsay statement by declarant Dawn Day. Had Paul given prior notice of his intention to offer Dawn’s statement, the court would have selected the modified ADMIT procedure—imposing on Otto the burden of producing the declarant, admitting the hearsay if Otto did not produce her, and requiring Paul to put Dawn on the stand as part of his case, or forgo use of the hearsay, if Otto did produce her. Otto says that, rather than allowing Dawn’s statement to be admitted without subjecting her to adverse questioning, he would indeed want to produce her as a witness. He cannot do so before Paul finishes presenting his case-in-chief, later that day. After Paul is finished, Otto will take all day Wednesday, and perhaps part of Thursday, to present his evidence. And, because Dawn lives in Courthouse City, Otto can subpoena her to testify as early as Wednesday afternoon or Thursday morning.

The court might well adhere to its inclination to impose on Otto the burden of producing the declarant, but give Otto some extra time, because of Paul’s failure to give earlier notice. Otto cannot produce Dawn before the close of Paul’s case-in-chief, but he could do so before the trial ends, without the need for a continuance. Thus, the court might rule that, unless Otto produces Dawn by Thursday morning, the hearsay evidence will be admitted. If Dawn does appear on Thursday morning, then after Otto has finished presenting his case, Paul may put Dawn on the stand as his own witness. If Paul declines to do so, the hearsay will be excluded. This ruling means that the presentation of Paul’s case is broken up, and put out of the order he

opponent has undertaken any efforts, to state whether or not he intends to produce the declarant if the opponent does not. On the other hand, the court might conceivably be willing to let the parties play a bluffing game, which is likely to result in the burden of producing the declarant being borne by the party most eager for her live testimony.
had wished—but he could have prevented that by giving earlier notice of his intention to present Dawn's evidence.

The problem created by the proponent’s delay in giving notice will not always be so easily solved. Sometimes, the delay may make it more difficult to produce the declarant at all before the end of the trial, even if the trial were extended by a reasonable continuance. In such a case, as suggested in Part 3, the court might respond by imposing upon the proponent the incremental burden of producing the declarant created by the delay—even though, if notice had been adequate, the court would have imposed the entire burden of producing her on the opponent. In other words, the court might make the proponent bear the risk that the proponent cannot be produced in time for trial.

For now, though, the point I want to emphasize is this: If, notwithstanding lateness in notice, the court is inclined to impose on the opponent all or part of the burden of producing the declarant, and if the opponent satisfies that burden, then the declarant still ought ordinarily to be put on the stand by the proponent, not by the opponent. If the proponent’s lateness in giving notice means that the opponent cannot reasonably be expected to produce the declarant, and as a result the declarant will not testify until well after the proponent has finished putting in his other evidence, so be it; that is a cost the proponent has brought on himself.

B. The Order of the Proponent’s Questioning

In Section A, I have contended that, however the declarant is brought to the stand, he ought ordinarily to be examined first by the proponent, and then cross-examined by the opponent. But given that the declarant is on the stand, should her hearsay statement be admitted?

The question of whether, and to what extent, prior statements of a witness should be treated as hearsay has generated a great deal of controversy. The traditional view is that a prior statement offered to prove the truth of a matter it asserts is hearsay, notwithstanding that the declarant is a witness subject to cross-examination. Others—including Wigmore, the drafters of the Model Code of Evidence, and at least two states—take the contrary view, that the purposes of

---

29 3A WIGMORE, EVIDENCE § 1018, at 996 (Chadbourn rev. 1970).
30 MODEL CODE OF EVIDENCE Rule 503(b) (1942).
31 KAN. STAT. ANN. § 60-460(a) (1983); see Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969). Note also that under Indiana decisions, an out-of-court declaration may be considered
The hearsay rule are satisfied if the declarant is present and subject to cross-examination.

The Federal Rules of Evidence take a hedged view. The Rules do not generally exempt a statement from being treated as hearsay simply because the declarant is a witness subject to cross-examination. Rule 801(d)(1) does, however, create exemptions for three important categories, in which

the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person . . . .

In short, the Federal Rules set out two categories of statement (clauses (A) and (B)) that are exempted from the hearsay rule in light of the declarant's testimony, and one category (clause (C)), that is exempted irrespective of the nature of the declarant's testimony. All other prior statements are treated as hearsay, and so presumptively excluded, irrespective of the declarant's testimony.

I do not offer here a comprehensive solution for ruling on hearsay objections to prior statements by witnesses. Rather, I make a simple procedural suggestion: the hearsay statement should not ordinarily be introduced, and its admissibility should not be decided, until the proponent has first asked the declarant-witness for her current testimony about the underlying event or condition that was the subject of the hearsay statement.

If the court admits the hearsay first, before hearing the declarant's current testimony concerning the underlying event or condition, it leaves a potential problem unsolved. It may be that, for a manipulative reason, the proponent wishes to introduce the prior statement instead of (rather than in addition to) the current testimony. The proponent might want to avoid asking about the declarant's recollection because he is afraid that she would depart, in a way unfavorable to him, from the prior statement. Or perhaps he knows that the declar-

---

32 FED. R. EVID. 801(d)(1). Some states' rules are more generous than the federal rules in that they exempt from the hearsay rule any prior inconsistent statement of a witness who is subject to cross-examination, without the limitations of rule 801(d)(1)(A) on the circumstances in which the statement was made. See, e.g., Gibbons v. State, 286 S.E.2d 717, 721 (Ga. 1982).

---
ant would not testify in a convincing manner about the event or condition, or would crumble under cross-examination. If the declarant were eager to help the proponent's case, however, she might have no trouble testifying that she made the prior statement, and then retreat behind a stone wall of "I don't remember" when asked about the underlying events.

Of course, as I suggested earlier, there is a similar possibility that the proponent is acting in such a manipulative way, hiding potentially harmful evidence, whenever he offers a hearsay statement rather than producing a declarant who could be brought to court. Nevertheless, hearsay statements by absent declarants, even available ones, often are admitted, and should be. Is there any difference when the declarant is on the stand? I believe there is. When the declarant is absent, the impossibility of producing her, or the burden that doing so would impose on the proponent, may support a decision to admit the hearsay. The decision may reflect a judgment in the particular instance that, if the declarant is to be produced, the opponent should bear the burden of doing so. But if the declarant is already on the witness stand, any burden that might be imposed on the opponent has been satisfied, and there is no remaining burden at all on the proponent to secure the declarant's current testimony.

The court might as well eliminate the possibility of manipulation by requiring the proponent to ask the declarant-witness to state her current recollection before the court considers the hearsay statement.

