State Of Mind: The Elusive Exception

I. INTRODUCTION

After examining the relevant authority concerning the state of mind exception[1] to the hearsay rule one federal judge recently observed:

> There may be few other evidentiary questions as to which courts are so confused or the cases so irreconcilable. . . . Some courts simply use it [the state of mind exception] as a pretext for allowing in virtually any hearsay evidence, while others summarily exclude it without analysis or discussion. To add to the difficulties, only the relatively recent cases are of any real help in analyzing the problem intelligently because the vague and inscrutable *res gestae* doctrine invariably clouded opinion of older cases.[2]

The confusion exists partly because the exception actually includes four kinds of statements: (1) present state of mind,[3] (2) present state of physical condition,[4] (3) past state of mind,[5] and (4) past state of physical condition.[6] In addition, each kind of statement can be introduced for several different purposes: the proper uses of present state of mind or physical condition statements are different from the proper uses of past state of mind or physical condition statements. Furthermore, in some cases it is not clear whether the statements are really hearsay at all.[7] Little wonder the judge found the

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[1] In this Comment the term "state of mind exception" will include the exception for both statements of state of mind and statements of physical condition.

[2] United States v. Brown, 490 F.2d 758, 768 (D.C. Cir. 1973).

[3] FED. R. EVID. 803(3) [28 U.S.C. FED. R. EVID. 101 *et seq.* (1975)], set forth in note 69 *infra;* CAL. EVID. CODE § 1250 (West 1968), set forth in note 73 *infra. See* text accompanying notes 69-125 *infra* for a discussion of present state of mind statements.

[4] FED. R. EVID. 803(3), set forth in note 67 *infra;* CAL. EVID. CODE § 1250 (West 1968), set forth in note 73 *infra. See* text accompanying notes 127-140 *infra* for a discussion of present state of physical condition statements.

[5] FED. R. EVID. 803(3), set forth in note 67 *infra;* CAL. EVID. CODE § 1251 (West 1968), set forth in note 65 *infra. See* text accompanying notes 141-151 *infra* for a discussion of past state of mind statements.

[6] FED. R. EVID. 803(4), set forth in note 68 *infra;* CAL. EVID. CODE § 1251 (West 1968), set forth in note 65 *infra. See* text accompanying notes 152-161 *infra* for a discussion of past state of physical condition statements.

[7] FED. R. EVID. 801(c); CAL. EVID. CODE § 1200(a) (West 1968), set forth in note 11 *infra. See* text accompanying notes 11-47 *infra* for a discussion of the proper classification of certain statements.

state of the law unsatisfactory.[8]

To understand the state of mind exception one must carefully examine the kind of statement under consideration and the desired evidentiary use of that statement. This article will analyze each kind of statement separately, examining the pertinent provisions of the California Evidence Code[9] and the Federal Rules of Evidence.[10] It will note differences in language and meaning between the two codes, discuss the case law which has interpreted them, and give examples of the application of the exception.

II. HEARSAY OR NONHEARSAY?

Exceptions to the hearsay rule are of no concern unless there is hearsay.[11] This seems self evident, but confusion exists about whether certain declarations of state of mind are in fact hearsay. Classification of a statement as hearsay or nonhearsay can be crucial when the evidence is used to show declarant's state of mind of memory or belief.[12] Although such declarations are theoretically admissible under the state of mind exception, neither the Evidence Code nor the federal rules permits the use of a statement of memory or belief to

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[8] Although the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws developed a comprehensive analysis of the exception in 1953, only codification by the various states has brought any consistency to the exception. The Kansas Rules of Evidence (1964) and the New Jersey Rules of Evidence (1967) are basically enactments of the Uniform Rules. Even today, however, there are some still unsettled aspects of the exception to which both California and federal courts will have to address themselves. *See* text accompanying notes 95-126 and 152-161 *infra.*

[9] Hereinafter referred to in the text as the Evidence Code.

[10] Hereinafter referred to in the text as the federal rules.

[11] The federal rules and the Evidence Code define hearsay in substantially the same way.

FED. R. EVID. 801(c):

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

CAL. EVID. CODE § 1200(a) (West 1968):

> "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of matter stated.

[12] When state of mind is itself an issue in the case (*see* text accompanying notes 76-82 *infra*] or when state of mind is used as evidence of conduct [*see* text accompanying notes 83-94 *infra*) the problem of classification of the evidence as hearsay or nonhearsay is academic. The evidence is admissible either as nonhearsay, circumstantially inferring state of mind; or as hearsay, admissible under the state of mind exception to the hearsay rule. U.S. v. Brown, 490 F.2d 758, 762-63 (D.C. Cir. 1973); E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 249 at 591 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]; R. CROSS, EVIDENCE 475 (3d ed. 1967); 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1715, 1630 (3d ed. 1940) [hereinafter cited as WIGMORE (3d ed.)].

prove the fact remembered or believed.[13] If, however, the proponent of a statement offered to show memory or belief can convince a court that the proffered evidence is not hearsay, this limitation does not apply.[14]

For example, suppose that plaintiff, injured in an automobile accident, wishes to prove that defendant car driver ran a red light. Two witnesses saw the accident and made statements to an investigator, but plaintiff has been unable to locate the witnesses to testify at the trial. Suppose the first witness had told the investigator, "I remember that the light was red," and the second witness had stated, "That driver [defendant] is color blind!"

Plaintiff, hoping to use the first statement to prove that the light was red, could reason as follows: (a) the statement is a hearsay statement of the declarant's memory;[15] (b) since memory is a state of mind, the statement is admissible under the state of mind exception to the hearsay rule; and (c) the fact that the witness had a memory that the light was red is relevant evidence tending to show that the light was in fact red. Plaintiff, however, may not use the statement for this purpose. As noted, the codes specifically prohibit the use of a hearsay statement of memory or belief to prove the fact remembered or believed. Use of the first statement to prove that the light was red is an improper use of the state of mind exception.

Plaintiff, hoping to use the second statement to prove that the light was red, could reason similarly, but the first two steps of the reasoning process differ significantly. Plaintiff could reason as follows: (a) since the statement is not offered to prove that de-

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[13] FED. R. EVID. 803(3), set forth in note 67 *infra*. CAL. EVID. CODE § 1250 (b) (West 1968), set forth in note 99 *infra*. Any statement can be treated as a statement of a person's memory or belief in the facts stated, which in turn can be circumstantial evidence that facts existed which created the memory or belief, and that the memory or belief is therefore true. This reasoning process is not permissible because it circumvents the hearsay rule. *See* text accompanying notes 94-102 *infra*.

[14] *But see* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948), which argues that classification of such evidence as nonhearsay is in effect a circumvention of the hearsay rule and therefore erroneous. Professor Morgan later modified his position. *See* Morgan, *Hearsay*, 25 MISS. L.J. 1, 8 (1953) [hereinafter cited as Morgan].

[15] The use of the statement, "I remember the light was red" directly asserts the declarant's memory. If used to prove the declarant's memory, it is hearsay. Even if the declarant had said, "The light was red," omitting the words, "I remember," the statement would still be a hearsay statement of memory, because in that situation the declarant clearly intended to communicate his memory of the past event. *See, e.g.*, Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934) [hereinafter cited as Hinton]; McCormick, *Hearsay*, 10 RUTGERS L. REV. 620 (1956); Morgan, *supra* note 14. Because few statements of memory or belief are direct statements prefaced by the words "I remember" or "I believe," and because it is often difficult to determine what a declarant intended to assert by his statement, the problem of identifying hearsay statements of memory or belief is complicated.

fendant is color blind, it is not hearsay,[16] (b) declarant would not say that defendant was color blind unless he remembered[17] that defendant had entered the intersection against a red light, and (c) the fact that the witness remembered the light was red is relevant evidence tending to show that the light was in fact red. If this reasoning is correct, the proponent can do indirectly with the second statement what he cannot do directly with the first statement. The last step in the reasoning process in both examples uses the declarant's memory to prove the fact remembered. Nevertheless, since the second statement is not a direct statement of the declarant's state of mind, but is used as circumstantial evidence of that state of mind, it is arguably not hearsay. If it is not hearsay, the limitation on the use of hearsay memory or belief statements is inapplicable.

Whether the second statement is properly classified as hearsay or nonhearsay is unclear. Such an extrajudicial statement, which does not expressly assert the fact it is offered to prove, but which is relevant because it implies the declarant's memory or belief of that fact is called an implied assertion.[18] The classic illustration of the problem is the English case of *Wright v. Doe d. Tatham.*[19] In that case, the testamentary capacity of the decedent was challenged in an attempt to defeat his will. Declarants had written letters to the testator concerning social and commercial affairs, which were offered to prove the mental competence of the testator. Declarants would not have written such letters, the proponent argued, if they did not believe that the testator was capable of understanding them. Declarants' beliefs that the testator was sane were some evidence that in fact he was. The proponent of the evidence argued that it was nonhearsay because it was offered, not to prove the truth of the letters' contents, but to infer the beliefs of the writers.[20] The court

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[16] FED. R. EVID. 801(c); CAL. EVID. CODE § 1200(a) (West 1968), set forth in note 11 *supra.*

[17] The statement in the hypothetical case is used to infer the declarant's memory. The analysis would be the same if the statement were offered to show the declarant's belief.

[18] Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962) [hereinafter cited as Finman]. A broader term for such a statement is "nonassertive conduct." *See, e.g.*, CAL. EVID. CODE § 1200, Senate Judiciary Comm. (West 1968); Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 6 CAL. LAW REV. COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES APP. 424 (1964); Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133 (1961). "Nonassertive conduct" also includes nonverbal conduct. *See, e.g.*, People v. Mendez, 193 Cal. 39, 223 P. 65 (1924) (flight from scene of crime as equivalent of confession of guilt). The term "implied assertions" will be used in this article to mean verbal conduct or statements. Verbal conduct can be oral or written.

[19] Wright v. Doe d. Tatham, 112 Eng. Rep. 488 (Ex. 1837), *aff'd.* 7 Eng. Rep. 559 (H.L. 1838).

[20] In addition, the proponent argued that the evidence was reliable because the

rejected that analysis, explaining its decision as follows:

> [P]roof of a particular fact which is not itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible. . . .[21]

Since the hearsay statement, "I believe the testator is competent," would not have been admissible, the court did not allow the use of the letters to infer that belief.

The debate whether implied assertions should be classified as hearsay or nonhearsay has been vigorous.[22] Wigmore contended that only statements which *directly* assert state of mind or which clearly are intended to do so are hearsay.[23] Other commentators[24] and cases[25] have argued that statements *impliedly* assertive of state of mind should also be treated as hearsay. Professor Morgan at first urged that implied assertions should be classified as hearsay, and later changed his mind.[26] McCormick, noting the confused treatment of the issue and the failure of many cases to recognize the issue at all, concluded that declarations tending to prove the declarant's state of mind circumstantially could be treated more simply as nonhearsay.[27]

Neither the California Code nor the federal rules deals satisfac-

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authors of the letters had no intent to assert the testator's sanity.

[21] 112 Eng. Rep. at 516.

[22] *See, e.g.*, B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 1.4 (1972) [hereinafter cited as JEFFERSON]; E. MORGAN, SOME PROBLEMS OF PROOF 150-51 (1956); 2 WIGMORE (3d ed.), *supra* note 12, §§ 267, 459; Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 194 (1940); Hinton, *supra* note 15; MacGuire, *The Hearsay System; Around and Through the Thicket*, 14 VAND. L. REV. 741, 754 (1961); McCormick, *Hearsay*, 10 RUTGERS L. REV. 620 (1956); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 495 (1930); Morgan, *The Uniform Rules and the Model Code*, 31 TUL. L. REV. 145, 150 (1956); Morgan, *Hearsay and Nonhearsay*, 48 HARV. L. REV. 1138 (1935); Morgan, *supra* note 14; Rucker, *The Twilight Zone of Hearsay*, 9 VAND. L. REV. 453 (1956); Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

[23] 2 WIGMORE (3d ed.), *supra* note 12, § 267.

[24] JEFFERSON, *supra* note 22; Hinton, *supra* note 15; Morgan, *supra* note 14; Payne, *The Hillmon Case — An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955).

[25] People v. Spencer, 71 Cal. 2d 933, 458 P.2d 43, 80 Cal. Rptr. 99 (1969) (victim related threats of defendant to kill her; statement treated as admissible hearsay even though not a direct statement of fear); People v. Finch, 213 Cal. App. 2d 752, 29 Cal. Rptr. 420 (2d Dist. 1963) (victim's fear inferred from statements relating husband's threats: treated as hearsay).

[26] *See* note 14 *supra*.

[27] MCCORMICK (2d ed.), *supra* note 12, § 249 at 591, § 294 at 694; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228 (1954) [hereinafter cited as MCCORMICK (1st ed.)] ("[D]eclarations which only impliedly, indirectly or inferentially indicate the existence of the mental or emotional state they are tendered to prove . . . are not hearsay.") and § 268 (The statement "my husband is a detestable wretch" is not hearsay if used to show wife's lack of affection.).

torily with the proper treatment of implied assertions.[28] Hearsay is defined as an out-of-court statement offered to prove the truth of the matter stated or asserted.[29] "Statement" includes oral or written verbal expression.[30] Therefore, implied assertions meet the definition of "statement" because they are verbal expressions. It is difficult to determine, however, whether a statement used as an implied assertion of the declarant's memory or belief is offered to prove the truth of the matter stated or asserted, and therefore hearsay.[31] The thought a declarant intended[32] to state may be different from his actual expression. For example, did the witness who said, "That driver is color blind!" actually intend to state his memory that the light was red?[33] If so, should the two statements be treated differently because the

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[28]The definition of "statement" in current codes resolves the problem of proper classification when nonverbal conduct is used to infer the actor's memory or belief. FED. R. EVID. 801(a); CAL. EVID. CODE § 225 (West 1968), set forth in note 30 *infra*. Unless the nonverbal conduct is intended to be a substitute for verbal expression, it is not a "statement." Since hearsay by definition consists of a "statement," *see* note 11 *supra*, nonverbal conduct which is not a "statement" is not hearsay.

[29]The definition of hearsay in the Evidence Code is different from the federal rules; FED. R. EVID. 801(c); CAL. EVID. CODE § 1200 (West 1968) set forth in note 11 *supra*. The Evidence Code defines hearsay as an out-of-court statement offered to prove the truth of the matter "stated." The federal rules define hearsay as an out-of-court statement offered to prove the truth of the matter "asserted." No authority has been found, however, to indicate that the difference in terminology is significant. Arguably, "asserted" is a more inclusive term than "stated."

[30]FED. R. EVID. 801(a):

> A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

CAL. EVID. CODE § 225 (West 1968):

> "Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

[31]See Comment, *Hearsay: The Threshold Question*, this volume.

[32]The declarant's intent is important for two reasons. First, if a declarant intends his declaration to be an assertion of the fact it is offered to prove, the declaration is properly treated as hearsay, *see* note 15 *supra*. This is analogous to nonverbal conduct intended as an assertion, which is hearsay. Second, lack of intent to assert the fact it is offered to prove is one justification for the treating nonassertive conduct as nonhearsay. FED. R. EVID. 801, Advisory Comm. Notes; CAL. EVID. CODE. § 1200 Senate Judiciary Comm. (1968).

[33]Common experience teaches us that people are seldom precise in the use of language. Arguably, the statement, "That driver is color blind!" is merely the speaker's metaphoric declaration that the driver did not respond to the red light. Under the Evidence Code definition of hearsay, however, the declaration is not offered to prove what is "stated," since the declarant did not state that the light was red. A stronger argument could be made that under the federal rules the statement is offered to prove what it "asserts." The Advisory Committee Notes to rule 801 indicate that "nothing is an assertion unless intended to be one." If a statement is offered on the theory that it is not an assertion, the court must make a preliminary determination of whether the statement is intended to be an assertion. FED. R. EVID. 801(a), Advisory Comm. Notes. The Advisory Committee notes state that the determination of whether nonverbal conduct is a statement (the analog to the determination whether verbal conduct, by defini-

second witness did not express his memory or belief as plainly as the first witness? It is often difficult to determine the declarant's intent in statements which are used as implied assertions.

Faced with the difficulty of ascertaining a declarant's intent in such an ambiguous context, one respected California commentator follows the approach of *Wright v. Doe d. Tatham.* Justice Jefferson labels implied assertions as "implied hearsay" and concludes:

> Even if the circumstantial inference from declarant's express words is not one that can be said to be compelled or clearly intended by declarant, the implied hearsay concept should be invoked if an express statement by declarant stating the suggested inference would constitute inadmissible hearsay. If such an express statement of declarant would be inadmissible as hearsay, the hearsay rule should not be permitted to be circumvented by the circumstantial-evidence-reasoning process of drawing the same inference from other words used by the declarant.[34]

Thus, Jefferson would not admit the statement, "That driver is color blind!" in the example given earlier. Since the declarant's extrajudicial statement, "I remember the light was red," would be inadmissible hearsay, Jefferson would not allow the proponent to infer that the declarant remembered the light was red from other words. Although Jefferson's analysis provides consistency in the treatment of memory or belief state-of-mind evidence, and eliminates the anomalous situation in which a proponent is allowed to do indirectly what he cannot do directly, other authorities have come to a different conclusion.

For example, the California Senate Judiciary Committee, in its comment to the hearsay rule in the Evidence Code, takes a different approach to the treatment of implied assertions.[35] Telephone statements placing bets used to infer the speaker's belief that he was speaking to a gambling establishment are treated as nonhearsay, because they are "offered for some purpose other than to prove the fact stated therein."[36] Such statements are treated as nonassertive conduct,[37] and "evidence of nonassertive conduct is not hearsay even though offered to prove that the belief giving rise to the conduct was based on fact."[38]

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tion a statement, is an assertion) "involves no greater difficulty than many other preliminary questions of fact."

[34] JEFFERSON, *supra* note 22, § 1.4 at 15.