Often, of course, the proponent wishes to introduce the hearsay declaration in addition to (rather than instead of) the declarant-witness' current testimony. Sometimes, though, the hearsay statement will just show that the witness has said before what she has just testified to from the witness stand. Where this is so, the hearsay statement is probably nearly useless, and ought not to be allowed. Often, however, the hearsay statement adds a great deal to the current testimony. The earlier statement may be more detailed than the current testimony, because it reflects a fresher memory. Or, if it is consistent with

---

33 See supra at 895.

34 Of course, if the declarant may assert a privilege, there is a remaining aspect of the burden—persuading her to waive the privilege—even though she is physically on the stand. I am using "on the witness stand" as a shorthand statement for "on the witness stand, ready, able, and willing to testify." A declarant who does not meet this standard may be deemed effectively absent, whatever her physical location.

35 There is a general rule against bolstering the witness' credibility before it has been attacked, but here another consideration applies. Merely proving that the witness has made the same statement repeatedly proves nothing about her credibility, or the accuracy of the statement. Of course, the circumstances in which she made the prior statement may support her credibility.
the current testimony, it may help rebut a contention that the witness has given false testimony because of some earlier-occurring failure of testimonial capacity; to the extent that the asserted failure occurred after the earlier statement, the asserted failure cannot explain how the witness has given the account that she has in her testimony. Or, if the prior statement is inconsistent with the current testimony, the statement may not only help impeach the current testimony, but also give another rendition of events that ought to be presented to the jury. In any event, the incremental probative value of the earlier statement, and any dangers it poses, are more easily assessed after, rather than before, the declarant has testified from current memory.

Moreover, no significant harm can be done by asking the declarant-witness for her current testimony before admitting the hearsay statement. Ordinarily, any admissibility problems that beset the current testimony would also beset the hearsay. Occasionally, the declarant’s memory of the underlying event or condition may be too vague to warrant admissibility, whereas the hearsay statement may represent a fresh recollection. But even where this is so, there is no real harm done, and some potential benefit to be gained, in asking the witness first for her current recollection. Taking that testimony will not use up a significant amount of time nor introduce prejudicial information, but it might help in evaluating the hearsay statement, if that statement is eventually admitted.

C. Summary of the Proposed Procedure for Examining the Declarant

The proposals made in this Part may be summarized briefly. If the declarant of a hearsay statement testifies, then no matter how she may have been brought to court, the proponent ordinarily ought to put her on the stand first, as part of his case. Once she is on the stand, the proponent ought to ask her first for her current testimony about the statements underlying events or conditions. Only then, if at all, should the hearsay statement be admitted. When the proponent is finished examining the declarant, the opponent should then be allowed to cross-examine her in ordinary course.

Under this system, the court’s ruling with respect to a hearsay statement by a declarant who is absent but who could be brought to court is, in a sense, tentative. The decision to ADMIT or EXCLUDE the statement indicates only what will be done if the declarant is not timely produced as a live witness. If the decision is to EXCLUDE, but the proponent timely produces the declarant, he can put her on the stand and examine her. Perhaps the court will decide after hearing
her current recollection that in light of her testimony the hearsay is admissible. And if the initial decision is to ADMIT, the opponent ordinarily should have until a prescribed time, before which the hearsay should not be admitted, to produce the declarant. If the opponent does produce the declarant by that time, the proponent will put the declarant on the stand or forgo use of the hearsay. After her current testimony is taken, the court can then evaluate whether, in light of that testimony, the declarant’s hearsay statement ought to be admitted.

III. DIVIDING THE BURDENS: THE COURT’S CHOICES OF ALLOCATION

Part 2 discussed the procedure that ought to be followed when the declarant is produced as a witness at trial. Part 3 takes a step back, and examines the choices the court has in allocating the burden of producing the declarant.

As discussed in Part 1, various tasks must be performed to ensure a declarant’s testimony in court. The declarant must be identified, located, brought to court, and persuaded, by either voluntary or compulsory means, to testify. The simplest arrangement is for the entire physical burden of producing the declarant’s testimony, and also the financial burden associated with the physical burden, to be imposed on one party or the other. The burdened party decides whether or not to produce the declarant as a witness, where doing so is feasible, and then, if he decides in the affirmative, does what is necessary to produce her and absorbs the cost of doing so. But the simplest arrangement is not necessarily always the best.

A. Dividing the Physical Burden

1. Hypotheticals and Possible Decisions

In some cases it makes sense to divide the physical burden of producing the witness, imposing part on one party and part on the other. Consider the following hypotheticals.

HYPOTHETICAL 3: Proponent Propco offers, for a hearsay purpose, a memorandum evidently made by one of its employees, who is not identified on the face of the memo. The court is inclined to admit the memo, because it believes that the memo would be more proba-

---

36 I will assume throughout that a party cannot be required against his will to meet the financial burden of producing the declarant. That is, if the court imposes the financial burden on a party, and the party does not wish to pay what it costs to produce the declarant, he does not have to; he may, however, suffer adverse evidentiary consequences.
But it also recognizes a chance that, if opponent Oppco had a chance to subject the declarant, whoever she is, to adverse live questioning, the declarant's version of events would not be as damaging to Oppco as now appears—if for no other reason than that Oppco might be able to clear up some ambiguities in the memo. Furthermore, the court is confident that Propco could, with some work, identify and locate the declarant but that opponent Oppco could not, at least not without great difficulty.

The court might impose on Propco the burden of identifying and locating the declarant, and on Oppco the other aspects of the burden of producing the declarant. Thus, if Propco does not provide Oppco with the name and address of the declarant, the hearsay is excluded. If Propco does provide Oppco with the name and the address, the hearsay is admitted—at least, unless Oppco produces the declarant.

Figure 3a

---

Figure 3a is a diagram showing in general terms how this ruling, splitting the burden between the two parties, might work. Figure 3a presents one "subgame," in addition to ADMIT and EXCLUDE, that the court may select when it is called on to decide the hearsay objection. Under this subgame, called SPLIT BURDEN (PROONENT FIRST), the proponent must first decide whether to choose DO NOTHING or PART-PRODUCE. If he chooses DO NOTHING, the hearsay is excluded and the declarant is not produced (evidentiary result NE). If he chooses PART-PRODUCE, he commits himself to performing a portion of the

---

37 See supra note 4.
burden designated by the court, and the opponent must then decide whether to DO NOTHING or PART-PRODUCE. If the opponent decides to DO NOTHING, the hearsay is admitted (H) without cost to either party. (Although the proponent committed himself to performing part of the burden of producing the declarant, the opponent’s decision has rendered that commitment moot.) If the opponent decides to PART-PRODUCE, then the declarant will in fact be produced as a live witness (LT), and each party will bear the costs of its portion of the burden of production (indicated by the subscripts p’ and o’, read as “p-prime” and “o-prime” respectively).