[35] CAL. EVID. CODE § 1200, Senate Judiciary Comm. (West 1968), *citing* People v. Reifenstuhl, 37 Cal. App. 2d 402, 99 P.2d 564 (2d Dist. 1940).

[36] CAL. EVID. CODE § 1200, Senate Judiciary Comm. (West 1968):

> Under this definition [of hearsay], as under existing case law, a statement that is offered for some purpose other than to prove the fact stated therein is not hearsay.

[37] *See* note 18 *supra.*

[38] CAL. EVID. CODE § 1200, Senate Judiciary Comm. (West 1968).

Jefferson rejects this analysis as "improper and unsound" for two reasons.[39] First, since the caller's words are relevant only as an implied statement of the caller's belief, he concludes that "evidence of the actual words of the telephone caller is admitted to prove the truth of the implied statement, and hearsay, therefore, is necessarily involved."[40] Second, he says that a "statement" cannot be nonassertive conduct, because "[c]onduct is the very opposite of 'verbal expression'."[41] The first reason is conclusory and merely restates the issue. The second illustrates the imprecision of the term "nonassertive conduct" when applied to verbal expression, and ignores the code definition of conduct which "includes all active and passive behavior both verbal and nonverbal."[42] It does not answer the more difficult question whether verbal expression, not offered to prove what is expressly stated, should be treated as hearsay.

Another commentator, analyzing the Uniform Rules of Evidence, on which both the California Code and the federal rules are based, comes to a different conclusion from that of Justice Jefferson. He states:

> Verbal conduct would be a "statement." But if the verbal conduct was offered to prove a proposition other than the one therein stated, the evidence would not be hearsay. . . . For example, a business letter written to *T* is offered to show that the writer believed *T* to be sane and therefore that *T* was sane. The letter is a "statement" but one concerning some business matter. As evidence of *T*'s sanity, the letter is not offered to prove the matter stated in it and therefore is not hearsay.[43]

McCormick agrees with this analysis. Citing the California Code, he observes: "The position that hearsay includes neither nonassertive conduct nor *assertive statements not offered to prove what is asserted* finds solid adherence in recent and current statutes and rules dealing with the subject."[44] The comment to section 1250 of the Evidence Code is even more explicit:

> In light of the definition of "hearsay evidence" in Section 1200, a distinction should be noted between the use of a declarant's statements of his then existing mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state. Under the Evidence Code, no hearsay problem is involved if the declarant's statements are not being used to prove the truth of

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[39] JEFFERSON, *supra* note 23, § 1.4 at 16.
[40] *Id.*
[41] *Id.* at 17.
[42] CAL. EVID. CODE § 125 (West 1968).
[43] Finman, *supra* note 18, at 684 n.8.
[44] MCCORMICK (2d ed.) *supra* note 12 at § 250, 599-600 (emphasis added). MCCORMICK, at 600 n.53, also cites proposed FED. R. EVID. 801, UNIFORM RULE 62(1), KAN. CODE CIV. P. § 60-459(a) and N.J.R. EV. 62(1).

> their contents but are being used as circumstantial evidence of the declarant's mental state.[45]

The federal rules also classify a statement which is not a direct assertion of memory or belief as nonhearsay. The Advisory Committee Comments address the problem of a statement used to infer the declarant's memory or belief:

> [V]erbal conduct which is assertive but *offered as a basis for inferring something other than the matter asserted*, [is] also excluded from the definition of hearsay. . . .[46]

The Advisory Committee thus agrees with McCormick, and would classify evidence which is not a direct assertion of memory or belief as nonhearsay.

The weight of authority, therefore, supports the view that implied assertions should not be treated as hearsay, and the drafters of the codes seem to have accepted this view.[47] Nevertheless, the common law approach, exemplified by *Wright v. Doe d. Tatham*, lingers on in the analysis of such respected commentators as Justice Jefferson. The California attorney should be prepared to meet and counter the objection that implied assertions are merely implied hearsay statements and therefore inadmissible. Even though the code language is ambiguous, the comments to both the California Evidence Code and the Federal Rules of Evidence indicate that the drafters intended to treat implied assertions as nonhearsay, and that view has been accepted by most commentators. The attempt to provide a simple and consistent treatment of implied assertions, therefore, permits an attorney to do indirectly what he may not do directly.

III. RATIONALE FOR THE EXCEPTION

The hearsay rule excludes certain out-of-court statements considered unreliable because of four basic risks: (1) faulty perception,

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[45] CAL. EVID. CODE § 1250, Assembly Judiciary Comm. (West 1968).

[46] FED. R. EVID. 801(a), Advisory Comm. Notes (emphasis added).

[47] This does not mean that evidence which is not hearsay is automatically admitted. The trial judge may still exercise his wide discretionary powers. FED. R. EVID. 403 and CAL. EVID. CODE § 352 (West 1968) allow the judge to exclude the evidence if its probative value is outweighed by dangers of misuse, time consumption, confusion, or prejudice. *See* text accompanying notes 170-177, *infra*. Some commentators have recognized that treating implied assertions as nonhearsay allows admission of evidence which may nevertheless be subject to latent hearsay dangers. Professor Finman suggests that the judge should consider the effect of the latent dangers (memory, narration, perception and trustworthiness) in determining probative value. Finman, *supra* note 18 at 702-06. Arguably, however, in classifying implied assertions as nonhearsay, the drafters have deemed the hearsay dangers to be minimal. To reconsider these dangers under the term "probative value" is to return to an analysis which the drafters apparently viewed as nonproductive. *See* Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 6 CAL. LAW. REV. COMM'N REPORTS,

(2) faulty memory, (3) faulty narration, and (4) untruthfulness.[48] Such out-of-court evidence is generally inadmissible because the four risks cannot be exposed and minimized by subjecting the declarant to the procedural safeguards of oath, demeanor scrutiny, and cross-examination.[49] Notwithstanding the absence of these procedural safeguards, some statements are admitted under exceptions to the hearsay rule provided (1) there is a necessity for doing so, or (2) the evidence possesses special reliability, or both.[50] The basis for the state of mind exception is a combination of the necessity and special reliability rationales.[51]

Traditionally, natural and spontaneous state of mind declarations made with no apparent motive to deceive and under circumstances indicating trustworthiness were admitted only if there was a necessity for such evidence.[52] The necessity for the evidence on a crucial issue was usually based upon the facts that the declarant was unavailable, and that there was no adequate evidence of the declarant's state of mind or physical condition other than his assertion.[53] Such is generally true whenever state of mind is itself in issue as a substantive element of the action, as for example, a person's intent in deed transfers or will executions.[54] Because state of mind or physical condition is an internal fact perceived only by the declarant, his statements about such state of mind or physical condition are often the most persuasive evidence on the issue.

Although necessity was the original rationale for the exceptions, it alone applied in few cases. Reliability became the accompanying

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RECOMMENDATIONS, AND STUDIES APP. 401, 422 (1964). 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE 801(a)[01] at 801-48, 49 (1975) [hereinafter cited as WEINSTEIN].

[48] MCCORMICK (2d ed.), *supra* note 12, § 245 at 581.

[49] *Id.*

[50] Hinton, *supra* note 15, at 413-18.

[51] The rationale supporting admissibility of each state of mind statement discussed herein is a varying mixture of necessity and reliability. Besides being the basis of admissibility, the supporting rationale is a factor in determining the limits on the use of state of mind evidence. *See* text accompanying notes 76-126 *infra*.

[52] Whitlow v. Durst, 20 Cal. 2d 523, 127 P.2d 530 (1942) (estate settlement—reconciliation agreement); *In re* Anderson's Estate, 185 Cal. 700, 198 P. 407 (1921) (wills); Adkins v. Brett, 184 Cal. 252, 193 P. 251 (1920) (alienation of affections); Williams v. Kidd, 170 Cal. 631, 151 P. 1 (1915) (deed transfers).

[53] *See* cases cited in note 52 *supra*, and Hinton, *supra* note 15 at 414-18.

[54] *In re* Carson's Estate, 184 Cal. 437, 194 P. 5 (1920) (testatrix's intent based on belief that her marriage was valid); Williams v. Kidd, 170 Cal. 631, 151 P. 1 (1915) (grantor's intent when deed transferred); Schnepfe v. Schnepfe, 120 Cal. App. 2d 463, 261 P.2d 321 (3d Dist. 1953) (intent of grantor-decedent at time of deed delivery); Casey v. Casey, 97 Cal. App. 2d 875, 218 P.2d 842 (1st Dist. 1950) (intent of grantor-decedent to create trust in realty); Dineen v. Younger, 57 Cal. App. 2d 200, 134 P.2d 323 (1st Dist. 1943) (lack of intent of grantor to totally divest herself of ownership at time of execution).

rationale to justify admissibility.[55] The statements were weighed against the enumerated hearsay risks to determine if they were sufficiently reliable, as well as necessary, to be admitted without the traditional procedural safeguards.

Statements of present state of mind or physical condition avoid the perception flaw because the declarant is the foremost authority on what he thinks or feels.[56] They avoid the memory flaw because the declarant is describing feelings which exist at the very time he makes the statement. Because the declarant is relating a then-existing state of mind or condition, the narration risk is no greater than with any other admissible contemporaneous statement.[57] Justice Holmes articulated the reliability rationale as follows: "[S]uch declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same person."[58] Untruthfulness, then, is the only remaining risk which must be exposed and minimized to insure sufficient reliability.

Because the untruthfulness risk was not minimized by any inherent trustworthiness[59] of such statements, courts have traditionally been suspicious of them. When the declarant had a motive to misrepresent or manufacture evidence, the statements were excluded;[60] when no motive to deceive was apparent and there were circumstances indicating trustworthiness at the time of the statement, they were ad-

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[55] *See, e.g.*, People v. Atchley, 53 Cal. 2d 160, 346 P.2d 764 (1959) (statement of fear used to infer victim was not the aggressor); Hatzakorian v. Rucker-Fuller Desk Co., 197 Cal. 182, 239 P. 709 (1925) (statement of fear used to show decedent was cautious); Benjamin v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 171 Cal. 260, 152 P. 731 (1915) (letter written by deceased used to show suicidal intent); Elmer v. Fessenden, 151 Mass. 359, 24 N.E. 208 (1889) (Holmes, J.) (belief in doctor's report used to show motives of employees who walked off job).

[56] Although psychologists may not so readily accept this conclusion, the courts unquestionably do so absent strong evidence otherwise. Hutchins and Slesinger, *Some Observations on the Law of Evidence: State of Mind to Prove an Act*, 38 YALE L.J. 283, 291-98 (1929); Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 29-30.

[57] FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(2) (excited utterances); CAL. EVID. CODE § 1240 (West 1968) (spontaneous statement).

[58] Elmer v. Fessenden, 151 Mass. 359, 24 N.E. 208 (1889).

[59] As used herein, reliability is satisfied when all four hearsay risks are minimized. Trustworthiness, on the other hand, is satisfied if the untruthfulness risk is minimized. CAL. EVID. CODE § 1252 is a trustworthiness standard to determine if the declarant had a motive to deceive. *See* notes accompanying text 165-169 *infra*.

[60] *See* People v. Hamilton, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961) (victim's statement of fear made with apparent ulterior motive); People v. Talle, 111 Cal. App. 2d 650, 245 P.2d 633 (1st Dist. 1952) (statement made

mitted. This exercise of discretion was a condition of admissibility and amounted to a procedural safeguard found in few other exceptions to the hearsay rule.[61] Giving a judge discretion in this area was unusual because questions solely of truthfulness are normally left to the trier of fact, usually a jury, and are not within the judge's power to decide.[62]

California has codified this procedural safeguard.[63] The code gives the judge discretion to exclude statements he finds untruthful. The federal rules do not codify a truthfulness standard as a condition of admissibility. Instead, in the federal courts the jury minimizes the untruthfulness risk as part of its general duty to judge credibility.

For declarations of past state of mind or physical condition, the reliability rationale wanes because at least the memory and narration risks reappear. At common law such evidence was excluded except in situations of special necessity.[64] There was a natural suspicion of such evidence which barred its admission, and rarely was a strong enough need presented to overcome it. California has made a significant change from the common law.[65] This change reflects an emphasis on the necessity rationale to justify admission of an unavailable declarant's statements of his past state of mind or physical condition which is directly in issue.[66] The federal rules, on the other hand, adhere to the traditional position and generally find insufficient necessity or reliability to admit such statements. They admit

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to attorney in preparation of declarant's case).

[61] CAL. EVID. CODE § 1260 (West 1968) (statement concerning declarant's will); CAL. EVID. CODE § 1310 (West 1968) (statement concerning declarant's own family history); CAL. EVID. CODE § 1311 (West 1968) (statement concerning family history of another); CAL. EVID. CODE § 1323 (West 1968) (statement concerning boundary).

[62] *E.g.*, Adkins v. Brett, 184 Cal. 252, 254-55, 193 P. 251, 252 (1920). *See* J. FRANK, COURTS ON TRIAL, 110-25 (1949).

[63] CAL. EVID. CODE § 1252 (West 1968):

> Evidence of a statement is inadmissible under this article [sections 1250-51] if the statement was made under circumstances such as to indicate its lack of trustworthiness.

[64] *See* wills and deed transfer cases, note 54 *supra*.

[65] CAL. EVID. CODE § 1251 (West 1968):

> Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:
> (a) The declarant is unavailable as a witness; and
> (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

[66] State of mind or condition is directly in issue when it is an element of a cause of action or defense. *See* note 79 *infra*.

statements of past state of mind only if they concern the declarant's will[67] and admit statements of past physical condition only if made in certain trustworthy contexts.[68]

IV. PRESENT STATE OF MIND: SECTION 1250, RULE 803(3)

Absent psychological concerns,[69] state of mind is legal notion[70] with evidentiary significance in two situations: (1) when it is itself directly in issue,[71] and (2) when it is used circumstantially to infer conduct in accord with that state of mind.[72] California Evidence Code section 1250 specifically distinguishes these two ways of using state of mind evidence.[73] Federal rule 803(3) does not specifi-

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[67] FED. R. EVID. 803(3) admits hearsay evidence if it is

> a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed *unless it relates to the execution, revocation, identification, or terms of declarant's will.* (emphasis added)

[68] FED. R. EVID. 803(4) admits hearsay evidence if it is

> made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

See text accompanying notes 156-58 *infra.*

[69] *See* note 56 *supra.*

[70] There are a large number of states of mind which statements can be used to show: love, hate, hope, not caring, intent, fear, knowledge, want, desire, attraction, belief, memory, sorrow; physical condition would include: pain, suffering, strength, weakness, depression, nervousness. *See* MCCORMICK (2d ed.), *supra* note 12, § 294.

[71] Zippo Manufacturing Co. v. Rogers Imports, Inc. 216 F. Supp. 670 (S.D.N.Y. 1963) (confusion in minds of prospective customers); Executive Employment Service Inc. v. Executives Inc., 180 F. Supp. 258 (E.D. Pa. 1960) (same); Watenpaugh v. State Teachers Retirement System, 51 Cal. 2d 675, 336 P.2d 165 (1959) (intention to designate beneficiary); *In re* Carson's Estate, 184 Cal. 437, 194 P. 5 (1920) (testamentary intent); Jamieson v. Tully, 178 Cal. 380, 173 P. 577 (1918) (loss of affection); People v. Farr, 255 Cal. App. 2d 679, 63 Cal. Rptr. 477 (2nd Dist. 1967) (criminal intent); Piercy v. Piercy, 18 Cal. App. 751, 124 P. 561 (3d Dist. 1912) (lack of intent to pass title).

[72] Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892) (statement of intent used to show that declarant went to Crooked Creek); People v. Brust, 47 Cal. 2d 776, 306 P.2d 480 (1957) (wife's statement of hostility toward husband used to show her conduct toward him); People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944) (victim's statement of intent to go out on date used to infer her subsequent conduct); Benjamin v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 171 Cal. 260, 152 P. 731 (1915) (letter written by deceased used to show he committed suicide).

[73] CAL. EVID. CODE § 1250(a)(1), (2) (West 1968):

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion or physical sensation at that time or at any other time when

cally state the uses to which state of mind evidence can be put, but the federal case authority at the time of codification made the same analytical distinction in use of the evidence,[74] and rule 803(3) is a codification of the case law at time of enactment.[75]

A. STATE OF MIND "DIRECTLY IN ISSUE": SECTION 1250(a)(1), RULE 803(3)

Using the necessity and reliability rationales, the common law firmly established the use of present state of mind declarations[76] to prove declarant's state of mind if directly in issue.[77] The terms "directly in issue" and "itself in issue" traditionally referred to cases in which state of mind was an element of a cause of action[78] or to cases in which state of mind was placed in issue by the defense.[79] If

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it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

In People v. Ireland, 70 Cal. 2d 522, 530 n.6, 450 P.2d 580, 584 n.6, 75 Cal. Rptr. 188, 192 n.6 (1969), the California Supreme Court recognized that in the past cases this distinction was not generally made, thereby confusing the analysis; the court said that hereafter it should be made whenever admitting hearsay statements under the state-of-mind exception.

[74] United States v. Brown, 490 F.2d 758, 762 (D.C. Cir. 1973).

[75] FED. R. EVID. 803(3), H. Rpt. No. 93-650; 7 WEINSTEIN, *supra* note 47, ¶ ¶ 803[03], 803[04]. Unlike CAL. EVID. CODE § 1250(a)(1), (2) (West 1968), FED. R. EVID. 803(3), set forth in note 67 *supra*, does not limit the uses of present state of mind statements.

[76] A declaration of present state of mind is one which describes a state of mind existing at the time of the declaration. MCCORMICK (2d ed.), *supra* note 12, § 294 at 695.

[77] In Whitlow v. Durst, 20 Cal. 2d 523, 524, 127 P.2d 530, 531 (1942), Justice Traynor articulated the use of a hearsay statement to show the declarant's state of mind which was directly in issue:

> When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible evidence as an exception to the hearsay rule. . . . Thus in cases involving the delivery of deeds, declarations of the alleged grantor, made before and after making of the deed, are admissible upon the issue of delivery . . . likewise in gift cases. . . .