Hypothetical 4: Propco wants to introduce a statement made by one of its former employees, Deborah Decker. Apart from the memo itself, Oppco has no information at all concerning Decker. Propco knows Decker’s address as of the time she left its employ, three years ago, but does not know of her subsequent whereabouts. Furthermore, no current employees of Propco have any information that would help locate Decker.

The court might require Propco, as a precondition to admission of the hearsay, to provide Oppco with Decker’s last known address, before imposing on Oppco the remainder of the burden of producing her. If Propco does give the address to Oppco, Oppco could try to find Decker and produce her as a witness. If Oppco fails to do so, the hearsay statement will be admitted. This solution, like that suggested with respect to Hypothetical 3, is an example of Split Burden (Proponent First).

Hypothetical 5: Paul Proponent, in litigation with Otto Opponent, wishes to introduce for a hearsay purpose a statement made by a friend of Otto’s in a conversation with Paul and Otto. The court is inclined to exclude the statement, imposing on Paul the burden of producing the declarant. Paul, however, does not know the name or identity of the declarant. If Paul had known well enough before trial that he would want to present the statement, he could have, by means of either interrogatories or deposition questions, required Otto to provide the name and address of the friend. But the relevance of the statement only became apparent during trial, as a result of evidence introduced by Otto.

It is too late for further discovery—or, perhaps more accurately, the narrowness of the information that Paul seeks, and the presence of the parties before the court, make formal discovery unnecessary. The court might rule that, unless Otto provides Paul with the name and address of the declarant, the hearsay will be admitted. The court

38 Recall that, under the procedure proposed in Part 3, LT, rather than LT*, is ordinarily used no matter how the declarant is produced as a witness.
might further rule that, if Otto does give Paul the name and address, the hearsay will be excluded, at least unless Paul produces the declarant.

Note that the solution suggested here reverses the process suggested in connection with Hypotheticals 3 and 4; here, it is the opponent, Otto, who must choose first, by providing the name and address of the declarant. Figure 3b presents this reverse process, SPLIT BURDEN (OPPONENT FIRST), in general terms. Like the PROPONENT FIRST variation, this is an alternative subgame to ADMIT and EXCLUDE. When the court chooses this ruling, the opponent must make the first decision. If he decides to DO NOTHING, the hearsay is admitted (H). If he chooses PART-PRODUCE, the proponent must then choose between PART-PRODUCE and DO NOTHING. If the proponent likewise chooses PART-PRODUCE, the result will be LT, the same result that would occur under SPLIT BURDEN (PROPONENT FIRST) if both parties chose PART-PRODUCE. If the proponent decides to DO NOTHING, the result is NE.

HYPOTHETICAL 6: Paul wants to introduce the hearsay statement of his sister, Donna DeKalb. Donna’s location is well known: She is overseas, beyond the subpoena power. The court believes that, if it was important to Paul that Donna testify, he could persuade her to do so. Otto, however, could not compel her to testify. The court is inclined to admit Donna’s statement, because it believes that the statement is more probative than prejudicial. The court recognizes, however, that if Otto had a chance to cross-examine Donna he might be able to expose weaknesses in her story.

The court might impose on Paul the burden of persuading Donna to come to court to testify. The court can do this by ruling that, if Paul fails to report that Donna is willing to appear, the hearsay is excluded. This potential consequence gives Paul an incentive to persuade Donna to appear—assuming he has confidence that her testimony will support him, and he believes that presenting her version of events, whether by live testimony or hearsay, is important to him. And the same potential consequence might also give Donna an incentive to agree.

At the same time, the court might impose on Otto the burden of arranging transportation for Donna. Under this ruling, if Donna does express a willingness to appear, Otto will have to arrange to bring Donna to court, and pay for the transportation, or else the hearsay would be excluded. Otto would thus be required to decide whether in fact he prefers that Donna testify live, subject to adverse questioning

---

39 See supra note 4.
by him, or that her hearsay statement be admitted—and whether he prefers the live testimony sufficiently to be willing to pay for the costs of transportation.

This solution, like those discussed in relation to Hypotheticals 3 and 4, is an example of SPLIT BURDEN (PROPONENT FIRST), because the proponent is required to state whether or not he will bear his portion of the burden before the opponent is required to commit or perform.

HYPOTHETICAL 7: Albert Acker is the accused in a felony case. The prosecution wants to introduce evidence of the out-of-court statement of Della Deaver, a former collaborator of Acker's. The court is able to satisfy itself that the statement is not excluded by Acker's rights under the Confrontation Clause. The court is inclined to admit the statement, because it believes that the statement is more probative than prejudicial, but it realizes that if it did so Acker would not be able to compel Della to testify. The problem is not bringing Della to court: She lives in a distant state, but either party would be able to secure her presence pursuant to the Uniform Act To Secure The Attendance of Witnesses from Without a State in Criminal Proceedings. Rather, the problem is that Della has made clear, through counsel, that if called to testify she would claim

---

40 Under both the current doctrine, see supra note 8, and the theory suggested supra note 9, there would not be a confrontation problem if Deaver made the statement to assist a conspiracy between her and Acker.

41 See supra note 4.

her fifth amendment privilege against self-incrimination. There is in fact a theoretical possibility that Deaver could be prosecuted, and that her statement would be used against her. But it is highly unlikely that she will be prosecuted, because her involvement in the criminal enterprise was tangential at best. In any event, the statement is at most mildly inculpatory of her.

The court might hold that, given the probative value of the statement, Acker should bear the burden of producing Deaver as a witness—except that only the prosecution can induce her to testify. The court might decide that the prosecutor has ample and reasonable means of avoiding the fifth amendment problem. If Deaver were seriously exposed to criminal liability, she and the prosecutor might possibly enter into a plea bargain; given that she is not, it would probably be simplest to offer her immunity from the use of her testimony in any prosecution of her. Thus, the court might impose on the prosecutor the burden of eliminating the fifth amendment problem. That is, the court might rule that the hearsay will be admitted unless the prosecution reports that it has granted Deaver immunity or that Deaver has for some other reason agreed to testify. But, because the probative value of the evidence outweighs its prejudicial potential, the court might impose on Acker the remaining portion of the burden of producing Deaver. This means that, if the prosecution carries its burden, so that Deaver is willing or compelled to testify, Acker would have to arrange for Deaver to be brought to court, presumably through the mechanism of the Uniform Act, or the hearsay would be excluded.

The solution as presented here is an example of **SPLIT BURDEN (PROPONENT FIRST)**, because the proponent, the prosecution, is required to commit first before the opponent, the accused, is required to commit or perform. But, as we shall now see, this sequence is not inevitable.