[78] *See, e.g.*, Wibye v. United States, 87 F. Supp. 830 (N.D. Cal. 1949), *aff'd*, 191 F.2d 181 (9th Cir. 1951) (statement of intent by government employee indicating he was within scope of employment at time of accident); Hansen v. Bear Film Co., 28 Cal. 2d 154, 168 P.2d 946 (1946) (intent of deceased to transfer stock into trust); Whitlow v. Durst, 20 Cal. 2d 523, 127 P.2d 530 (1942) (discussed in note 77 *supra*); People v. Farr, 255 Cal. App. 2d 679, 63 Cal. Rptr. 477 (2nd Dist. 1967) (written declarations of love and compassion by defendant tending to show lack of intent to murder his wife).

[79] *See, e.g.*, People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (victim's statement relating defendant's intent to kill her ruled inadmissible because victim's state of mind not put in issue by defendant); People v. Pinn, 17 Cal. App. 3d 99, 94 Cal. Rptr. 741 (2d Dist. 1971) (victim's state of mind declarations admissible because defendant placed victim's conduct directly in issue by his version of the facts); People v. Cooley, 211 Cal. App. 2d 173, 27 Cal. Rptr. 543 (5th Dist. 1962) (defendant put victim's state of mind in issue by

A says "I love *B*" and *A*'s love for *B* is directly in issue,[80] *A*'s out-of-court statement is admissible hearsay to show *A*'s love at the time of making the statement. If *A*'s love for *B* at some other time, past or future, is directly in issue, *A*'s state of mind at the time of the statement may be inferred to have continued from, or to continue until, the time when *A*'s love for *B* is itself in issue. Continuity of state of mind is a circumstantial reasoning process often used with state of mind declarations, because a declarant rarely says what is on his mind precisely at the time in issue.[81] Admitting state of mind statements for this purpose presents few problems under either Evidence Code section 1250(a)(1) or federal rule 803(3).[82]

B. STATE OF MIND TO INFER CONDUCT: SECTION 1250(a)(2), RULE 803 (3)

The more difficult application of the exception is the use of a present state of mind declaration to infer conduct of the declarant in accord with that state of mind.[83] This is the famous *Hillmon* doctrine which is codified in both the California Code[84] and the federal rules.[85] In *Mutual Life Ins. Co. v. Hillmon*,[86] decided in 1892, the

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his version of victim's death).

When state of mind is an element of a cause of action or is put in issue by the defense, it will be referred to as being *directly in issue.* This is the use of state of mind evidence permitted by CAL. EVID. CODE § 1250(a)(1)(West 1968), set forth in note 73 *supra.*

When state of mind is not itself an element of a cause of action or of the defense but is used to infer a fact which is itself directly in issue, it will be referred to as being *indirectly in issue.* This use of state of mind evidence is permitted by CAL. EVID. CODE § 1250 (a)(2) (West 1968), set forth in note 73 *supra. See* Seidelson, *The State of Mind Exception to the Hearsay Rule,* 13 DUQUESNE L. REV. 251, 261-62 (1974).

[80] *See* Adkins v. Brett, 184 Cal. 252, 193 P. 251 (1920) (Alienation of affections).

[81] MCCORMICK (1st ed.), *supra* note 27, § 269 at 569. Thus in the foregoing example if on Monday *A* said he loved *B*, but *A*'s love for *B* on the Thursday following was directly in issue, then *A*'s love for *B* will be inferred to have continued until Thursday. If *A*'s love for *B* was directly in issue on the Thursday before, then *A*'s love for *B* will be inferred to have continued from last Thursday. Continuity of present state of mind reasoning broadens the use of state of mind statements.

[82] Continuity of state of mind is limited in that the point at which the statement is made may be too remote in time from the point at which state of mind is in issue to be of any probative value. "The stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current. But there is a point beyond which evidence becomes irrelevant." Chafee, *Progress of the Law, 1919-1922: Evidence II,* 35 HARV. L. REV. 428, 444 (1922).

[83] In this situation, state of mind is *indirectly in issue. See* note 79 *supra.*

[84] CAL. EVID. CODE § 1250(a)(2) (West 1968), set forth in note 73 *supra.*

[85] FED. R. EVID. 803(3), H. Rpt. No. 93-650; 4 WEINSTEIN, *supra* note 47, ¶ 803(3)[04].

[86] 145 U.S. 285 (1892).

dispute concerned the identity of a man who had been shot and killed at Crooked Creek. To recover on several life insurance policies, plaintiff-beneficiary alleged that the deceased was her husband-insured, Mr. Hillmon. The insurance companies argued the deceased was a Mr. Walters, and introduced letters written and mailed by Walters to his fiancée prior to the Crooked Creek incident. The letters expressed Walters' intention to leave Wichita, Kansas, soon "with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me." The United States Supreme Court held the letters admissible, reasoning that they showed that Walters

> . . . had the intention of going and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.[87]

Because Walters was never heard from again, his conduct on the day of the killing was in dispute. By contending the dead man was Walters, the insurance company placed Walters' conduct directly in issue. The letters were introduced to show Walters' intent, which was indirectly in issue, from which his subsequent conduct, which was directly in issue, could be inferred.[88] This use of a statement of present state of mind adds another step in the reasoning process because, in addition to (a) establishing state of mind from words or conduct declaring or implying it, and (b) inferring the continuity of that state of mind to a point at which it allegedly was acted upon, the trier of fact must now (c) infer that the conduct occurred in accord with that state of mind. The California case law, following *Hillmon*, accepted the use of present state of mind declarations to show conduct.[89]

The *Hillmon* case aroused controversy.[90] Some writers perceived that the *Hillmon* three-step reasoning process could just as well be used to show past conduct or events as to show future conduct.[91] If

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[87] *Id.* at 295-96

[88] *See* note 79 *supra.* In *Hillmon* the declarant's conduct was *directly* in issue. In other cases, the declarant's conduct may be *indirectly* in issue, and relevant as a step in the circumstantial reasoning process of inferring another person's conduct. *See* text accompanying notes 112-125 *infra* for a discussion of this use of state of mind evidence.

[89] People v. Atchley, 53 Cal. 2d 160, 346 P.2d 764 (1959) (victim's statement of fear used to show her subsequent conduct); People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 637 (1944) (victim's statement of intent to go out on date used to infer her subsequent conduct); People v. Cooley, 211 Cal. App. 2d 173, 27 Cal. Rptr. 543 (5th Dist. 1962) (victim's statement of fear used to infer subsequent conduct at time of murder.)

[90] *See* Hutchins and Slesinger, *Some Observations on the Law of Evidence: State of Mind to Prove an Act*, 38 YALE L.J. 283 (1929); Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 HARV. L. REV. 709 (1925): Payne, *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955); Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

[91] *See, e.g.*, Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 157 (1912).

intent was the state of mind used to infer subsequent conduct in *Hillmon*, why, they reasoned, could not memory or belief, also states of mind, be used to show past conduct? The circumstantial reasoning process would be similar. In addition to (a) establishing present state of mind (memory)[92] from words or conduct declaring or implying it, and (b) inferring the continuity of that state of mind (memory) back to its creation (perception), the trier of fact could also (c) infer that the remembered conduct or event occurred in accord with that state of mind.[93] No court accepted this analysis, but it was not until *Shepard v. United States*,[94] in 1933, that the reason for limiting the *Hillmon* doctrine was judicially articulated.

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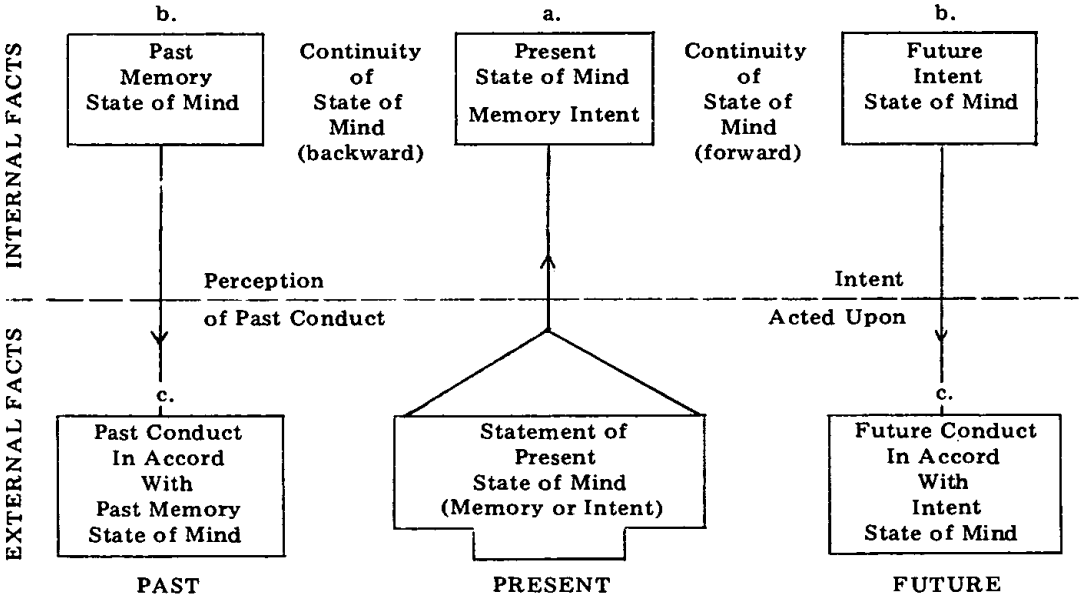
[92] Belief as a state of mind may be used instead of memory in this analysis. The inference would not be limited to past conduct. Belief could also be used to infer present or future conduct, event, or condition. Using belief as a state of mind, however, may violate the first hand knowledge rule if the declarant did not perceive that which he asserts. His assertion therefore may be no more than personal opinion. FED. R. EVID. 602, 801; CAL. EVID. CODE § § 702, 800 (West 1968); MCCORMICK (2d ed.), *supra* note 12, § 10 at 20.

[93] This analysis can be shown by the following graph:



One recent writer argues that memory should be allowed to prove past conduct or events in some contexts when the declaration is trustworthy. He contends that the inference that a past event occurred in accord with a memory is just as reliable as the inference that future conduct occurred in accord with intent. Seidelson, *The State of Mind Exception to the Hearsay Rule*, 13 DUSQUESNE L. REV. 251, 260-61 (1974).

[94] 290 U.S. 96 (1933).

C. THE SHEPARD LIMITATION: SECTION 1250(b), RULE 803(3)

In *Shepard v. United States*,[95] the United States Supreme Court declined to extend the *Hillmon* three-step reasoning process to show past conduct. Dr. Shepard was on trial for the murder of his wife. The prosecution introduced testimony that the wife told a nurse, "Dr. Shepard has poisoned me." The Court held that the statement could not be admitted as a state of mind declaration. Justice Cardozo elaborated:

> [*Mutual Life Ins. Co. v. Hillmon*] marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end or nearly that, to the rule against hearsay if the distinction were ignored.[96]

When hearsay statements of memory or belief assert a fact in issue, for example, that Dr. Shepard murdered his wife, use of the state of mind exception circumvents the hearsay rule. Statements of memory or belief are assertions of the declarant's present state of mind and almost any statement can be classified as a declaration of memory or of belief in what is asserted.[97] Since present state of mind evidence is admissible hearsay, any statement of memory or belief is potentially admissible under the state of mind exception. The Court in *Shepard* declared inadmissible a hearsay statement of memory or belief to prove the fact remembered or believed. This bar to looking backward with memory or belief hearsay statements is essential. Otherwise, any assertion of a past act, event, or condition would be admitted as a statement of present state of mind of memory or belief to infer the factual basis underlying the memory or belief. Such reverse application of the *Hillmon* doctrine, using memory or belief, instead of intent, to look to the past rather than the future, circumvents the hearsay rule and thus is prohibited.[98] Evidence Code section 1250(b) and federal rule 803(3) specifically bar the use of a hearsay statement of memory or belief to prove the fact remembered or believed.[99]

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[95] *Id.*

[96] *Id.* at 105-06.

[97] *See* note 13 *supra*.

[98] The use of statements of belief to prove the existence of present or future events presents the same problem, and is also prohibited. *See* note 92 *supra*. Although the *Shepard* case is one in which memory or belief statements are used to prove past events, the term "the *Shepard* limitation" in this Comment will include the use of statements of belief to prove present or future events.

[99] FED. R. EVID. 803(3):

> . . . but not including a statement of memory or belief to prove the fact remembered or believed. . . .

CAL. EVID. CODE § 1250(b) (West 1968):

> This section does not make admissible evidence of a statement of

It is important, however, to recognize that the statutory language of section 1250(b) and rule 803(3) does not wholly bar looking backward with state of mind hearsay evidence to infer past conduct. The language refers only to the special states of mind of memory or belief. Section 1250(a)(2) permits the use of state of mind evidence to infer or explain conduct of the declarant. It does not limit the inference drawn to show only the *subsequent* conduct of the declarant. What about a statement of present state of mind other than memory or belief, such as knowledge or fear, to infer past conduct of the declarant? Suppose the victim of an attempted murder by shooting makes a statement after the incident that she knows nothing about guns and is deathly afraid to touch them. The defendant's version of the incident is that his gun went off accidentally in the victim's hands when she was "breaking it down to clean" for him. The defendant has thus placed the victim's prior conduct directly in issue. The prosecution would seemingly be allowed to offer the subsequent statement of present ignorance and fear of guns to infer the existence of the same states of mind when the crime occurred. The inference would be that acting in accord with her ignorance and deathly fear of guns, the victim did not handle or attempt to clean the weapon as defendant claims.[100] The language of section 1250(b) would not bar this evidence even though it looks to past conduct. The language of federal rule 803(3) apparently would also admit the evidence for this use, but the House Judiciary Committee Report[101] on this rule says that the *Hillmon* doctrine should be limited only to *subsequent* conduct of the declarant.[102]

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memory or belief to prove the fact remembered or believed.

The *Shepard* limitation does have a special exception in wills cases. FED. R. EVID. 803(3):

> . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

CAL. EVID. CODE § 1260 (West 1968):

> Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

[100] Obviously, if the present state of mind of fear was only caused by the incident itself, then the statement has no probative value as to the victim's conduct prior to the gun going off. The proponent of the evidence would have to show that the victim had a general fear of firearms before the incident. This would probably be hard to show. On the other hand, it would be easy to infer that victim had no knowledge of cleaning guns and her conduct at the time of the incident was in accord with her ignorance.

[101] FED. R. EVID. 803(3), H. Rpt. No. 93-659.

[102] There are, however, no California or federal cases that have applied the exception this way. One reason may be that many such "post-incident" statements may be admitted under the exceptions for dying declarations [FED. R. EVID. 804(b)(2); CAL. EVID. CODE § 1242 (West 1968)], or spontaneous exclamations [FED. R. EVID. 803(2); CAL. EVID. CODE § 1240 (West 1968)]. The more

D. IMPROPER USE: *MERKOURIS*

A problem in using state of mind evidence to infer conduct is admission of the evidence for an improper purpose. In *People v. Merkouris*,[103] the defendant was charged with the murder of his former wife. His state of mind and conduct were directly in issue; neither the victim's state of mind nor her conduct was directly in issue. The California Supreme Court ruled admissible a hearsay statement the victim made to her mother that (a) the defendant had threatened her and (b) she was afraid he might harm her. The entire statement was deemed admissible, purportedly to show only the victim's fear,[104] which the court treated as indirectly in issue. The court reasoned that the victim's fear as a present state of mind was relevant to show circumstantially that defendant caused the fear by threatening her. The victim's present state of mind was being used to infer past conduct of the defendant, which was also expressly asserted in the statement. If defendant had threatened the victim it certainly would have been relevant to prove he carried out the threats in the subsequent crime. By admitting the entire statement, however, relating defendant's threats, as well as victim's fear, the court in effect admitted it to prove the truth of the matter stated, namely that defendant threatened her and she feared him. The reasoning of the court circumvents the hearsay rule and the circumvention cannot be cured by a limiting instruction.[105] The victim's memory of threats by the defendant is directly asserted, and the threats, in effect, are what the statement is offered to prove.[106]

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probable reason is that if the post-incident declarant is available at trial, he can testify about what actually happened and there is no need for the state of mind analysis.

[103] 52 Cal. 2d 672, 344 P.2d 1 (1959).

[104] The trial court gave a limiting instruction that the statement was not introduced to prove that defendant had made the threats but only to show victim's fear. Justice Peters, in dissent, found the instruction "obviously ineffectual." *Id.* at 696, 344 P.2d at 15.

[105] Neither the victim's state of mind nor her subsequent conduct was directly in issue. Victim's state of mind was used indirectly to infer defendant's past conduct (threats) from which his future conduct (murder) was inferred. The victim's statement, however, directly asserted the past conduct of defendant. A limiting instruction would probably not prevent a jury from using the statement as proof of the threats it directly asserted. Referring to this kind of problem, McCormick wrote, "This is mental gymnastics which is probably beyond the jury's ability and more certainly beyond their willingness to accept." MCCORMICK (1st ed.), *supra* note 27, § 269 at 570-71.