---

43 In Lee v. Illinois, 476 U.S. 530 (1986), the four dissenters, discussing an issue not addressed by the majority, indicated that they would hold that the Confrontation Clause did not preclude the prosecution from introducing a statement notwithstanding the fact that the prosecution had not used inducements available to it to persuade the declarant to waive a prospective claim of fifth amendment privilege and testify. *Id.* at 548 (Blackmun, J., dissenting). Even assuming, *arguendo*, that this position is valid as a matter of Confrontation Clause law, a jurisdiction would remain free, as a matter of its ordinary hearsay law, to impose on the prosecution the burden of inducing a declarant to waive such a claim of privilege.

44 Another situation might warrant the same solution. Suppose the same facts as Hypothetical 7, except for two changes. First, Acker, rather than the prosecution, offers Deaver's statement. Second, the court believes that the statement is more prejudicial than probative. In such a case, as in Hypothetical 7, it may make sense for the court to impose on the prosecution the burden of nullifying the fifth amendment problem, and on the accused the remaining portions of the burden of producing the declarant.
2. Sequences, Consequences, and Sanctions

If the court decides to split the physical burden, it must go beyond merely allocating the burden. The court must also be concerned with the sequence in which the parties will be called on to perform, or to commit as to whether or not they will perform, their respective tasks. Note that in each of the suggested decisions presented in connection with the above hypotheticals, one party is first called on to satisfy part of the burden of producing the declarant, or in some cases merely to represent that he will satisfy that part if the other party satisfies his share of the burden. The other party is then called on to satisfy the remaining portions of the burden.

Usually, as in the solutions suggested for Hypotheticals 3 through 5, the portions of the burden must be satisfied in the natural chronological sequence; the declarant must be identified and located before she can be brought to court. But this is not always true. In Hypothetical 7, for example, the portion of the burden imposed on the prosecution—eliminating the fifth amendment problem—might be performed before, after, or even during, the opponent’s performance of his portion of the burden. Similarly, in Hypothetical 6, the opponent might perform some aspects of the burden imposed on him, such as arranging for transportation, before the proponent performs the portion imposed on him, persuading the declarant to travel to testify. In these cases, efficiency considerations may weigh in favor of one sequence over another, but no given sequence is logically mandated.

Whatever may be the sequence in which the parties are required to perform their respective shares of the burden, it need not be the same as the sequence in which they are required to commit as to whether or not they will perform. The latter sequence, moreover, is not subject to the same logical constraints that may apply to the former. Sometimes, it is appropriate for the court to call on one party to commit as to whether or not he will satisfy one aspect of the burden before the other party is called on to satisfy, or even to commit with respect to, a chronologically earlier aspect.\textsuperscript{45}

Such an alteration of sequence may be valuable in preventing needless cost or effort. Thus, in Hypothetical 7, it makes no sense for

\textsuperscript{45} Suppose that the burden of identifying the declarant is imposed on the proponent and that all other aspects of the burden of producing her are imposed on the opponent. The proponent’s portion must be performed first. But there are these possible sequences:

1. Proponent performs (or not); if proponent performs, then opponent performs (or not).
2. Opponent commits (or not); if opponent commits, then proponent performs (or not); if proponent performs, then opponent performs (or not).
3. Proponent commits (or not); if proponent commits, then opponent commits (or not);
Acker to go to the difficulty and expense of having Deaver brought to trial if in fact Deaver will claim the fifth amendment privilege and the prosecution will not induce her to testify. Acker should not be required to perform, at least, until after the prosecution has committed. Correspondingly, the court might well be reluctant to induce the prosecutor to enter into plea negotiations with Deaver or to grant her use immunity unless it knows that, assuming the fifth amendment problem is eliminated, Acker will indeed bring Deaver to trial. The court might rule that, before the prosecution is actually called on to take steps to induce Deaver to testify, Acker must commit himself to produce Deaver.

The choice of sequence may affect not only the costs incurred by the parties, but also the evidentiary consequence. Suppose the court is able to avoid waste by not calling on either party to spend any significant effort or expense in performing his portion of the burden until the other party has committed to satisfying his portion. The sequence in which the parties are required to commit—which, as noted above, is a different matter from the sequence in which they are required to perform—is still potentially important. This may become apparent by comparing figures 3a and 3b, which presented the PROPONENT FIRST and OPPONENT FIRST versions, respectively, of SPLIT BURDEN.

Note that, given a choice between these two procedures, each

4. The parties commit (or not) simultaneously; if both commit, then proponent performs (or not); if proponent performs, then opponent performs (or not).

Note that sequence 2 is the same as sequence 1 with one extra step (the opponent's choice) tacked on at the beginning, and that sequence 3 is the same as sequence 2 with another extra step (the proponent's choice) tacked on at the beginning. Sequence 4 is the same as sequence 1 with a different extra step (simultaneous commitment, as suggested in the text infra at 913).

Sequences 1 and 3 are PROPONENT FIRST sequences, because the proponent is called on at least to commit before the opponent is called on to commit or perform. Sequence 2 is an OPPONENT FIRST sequence because, although the proponent performs before the opponent, the opponent is first called on to commit. In the terms used infra 913-15, sequence 4 is a SIMULTANEOUS MOVES sequence.

If the assumption made at the beginning of this footnote—that the proponent performs before the opponent—is reversed, a different set of four possible sequences, corresponding to the four set out above (but with the parties switched in each case), is available. Two of these are OPPONENT FIRST sequences, one is a PROPONENT FIRST sequence, and one is a SIMULTANEOUS MOVES sequence. (For example, the solution suggested in connection with Hypothetical 5 is the simplest form of OPPONENT FIRST sequence: opponent performs (or not); if opponent performs, then proponent performs.)

In some cases, as suggested in the text, it is not necessary that one party perform all of his portion of the burden before the other party performs all of his portion. Sometimes, then, an infinite number of sequences may be possible.

46 See supra note 45 and accompanying text.
party should hope that the other is required to decide first, because this ordering will make a difference if neither party is inclined to perform the portion of the burden that the court imposes on it. If the court requires the proponent to commit first and the proponent chooses DO NOTHING, the result is NE, the result desired by the opponent, without the opponent ever having to commit. On the other hand, if the opponent must move first and chooses DO NOTHING, the result is H, which the proponent desires, and the proponent never has to commit.

**Figure 3c**

![Diagram](image)

If this asymmetry appears potentially troublesome, the court might choose a third procedure, SPLIT BURDEN (SIMULTANEOUS MOVES), pictured in Figure 3c. This diagram portrays the opponent as moving first, but effective simultaneity is represented by the dotted line around the two proponent nodes, which indicates that the proponent does not know which move the opponent has made. It could be, for example, that both parties submit their choices to the court under seal. (Reversing the order, showing the proponent moving first but with dotted lines around the two opponent nodes, would also indicate effective simultaneity.) If both parties choose PART-PRODUCE, 

---

47 E. Rasmusen, *supra* note 11, at 46-47. Sequence 4 in note 45 is one SIMULTANEOUS MOVES sequence. The other is: the parties commit (or not) simultaneously; if both commit, then opponent performs (or not); if opponent performs, then proponent performs (or not).
then, just as under the **PROPOSENT FIRST** and **OPPONENT FIRST** versions of **SPLIT BURDEN**, the declarant is produced and testifies live. If one party decides to **PART PRODUCE** but the other decides to **DO NOTHING**, the party whose inaction causes the declarant's absence suffers an adverse evidentiary result—**H** for the opponent, **NE** for the proponent. But if both parties decide to **DO NOTHING**, the choice reverts to the court, which now knows that only **H** and **NE**, and not **LT**, are available outcomes. In such a situation, for reasons discussed in the sequel to this article, the court should choose **H** if, as I believe is usually the case, the hearsay seems more probative than prejudicial, and **NE** if the reverse appears to be true.48

Note that, given this rule for the court's decision, the **SIMULTANEOUS MOVES** variation of **SPLIT BURDEN** becomes essentially the equivalent of the **OPPONENT FIRST** variation when the hearsay is more probative than prejudicial.49 Similar logic shows that, under the same rule of decision, when the hearsay is more prejudicial than probative the **SIMULTANEOUS MOVES** and **PROPOSENT FIRST** variations are essentially identical. This may suggest that, if the court wants to avoid the extra complexity of the **SIMULTANEOUS MOVES** variation, it should simply pick the **OPPONENT FIRST** variation if the hearsay is more probative than prejudicial and the **PROPOSENT FIRST** variation if the reverse is true. There is one further complication, however.

In some cases, a party's decision as to whether or not to satisfy his portion of the burden may give some indication as to whether the hearsay is more probative than prejudicial. Suppose the court believes that the evidence is indeed more probative than prejudicial, but it imposes part of the burden on the proponent because he can perform that part of the burden with minimum effort and the opponent could not, at least not without great effort; Hypothetical 4—in which the court might impose on Propco the burden of providing Oppco with the declarant's last known address, information readily at hand for Propco but not for Oppco—is an example of such a case. In such a situation, given that the burden imposed on the proponent is so mi-

---

48 Analysis of Hearsay, supra note 2; see also supra note 4.
49 This can be demonstrated by examining under each variation what happens if the opponent chooses **DO NOTHING**, and then what happens if he chooses his other alternative, **PART PRODUCE**. Under either variation, if the opponent chooses **DO NOTHING**, the hearsay is admitted. Under the **SIMULTANEOUS MOVES** variation, assuming the proposed rule of decision, this is the result that prevails whether the proponent chooses **PART PRODUCE** or **DO NOTHING**. And under the **OPPONENT FIRST** variation, if the opponent chooses **DO NOTHING** the proponent is never asked what he wants to do. Under either variation, if the opponent picks **PART PRODUCE** then the result will be **LT** if the proponent chooses **PART PRODUCE** and **NE** if the proponent chooses **NE**. Thus, under the stated assumptions, the results yielded by the two variations are identical to each other for all possible combinations of the parties' moves.
nuscule, if the proponent nevertheless fails to satisfy that part of the burden, it appears that, although he would have liked to introduce the hearsay, he prefers no evidence at all from the declarant to her live testimony. And this strongly suggests that the hearsay would in fact be more prejudicial than probative. The OPPONENT FIRST variation would deny the court this information if the opponent chooses DO NOTHING. It is better in such a case to require the proponent to commit himself before, or at the same time as, the opponent. Similarly, if the burden imposed on the opponent is minuscule, it is better to require the opponent to commit himself no later than the time the proponent does.

These considerations suggest the following, slightly more complicated, rule of thumb for a court choosing among variations of SPLIT BURDEN. If the burden imposed on one party is trivial, require that party to commit first. Where each party would have to bear a substantial burden, select the OPPONENT FIRST variation if the hearsay appears more probative than prejudicial, and the PROPONENT FIRST variation if the reverse is true. In doubtful cases, or where the extra effort seems worthwhile, choose the SIMULTANEOUS MOVES variation.

Note that under either the PROPONENT FIRST or OPPONENT FIRST versions of SPLIT BURDEN, if a party chooses to DO NOTHING he guarantees an adverse evidentiary result—the result that he fought the hearsay issue to avoid. Similarly, under the SIMULTANEOUS MOVES version, each party knows that choosing DO NOTHING risks the adverse result. No further sanction is ordinarily needed, because the adverse result—H for the opponent, NE for the proponent—is also

\[50\] The proponent apparently perceives that the hearsay would tend to persuade the jury in his favor and that the live testimony would tend to persuade the jury against him. Assume this is correct. It means that, if the hearsay is admitted, it will tend to move the jury in the opposite direction from that in which the jury would move if it had more information, in the form of live testimony of the declarant. Perhaps, for instance, the proponent knows that if the declarant testified live she would likely not adhere to the prior statement.

On the other hand, in rare cases it may be that there would be some prejudicial quality to the live testimony that the hearsay would avoid. Suppose the declarant has some readily apparent handicap that, both the proponent and the court fear, would tend unreasonably to make the jury believe she is not a credible witness. In such a case, the court might agree with the proponent that, even putting aside the burden of producing the declarant, the hearsay is preferable to the live testimony.

\[51\] If the opponent declines to satisfy a trivial burden, it means that he would rather the hearsay be admitted than that the declarant testify live. This appears to demonstrate that, at least in his view, the evidence is more probative than prejudicial; it is not as powerful as, but it points in the same direction as, the live testimony. If the proponent had to commit first, the court would be deprived of this reading of the opponent's perception.
the result that his adversary fought the hearsay motion to achieve.\textsuperscript{52} Even if a party, having committed to PART-PRODUCE, fails in bad faith to satisfy his portion of the burden, often no sanction is necessary; the failure to perform will lead to an adverse evidentiary result, and will have gained the party nothing. Sometimes, though, if a party goes to substantial effort or expense in reliance on his adversary’s commitment to satisfy part of the burden, a sanction for failure to perform would be appropriate.