[106] If the victim stated only her fear of the defendant (not the threats) and her state of mind or conduct was *directly* in issue, the statement would be admitted. *See* text accompanying 109-112 and 170-177 *infra*. If the victim stated only her fear of the defendant and her state of mind and her conduct were *indirectly* in issue, California law is unsettled whether the statement would be admissible. *See* text accompanying 112-126 *infra*. If the declarant's state of mind or conduct was neither directly nor indirectly in issue, the statement would be inadmissible under § 1250, set forth in note 73 *supra*, because that section limits the

The legislative comments to section 1250[107] expressly repudiate *Merkouris* and recognize that it violates the *Shepard* limitation because memory state of mind is being used to prove the fact remembered, namely, defendant's threats.[108]

The repudiation of *Merkouris*, however, does not extend to situations in which the declarant's state of mind or conduct is directly in issue.[109] Declarations of state of mind frequently relate, in addition, past acts of declarant or of another to justify the asserted state of mind. If, for example, a defendant charged with murder claims self defense, the victim's conduct is directly in issue as an element of the defense. To rebut the defense the prosecution introduces victim's hearsay statement, "I'm afraid of Bill because he threatened to kill me." The statement is offered to show that at the time of the killing victim was acting in accord with a fear state of mind and thus would not have been the aggressor. Even though the statement asserts threats by the defendant (past conduct) and technically violates the *Shepard* limitation, the statement is admitted because the victim's subsequent conduct is directly in issue. The statement can be put to a proper use independent of the potential improper use,[110] and a limiting instruction accompanying this statement is deemed to minimize the risk of misuse. The judge, nevertheless, has wide discretion to determine whether and in what form the statement is admitted.[111]

E. UNSETTLED USE: *CONRAD*

Beyond the *Merkouris* improper use, there is still confusion about the limits on the use of present state of mind evidence to infer conduct.[112] Can conduct of the declarant, inferred from a state of mind

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use of state of mind evidence to prove state of mind when itself in issue or to prove conduct of the declarant.

[107] CAL. EVID CODE § 1250, Assembly Judiciary Comm. (West 1968).

[108] People v. Merkouris has not been overruled on this point, and the comments are persuasive authority not binding on the courts.

[109] *Cf.* People v. Atchley, 53 Cal. 2d 160, 346 P.2d 764 (1959) (declarations by victim that she feared defendant because he had threatened her admitted to show victim was not the aggressor and to rebut self-defense claim); People v. Finch, 213 Cal. App. 2d 752, 29 Cal. Rptr. 420 (2d Dist. 1963) (victim's statements that she feared defendant because of his violent conduct toward her admitted to rebut defendant's contention that death occurred accidentally). CAL. EVID. CODE § 1250, Assembly Judiciary Comm. (West 1968).

[110] *See* cases cited in note 109 *supra*. In both People v. Atchley and People v. Finch the victim's subsequent conduct had independent legal significance and was directly in issue. In *Merkouris*, the victim's subsequent conduct had no independent legal significance. It was only used for an improper purpose, namely to prove that the past acts asserted in the statement were true.

[111] *See* text accompanying notes 170-177 *infra*.

[112] *See* text accompanying notes 83-94 *supra*. In Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), the subsequent conduct of the declarant Walters was directly in issue. The statement was not used to infer Hillmon's conduct.

declaration which does not violate the *Shepard* limitation, be used as circumstantial evidence of another's state of mind or conduct?[113] Recently the California Second District Court of Appeals in *People v. Conrad*[114] said yes. Victim, a shopkeeper, stated to her husband that if she were ever robbed, she would be very frightened and would not resist the taking of her money. Defendant, whose *modus operandi* in other robberies involved sexual assault, was accused of robbery and murder with intent to inflict great bodily harm. Both the victim's state of mind and conduct were indirectly in issue; the defendant's state of mind and conduct were directly in issue. To show the defendant's specific intent and conduct, the prosecution introduced the victim's prior statement to prove that the victim's death indicated she must have had a special reason to resist, such as sexual assault. The prosecution argued that since victim resisted, in this inferred setting of sexual assault, the defendant must have intended to inflict great bodily harm. The court recognized that the inferences were indeed tenuous, but nevertheless admitted the hearsay statement under the state of mind exception.[115] The victim's subsequent conduct at the time of the killing was not itself in issue, but was relevant to infer the defendant's conduct and intent. Unlike *Merkouris*, the victim's statement did not assert an act of the defendant, and therefore does not violate the *Shepard* limitation[116] The defendant's conduct and intent are inferred from the victim's possible conduct during the robbery, which in turn is inferred from her pre-crime state of mind declaration.

The court, by refusing to limit conduct inferred from state of mind evidence to that of the declarant only, indicated that inferring defendant's conduct was a proper use of the statement. Neither prior case law[117] nor the California Evidence Code is clear on the

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[113] This question was addressed but not clearly answered in People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944). There a victim's statement that she was going out with defendant was admitted to show her subsequent conduct. Neither the victim's state of mind nor her subsequent conduct was directly in issue. The court reasoned that the victim's state of mind and inferred subsequent conduct were relevant to the issue of defendant's guilt but did not specifically analyze how. *Id.* at 188, 148 P.2d at 632. Justice Traynor strongly dissented. He contended that victim's declaration of intent to go out with the defendant was also an assertion that defendant intended to go out with her. This he considered prejudicial and would have excluded. *Id.* at 189-90, 148 P.2d at 633. The Evidence Code, however, does not limit the use of state of mind declarations to show conduct of the declarant only. CAL. EVID. CODE § 1250(a)(2) (West 1968), set forth in note 73 *supra*.

[114] 31 Cal. App. 3d 308, 107 Cal. Rptr. 421 (2d Dist. 1973).

[115] *Id.* at 325, 107 Cal. Rptr. at 433.

[116] Nor does it assert a present or future act of the defendant which was the concern of Justice Traynor in dissent in People v. Alcalde, 24 Cal. 2d 177, 189-90, 148 P.2d 627, 633 (1944). *See* note 113 *supra*.

[117] *See* People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 637 (1944), discussed in note 113 *supra*. People v. Lew, 68 Cal. 2d 774, 441 P.2d 942, 69 Cal. Rptr. 102

point. Unlike section 1250(a)(1), section 1250(a)(2) does not specifically limit the use of the statement to declarant's conduct which is directly in issue. Nor does it specifically limit the use of the evidence to declarant's conduct *only*.[118] The *Conrad* court saw the statutory door ajar and admitted the statement. The result has been criticized by Justice Jefferson.[119] He construes section 1250(a)(2) to allow state of mind evidence to prove only the declarant's conduct and then only if such conduct is directly in issue. He argues that the victim's statement in *Conrad* is the equivalent of an "implied hearsay statement"[120] of declarant's belief that someone sexually assaulted her with intent to inflict great bodily harm. Therefore, he contends, because it is being admitted to prove the fact believed, it violates the *Shepard* limitation of section 1250(b).

The victim's statement in *Conrad*, however, was not a statement of belief about the defendant's conduct. It was a statement of her intent used to prove her expected conduct, which section 1250(a)(2) specifically allows. The issue is whether this is permissible when her conduct is relevant only as proof of the defendant's conduct. The extra inference does not make her statement one of belief about his conduct.[121]

The *Conrad* court's construction of section 1250(a)(2) is reasonable.[122] The evidence was admitted for a proper purpose, to prove the declarant's conduct. If her conduct is relevant to show his conduct or intent and the statement is not prejudicial to the defendant, it should be admitted.[123] If the drafters intended to preclude the

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(1968). There a victim's declaration of fear of the defendant was introduced to show the victim's subsequent conduct. The opinion, *in dictum*, stated that the victim's conduct would be in issue to infer the conduct of the defendant if there was no direct proof the victim had been with the defendant at the time of her death. *Id.* at 779, 44 P.2d at 944, 69 Cal. Rptr. at 104. *Accord*, Smith v. Slifer, 1 Cal. App. 3d 748, 81 Cal. Rptr. 871 (3d Dist. 1969) (declarant's statement that she was going to pay defendant for next week's ride admitted to show defendant treated declarant as a paying passenger rather than as a guest.)

[118] CAL. EVID. CODE § 1250(a)(2) (West 1968), set forth in note 73 *supra*.

[119] JEFFERSON, *supra* note 22, § 14.2 at 55-56 (1974 Supp.).

[120] *See* text accompanying notes 34-35 *supra*. Apparently Justice Jefferson reasons that the victim's statement is the equivalent saying:"I believe that I will not resist a robbery except in an unusual circumstance such as a sexual assault." Her belief that a sexual assault would cause her to resist a robbery is used to prove that the sexual assault in fact occurred.

[121] The victim's statement in People v. Alcalde, *supra* note 113 (I intend to go out with Frank), made direct reference to the defendant, but the victim's statement in People v. Conrad did not. The danger of prejudice that Justice Traynor feared in People v. Alcalde was not present in People v. Conrad.

[122] In light of the use of the victim's statement in People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944), discussed in note 113 *supra*, there is a basis in the prior case law for the Conrad court's construction of section 1250(a)(2).

[123] All relevant evidence is admissible, unless the code provides otherwise. CAL. EVID. CODE. § 351 (West 1968).

Conrad use, section 1250(a)(2) could have been drafted more precisely.[124] In addition, the judge has discretion to exclude evidence when inferences become too tenuous or confusing.[125]

The House Judiciary Committee Report on the federal rules addresses this problem.[126] The Committee limits the use of the *Hillmon* doctrine (using state of mind to infer conduct) to prove the declarant's subsequent conduct only. Under this interpretation, evidence such as that in issue in *Conrad* would not be admitted.