3. Good Faith and the Ability to Perform

Because it is simpler to impose the entire physical burden on one party rather than to split it, the burden ought only to be split when there is good reason to do so. Often, the reason for splitting is that one party has a significant advantage over the other in performing part of the burden, but there is some reason—perhaps fairness, perhaps efficiency—why the other party ought to bear remaining portions of the burden. In Hypothetical 3, for instance, because it appears that only Propco can efficiently determine the name and address of the declarant, the court might conclude that this part of the burden should be borne by Propco. But, because the memo appears more probative than prejudicial, the court might be inclined to impose on Oppco those aspects of the burden of producing the declarant as to which Propco does not have a substantial advantage.\textsuperscript{53}

A problem may arise, however. The court is imposing part of the burden on Propco only because it believes that Propco can satisfy that portion of the burden more efficiently than Oppco can. But what if the court is wrong, and by far? That is, what if it turns out that Propco cannot determine the name and address of the declarant at all, at least not without great difficulty and expense? Then, imposing on Propco the burden of identifying and locating the declarant amounts in effect to excluding the hearsay. But this, by the hypothesis of the problem, was not the court’s intention. The court intended only to induce Propco to facilitate the production of the declarant, assuming the opponent found it worthwhile to produce her; the court did not intend to hold that, if the declarant was effectively incapable of being produced, the hearsay ought to be excluded.

At least two basic approaches to this problem are possible. One

\textsuperscript{52} Even if both parties choose PART-PRODUCE and then one party fails to make good on his commitment, providing for the evidentiary result adverse to that party would often be sufficient sanction. But if the other party incurred substantial expense by performing his part of the performance in reliance on the commitment, it might be necessary for that party to be compensated, at least if the first party’s failure to meet his commitment was in bad faith.

\textsuperscript{53} See Analysis of Hearsay, supra note 2.
approach would attempt to prevent situations in which the dilemma might arise. Thus, in deciding whether or not to impose on a party a given portion of the burden of producing the declarant, the court would not consider the party's apparent advantage over his adversary in satisfying that portion of the burden unless the following prerequisite is met: the court must be confident to a high degree that the party can indeed satisfy that portion of the burden, and can do so without undue difficulty or exorbitant expense.

Another approach would be to deal with the problem after it arises by inquiring into the causes for the party's failure to satisfy the portion of the burden assigned to him. Under this approach, if the party tried and failed in good faith, then, to the extent that this portion of the burden was imposed on him only because of his presumed advantage in satisfying it, he should be relieved of it. Put another way, the burden imposed on a party might be deemed to be merely to make a good faith effort to achieve a designated portion of the job of producing the declarant. Under this approach, if the court determined that Propco's failure to identify and locate its employee was in good faith, the hearsay would be admitted; if Propco failed to make a good faith effort, however, the hearsay would be excluded.

Both of these approaches are necessary in part; neither is entirely adequate. It would be unwise for the court willy-nilly to assume that a given party can satisfy part of the production burden, and then have to either tolerate an unintended evidentiary result or inquire into the party's good faith when the party fails to perform. Perhaps, in Hypothetical 3, Propco cannot determine who the memo-writing employee was after all; perhaps, in Hypothetical 6, Paul simply cannot persuade his sister to testify, even if her refusal hurts him dearly in the litigation. On the other hand, no matter how careful a court tries to be, in some instances its confident prediction that a party can perform a designated portion of the burden of production will be unfounded. If a court is too stringent in demanding absolute certainty before it is willing to act on the assumption that a given party is able to satisfy efficiently part of the burden of producing the declarant, the court will be denying itself an effective device for resolving hearsay issues. Courts should be willing to tolerate the necessity of making an occasional inquiry into good faith.

B. Separating the Physical and Financial Burdens

In each of the hypotheticals presented in Section A, the solution presented involves some split of the physical burden of producing the declarant. In some circumstances, a different type of division would
be appropriate, a division in which one party bears the entire financial burden and the other bears the entire physical burden. Consider the hypotheticals that follow in this Section.

**HYPOTHETICAL 8:** Same facts as Hypothetical 3, in which Propco wishes to introduce a memorandum apparently made by one of its employees, with these additions: The memo is an entry in a computerized record. Propco can determine who the author of the memo is only after a search, which will require a more than trivial amount of staff time and some high-priced computer time. Only Propco employees could efficiently conduct the search. Propco's sole place of business is located in Courthouse City, and the memo was written only one year before the time of the trial; thus, once the author of the memo is identified, she could presumably be produced as a witness without difficulty.

In these circumstances, it might make sense for the court to impose the entire physical burden of producing the declarant on Propco. The declarant can be identified, at least efficiently, only by Propco, and identifying the declarant is in all probability the only difficult and expensive aspect of producing her. But the court might decide that, because the hearsay statement appears more probative than prejudicial, the expense of producing the declarant should not be incurred unless Oppco is willing to bear it. That is, the court might impose on Oppco the financial burden of producing the declarant.

**I will label this procedure, in which the physical burden is placed on the proponent and the financial burden is placed on the opponent, OPPONENT’S OPTION. The procedure is presented in Figure 3d as**
another possible subgame beginning with the court’s decision on the hearsay motion. Under this procedure, as under ADMIT, if the opponent decides to DO NOTHING, the hearsay is admitted; also as under ADMIT, the opponent may, if it is feasible and he wants to do so, PRODUCE the declarant as a witness. But now the opponent has another option as well: He may DEMAND that the proponent physically produce the declarant. If the proponent does PRODUCE her, the declarant gives live testimony (evidentiary result LT) and the opponent pays compensation to the proponent, determined by the court absent agreement by the parties; hence the notation $_{\text{op}}$, indicating that the opponent pays the proponent’s cost of producing the declarant. If, however, the proponent fails to produce the declarant (DO NOTHING), the hearsay is excluded (evidentiary result NE). As in the hypotheticals in section A, no further sanction is ordinarily needed, because excluding the hearsay gives the opponent what he sought by making the objection. Also as in those hypotheticals, occasionally an inquiry into good faith may be necessary, if Propco contends that in fact it cannot produce the declarant, at least not without great difficulty.

HYPOTHETICAL 9: Propco decides on the eve of trial that it wants to introduce a statement by Danielle Denver, one of its customers from a distant state. Danielle is, and has been, willing to testify in Courthouse City, if necessary, so long as she can arrive and leave within 24 hours; she does not do supersavers. The problem is that, because the time is so short, it is not certain that transportation for her can be arranged in time. The court would have chosen ADMIT had Propco given more notice, because it believes that the statement is more probative than prejudicial, but it accepts Oppco’s representation that Oppco wishes to subject Danielle to adverse questioning. The Court believes there is a plausible chance that such questioning might yield benefits for Oppco.

Here again OPPONENT’S OPTION appears to be a plausible ruling. Had Propco given adequate notice, the court would have imposed the financial and physical burdens on Oppco. Propco’s delay does not seem to have increased the financial burden; that is, bringing Danielle to court does not seem to be substantially more expensive than it would have been had Propco given more notice. Thus, the financial burden should probably still rest with Oppco, meaning that the hearsay will be admitted unless Oppco indicates that it will pay for the costs of bringing Danielle to court. But the delay has made the physical burden greater: it is less certain that Danielle will be able to appear in time at all. The court might regard it as appropriate that

54 See supra note 4.
this risk be put on Propco; if Oppco indicates willingness to pay the costs of transportation, then the hearsay will be excluded unless Propco manages to bring Danielle to court in time. Propco, in other words, bears the risk created by its delay.

Note that here, unlike Hypothetical 8, the physical burden is imposed on Propco not because of its presumed advantage in producing the declarant, but rather because of Propco's delay. Hence, in this case, if Propco cannot in fact produce her, no inquiry into its good faith in trying should be necessary; if Propco cannot produce her despite good faith efforts, that is its tough luck.

HYPOTHETICAL 10: Propco wants to introduce a statement by one of its sales staff, Dana Drew. It gave notice of its intention to do so well before trial, but as the trial began Oppco decided that it did not want to let Drew's statement be introduced without submitting her to adverse questioning. Drew had been in Courthouse City for months, but shortly before trial she began a sales trip to a distant state. Oppco cannot subpoena her quickly, nor is it feasible to arrange a deposition where Drew is. Propco could arrange to fly her back in time to testify, if necessary, but the flight would be expensive: No supersavers are available on such short notice.

Once more OPPONENT'S OPTION appears to be a plausible ruling, though for different reasons. It seems fair for Oppco to bear the financial burden of bringing Drew in to testify, if for no other reason than that, but for its delay in objecting to the hearsay, there would have been no expense in bringing Dana in to testify. On the other hand, Oppco cannot physically produce Drew, but there appears to be no reason why Propco cannot.55 Under this ruling, then, if Oppco decides not to pay for producing Drew, the hearsay is admitted. If Oppco decides to pay, but Propco does not produce her, the hearsay is excluded. And if Oppco decides to pay and Propco produces her, Oppco pays Propco the costs that Propco incurs in bringing her in, determined by the court if the parties are unable to agree.

HYPOTHETICAL 11: Propco wants to introduce a statement by an employee of Oppco's, Diane Dewitt. Had Propco given adequate notice of this fact, it would have been a simple matter for Oppco to produce her, because she was stationed in Courthouse City. And presumably Oppco would have produced her; according to a faxed affidavit by her submitted by Oppco, her statement was not intended to mean what Propco says it meant. But now Dewitt is in Oppco's outpost in Wildernessville. Oppco could bring her back in time to

55 If there is substantial doubt about Propco's ability to bring Drew in, the court might hesitate to adopt this ruling, unless it is willing to engage in an examination as to Propco's good faith in the event that Propco does fail to bring her in. See, supra pp. 905-10.
testify, if necessary, but it would have to send the company jet to fetch her.

This is virtually the reverse of Hypothetical 10, and the reverse result, PROponent'S OPTION, may be called for: because Propco's delay in giving notice created the expense of producing Dewitt, Propco ought to bear the financial burden. But only Oppco can satisfy the physical burden, or, at least, only it can do so efficiently. Under PROponent'S OPTION, as under EXCLUDE, if Propco does nothing the hearsay is excluded; also as under EXCLUDE, the proponent may, where it is feasible, physically produce the declarant himself. But now the proponent has the extra option of demanding that the opponent produce the declarant in return for compensation, which would be determined by court order if the parties do not agree on it. Failure by Oppco to produce the declarant would result in admission of the hearsay; again, no further sanction would be needed, because this would give Propco what it sought by introducing the hearsay.

**Figure 3e**

PROponent'S OPTION is pictured in Figure 3e. Note that this diagram is, in a sense, the mirror image of Figure 3d: Figure 3e may be derived from Figure 3d by switching OPPONENT with PROponent, subscript o with subscript p, and evidentiary result H with evidentiary result NE.
C. Other Possible Burden-Splitting Arrangements in Response to a Hearsay Objection

Section A of this Part suggested that in some circumstances it makes sense to divide between the parties the burden of performing the various tasks of producing the declarant. And Section B suggested that in some circumstances it makes sense to divide the burden along another dimension, imposing the financial burden on one party and the physical burden on the other. These cross-cuts do not exhaust the possibilities of burden splitting. For example, it would be possible to combine the two cuts, imposing on one party part of the physical burden, or part of the financial burden, and on the other party all the remaining portions of the burden of producing the declarant.

**HYPOTHETICAL 12:** Same facts as Hypothetical 8, in which Propco seeks to introduce a computerized memorandum evidently written by an unidentified employee, but with these changes: Once Propco identifies the declarant, it may still be difficult to produce her, because the memo is five years old and Propco's place of business is in another state, far from Courthouse City.

In this case, the court might impose on Propco only the physical burden of identifying the declarant, but impose on Oppco the remaining portions of the physical burden and the entire financial burden of producing the declarant. That is, the court might decide in this particular case that the proponent should be responsible for performing the task that only it can do efficiently, but that in general the opponent should bear the burden of producing the declarant—including the burden of payment for the physical tasks performed by both the proponent and the opponent.

**HYPOTHETICAL 13:** Same facts as Hypothetical 11, in which Propco gives belated notice of its intention to offer a statement by Oppco's employee Dewitt, except that Dewitt ordinarily is stationed in Wildernessville; had Propco given earlier notice of its intention to use the statement, she could have been brought to trial more cheaply, but the expense still would have been substantial.

If, supposing that notice had been adequate, the court would have imposed on Propco the financial burden of producing Dewitt, Propco's lateness in giving notice should only fortify that result. If, on the other hand, the court would have imposed on Oppco the burden of bringing the declarant in, it might alter that ruling merely by imposing on Propco the incremental financial burden caused by its delay. That is, Oppco would bear the entire physical burden of producing her and the hypothetical expenses it would have incurred had...
it produced her after receiving adequate notice from Propco. If Oppco did produce her, Propco would have to pay Oppco the excess of its actual costs over those hypothetical costs. Propco should also have an opportunity to decide that, rather than pay that difference, it would prefer doing without evidence from Dewitt altogether, but of course it should have to make this decision before Oppco incurs any substantial expense or difficulty.

Other variations on burden-splitting in response to a hearsay objection are possible, but I will not attempt to catalogue them all.

D. Splitting the Burdens Before the Hearsay Issue Is Posed

Sections A through C of this Part deal with the situation in which the hearsay issue has already been posed to the court. That is, the proponent has already chosen OFFER over PRODUCE and DO NOTHING, and the opponent has chosen OBJECT over PRODUCE and DO NOTHING. Thus, the proponent has decided that he prefers presenting the hearsay to either presenting the live testimony of the declarant—at least if he would have to bear the entire burden of producing the declarant—or presenting no evidence at all from the declarant. And the opponent has already decided that he prefers no evidence at all from the declarant to either producing the declarant himself or to allowing the declarant’s hearsay statement to be admitted without subjecting the declarant to adverse questioning.

But now let us take another step backward. In some circumstances, offering the hearsay is the second best alternative for the proponent; he may prefer to offer the declarant’s live testimony, if the opponent will carry at least part of the physical burden of producing the declarant.

HYPOTHETICAL 14: Another variation on Hypothetical 11: Oppco’s employee, Diane Dewitt, who at the moment is in Wildernessville, has made a statement favorable to Propco. If necessary, Propco will offer the statement, and the court would in all probability admit it. Shortly before trial, though, Propco decides that it would prefer to present Dewitt’s live testimony, for it believes that this would be far more compelling than repetition by another witness of her hearsay statement. But only with great difficulty, if at all, could Propco serve a subpoena on Dewitt in time for her to testify. Oppco could, if necessary, arrange for Dewitt’s presence in time to testify; it is reluctant to do so, however, because it would really prefer that she not testify.

In this case, rather than offering the hearsay, Propco might ask

56 See supra note 36.
for what I shall call EARLY OPTION. Under this procedure, as under PROONENT’S OPTION, the financial burden is imposed on the proponent and the physical burden on the opponent. This allocation appears to make sense in this case. It is Propco that wants Dewitt to testify, and perhaps Propco’s delay has caused an increase in the costs of arranging her appearance, so it is appropriate for Propco to pay for Dewitt to appear. Only Oppco, however, can efficiently arrange Dewitt’s appearance. Thus, it appears appropriate for Oppco to bear the physical burden of bringing her in.

There is one significant problem here that was not present in Hypothetical 11, in which Propco wished to introduce the hearsay statement rather than Dewitt’s live testimony. In Hypothetical 11, if Propco exercised its option and demanded production of Dewitt but Oppco failed to produce her, admitting the hearsay was a sufficient sanction, because that gave Propco all it had a right to expect when it offered the hearsay. But in Hypothetical 14, Propco’s request for EARLY OPTION shows that it prefers live testimony to hearsay. Correspondingly, Oppco prefers the hearsay to live testimony, and may realize that the court prefers the hearsay to no evidence at all from Dewitt. Thus, although it is appropriate, it is not a sufficient remedy to provide that, if Propco demands production of the declarant but Oppco fails to produce her, the hearsay will be admitted; admission of the hearsay without the declarant’s live testimony is the best result that Oppco can reasonably hope for, and the worst that Propco should reasonably fear. Some additional sanction may be necessary to ensure that the opponent will not frustrate the court’s objective by a bad faith failure to produce the declarant.57

57 Thus, once again, an inquiry into good faith may sometimes be necessary. Need for such an inquiry was also possible with respect to most of the hypotheticals presented in Sections A through C of this Part, but there the role of the inquiry was different. There, the proponent sought to introduce hearsay rather than live testimony. Under the suggested rulings, the court imposed all or part of the physical burden of producing the declarant on one party because of that party’s presumed advantage in satisfying that portion of the burden. The court did not order the party to satisfy that portion of the burden, but merely provided that he would suffer an adverse evidentiary result if he did not satisfy it. Occasionally, I argued, that party might contend that in fact it could not satisfy the designated portion of the burden, at least not efficiently, and in such a case the court’s incorrect perception that the party could perform that portion should not cause the party to suffer an adverse evidentiary result. Thus, an inquiry into that party’s good faith might occasionally be necessary.

In the present context, by contrast, under the suggested ruling the court does order the opponent to satisfy all or part of the physical burden of producing the declarant, because the court and the proponent would both prefer live testimony to hearsay, and only the opponent can efficiently produce the declarant. A good faith inquiry may be necessary because the opponent contends that he ought to be excused from that order, and from the sanctions that would normally follow failure to obey, on the ground that in fact it is difficult or impossible for him to produce the declarant.
Figure 3f presents the possibility of EARLY OPTION as a subgame beginning with the proponent’s first move. In addition to his choices of producing the declarant (if he can), offering the hearsay, or doing without any evidence from the declarant, the proponent may choose ASK FOR EARLY OPTION. If the court chooses to GRANT the request, the opponent may comply by producing the declarant; the notation -$p_0$ indicates that the proponent pays the opponent’s cost of production. If in response to GRANT the opponent does not produce the declarant, the hearsay is admitted and some additional sanction is imposed on the opponent. If the court chooses to DENY the request, the proponent is thrown back to his other choices of PRODUCE, OFFER, and DO NOTHING. The notation START OVER is a shorthand to indicate that the proponent again faces his initial choices, but without EARLY OPTION as a possibility.

**Figure 3f**

CONCLUSION

Much of this article’s message is suggested by Figure 4. This diagram strongly resembles Figure 1, but with two important changes.

First, LT* is replaced everywhere by LT, indicating that if the declarant testifies then, however she may have been produced, she should ordinarily be first questioned by the proponent and then by the opponent. When the declarant is being examined by the proponent, it is generally best that she be asked for her current testimony of the
underlying event or condition before the admissibility of the hearsay statement is decided.

Second, Figure 4 incorporates by reference Figures 3a through 3f, thus indicating extra choices that the court has. At the outset, if the proponent prefers live testimony to hearsay but the opponent is substantially better able to produce the declarant, the court might—before the hearsay issue is even posed—grant EARLY OPTION, thus allocating to the opponent the physical burden of producing the declarant and to the proponent the financial burden. If the proponent offers the hearsay and the opponent objects, the court is not limited to the choices of ADMIT and EXCLUDE in resolving the issue. It may also split the burden of production in the ways represented in Figures 3a through 3e—and in other ways not pictured.
I have not tried in this article to present a comprehensive theory of how a court should resolve hearsay disputes. Nor, for that matter, have I attempted to analyze systematically the criteria the court should use in deciding when, and how, to split the burden of production. I hope to make some progress towards those ends in the sequel to this article. In this article, I have tried to make two basic points. First, however the court might rule initially on the hearsay issue, and however the declarant may be produced as a witness, if she does testify she ordinarily ought to be examined first by the proponent, and she ordinarily ought to give her current testimony before admissibility of the hearsay statement is decided. Second, allocation of the burden of producing the declarant is a complex matter that admits of more than two possible solutions. In some circumstances, the burden may be beneficially split between the parties. Courts and rulemakers bearing these procedural points in mind will be better able to improve the administration of hearsay law.

58 Analysis of Hearsay, supra note 2.