V. PRESENT PHYSICAL CONDITION: SECTION 1250, RULE 803(3)

Statements of present physical condition have long been recognized as admissible hearsay evidence to prove the declarant's physical state at the time of the statement, or at any other time, whether asserted by articulate statements,[127] or by utterances of pain or suffering.[128] In California, section 1250 of the Evidence Code is a codification of existing case law.[129] As at common law, admissibility does not depend on to whom that statement is made. Again, the first three hearsay risks of perception, memory, and narration are minimal. Only untruthfulness remains and that is minimized, as with present state of mind declarations, by the court's application of the section 1252 trustworthiness standard.[130] Necessity, as well, is a basis for admissibility of present physical condition declarations because of their strong bearing on the frequent extent-of-injury issue.[131]

Present physical condition statements are most often admitted when physical state is directly in issue, for instance, to resolve the

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[124] When the drafters wanted to limit the use of state of mind evidence, they did so. The use of past state of mind evidence is limited to the declarant's past state of mind "... when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind...." CAL. EVID. CODE § 1251 (West 1968).

[125] CAL. EVID. CODE § 352 (West 1968). *See* text accompanying notes 170-177 *infra*.

[126] FED. R. EVID. 803(3), H. Rpt. No. 93-650:

> However, the Committee intends that the rule be construed to limit the doctrine of Mutual Life Ins. Co. v. Hillmon ... so as to render statements of intent by a declarant admissible only to prove his future conduct, and not the future conduct of another person.

[127] Aveson v. Kinnard, 6 East 188, 102 Eng. Rep. 1258 (1805).

[128] 6 WIGMORE (3d ed.), *supra* note 12, § 1718; Comment, *Exception to Hearsay Rule: Statement of Present Physical Condition or Present Pain When Not Made to a Physician*, 2 CAL. L. REV. 243 (1914).

[129] *See, e.g.*, Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496 (1919) and People v. Wright, 167 Cal. 1, 138 P. 349 (1914) (extent of injuries sustained).

[130] *See* text accompanying notes 165-169 *infra*.

[131] *See* McBaine, *Admissibility in California of Declarations of Physical or Mental Condition*, 19 CAL. L. REV. 231, 234-240 (1931).

damages issue in a personal injury action.[132] As with present state of mind declarations, continuity of physical condition from the time of the statement to the time directly in issue is an accepted reasoning process. Although the statements may also be used to prove the declarant's subsequent conduct, the case law does not reveal the use of a statement for this purpose. Furthermore, a statement of present physical condition may be used to infer past conduct of the declarant.[133] Again, however, such use has not yet surfaced in the case law.

Many statements of existing physical condition, usually pain or suffering, can also be classified as spontaneous utterances.[134] The significant overlap in this area was recognized in *People v. Lares.*[135] There defendant was charged with felony drunk driving.[136] A passenger's hearsay statement of back pain immediately after the accident was offered to show that defendant's negligent driving caused physical injury to another. The court held that the statement was admissible under either the present physical condition exception or the spontaneous declaration exception.[137]

The foregoing characteristics of the present physical condition exception also apply in the federal courts and are codified mainly in rule 803(3). Authority under the federal rules, however, for admitting statements of present physical condition is also found in rule 803(1) (present sense impression), rule 803(2) (excited utterances), and rule 803(4) (statements for purpose of medical diagnosis or treatment). As in California, to whom the statement is made does not affect admissibility.

One important distinction between the California Code and the federal rules concerns the admissibility of a statement, or part thereof, relating the cause of the asserted physical condition. California law does not allow such statements to be admitted for the purpose of proving the cause of the physical condition. Causation statements are apparently barred by the *Shepard* limitation in that a memory or belief of causation cannot be admitted to prove the causation remembered or believed. A physical condition statement relating a diagnostically significant cause, however, is admissible for the nonhearsay purpose of establishing the basis on which the examining

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[132] Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496 (1919); People v. Wright, 167 Cal. 1, 138 P. 349 (1914); *cf.* People v. Lares, 261 Cal. App. 2d 657, 68 Cal. Rptr. 144 (5th Dist. 1968).

[133] *See* text accompanying notes 99-102 *supra.*

[134] *See* CAL. EVID. CODE § 1240 (West 1968).

[135] 261 Cal. App. 2d 657, 68 Cal. Rptr. 144 (5th Dist. 1968).

[136] CAL. VEH. CODE § 23101 (West 1971). An element of the crime of felony drunk driving is that an injury is inflicted on a person other than the defendant.

[137] 261 Cal. App. 2d 657, 663, 68 Cal. Rptr. 144, 148 (5th Dist. 1968).

physician formed his opinion of the condition.[138] Obviously this is a fine line, and it is doubtful whether a jury could avoid using the statement relied upon by the doctor to form his diagnosis as proof of causation as well.

In contrast, federal rule 803(4) specifically permits admission of a statement of physical condition which includes the "cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[139] A prerequisite of admissibility, however, is that such a statement be made in certain trustworthy contexts.[140] If that condition is met, the causation statement can be used to prove the diagnostically significant cause, and not merely to show the basis on which a physician formed his opinion. The federal rules take the position that a person's natural desire for proper treatment ensures reliability of such a statement. In addition, the federal rules recognize the improbability that a jury will make the use distinction which the California Code calls for. For these reasons the federal rules appear to take the more valid position.

VI. PAST STATE OF MIND: SECTION 1251, RULE 803(3)

At common law statements of past state of mind[141] were generally considered untrustworthy as self-serving and were admitted only in the traditional necessity situations of wills or deed transfers where the declarant was usually unavailable.[142] The necessity rationale alone supported admissibility where no other adequate evidence could be obtained. Pre-code California cases expanded the application of this exception to admit such statements in situations in which previous state of mind was directly in issue.[143] Evidence Code sec-

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[138] CAL. EVID. CODE § 801 (West 1968).

[139] FED. R. EVID. § 803(4), set forth in note 68 *supra*.

[140] *E.g.*, statements made to physicians, ambulance drivers, hospital attendants, and members of the family. FED. R. EVID. 803(4), Advisory Comm. Notes. *See* text accompanying notes 157-58 *infra*.

[141] A statement of past state of mind is one which describes a state of mind which the declarant experienced at some time prior to the declaration. Declarations of past love, past fear, or past intent are examples of past state of mind declarations.

[142] *See* Whitlow v. Durst, 20 Cal. 2d 523, 127 P.2d 530 (1942) (declarations regarding testator's previous state of mind at time of alleged reconciliation with wife); Kelly v. Bank of America Nat'l. Trust and Savings Ass'n., 112 Cal. App. 2d 388, 246 P.2d 92 (4th Dist. 1952) (declarations of deceased-grantor that at time of conveyance he did not intend to transfer full title); McBaine, *Admissibility in California of Declarations of Physical or Mental Condition*, 19 CAL. L. REV. 231 (1951).

[143] *See* Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973) (statement by plaintiff's mother that she relied on cooperation of father in entering oral agreement concerning property distribution); People v. One 1948 Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538 (1955) (declara-

tion 1251 codified this exception to cover any situation in which the declarant is unavailable and his past state of mind is itself in issue. Necessity, however, rather than reliability is the rationale for admissibility.[144]

For example, if the injured plaintiff sues the employer of a negligent employee for damages suffered in a car-truck collision, a major issue is whether the employee acted within the scope of employment.[145] The employee tells plaintiff's insurance agent after the accident, "I thought that road [on which the accident occurred] was the fastest way to go." Plaintiff introduces the hearsay statement of employee's past state of mind to show his intent at the time of the accident. The statement of past intent tends to prove employee was acting for the benefit of the employer and thus was still within the scope of his employment. Section 1251 admits such a statement when the declarant is unavailable and, as here, his previous state of mind is directly in issue. The employee's memory of his past intent is used to prove his intent at the time of the accident.[146] Statements of past state of mind might well be considered an exception to the *Shepard* limitation. The declarant's present state of mind (his memory) is being used to prove the fact remembered (his past state of mind).[147]

The federal rules, with one exception, do not admit statements of past state of mind. The only past state of mind statements admitted by the federal rules are those that relate to execution, revocation, identification, or terms of declarant's will.[148] Past state of mind declarations in this special context can be used to show previous statements or testamentary-related acts of the declarant.[149] Moreover, such statements are admissible with no requirement of unavailability.[150] The absence of a specific past state of mind exception under the federal rules is a major difference from the California Code.[151]

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tion by a car owner's son that he knew prior to his arrest and the seizure of the car that another occupant was in possession of marijuana).

[144] *See* text accompanying notes 64-68 *supra*.

[145] Whether the employee thought he was acting within the scope of his employment is therefore directly in issue in the case. *See* text accompanying notes 76-82 *supra*. This fact pattern is similar to Garford Trucking Corporation v. Mann, 163 F.2d 71 (1st Cir. 1947).

[146] Past state of mind statements are also subject to the trustworthiness standard of CAL. EVID. CODE § 1252. *See* text accompanying notes 165-68 *infra*.

[147] *See* text accompanying notes 95-102 *supra*.

[148] FED. R. EVID. 803(3), *supra* note 67.

[149] In this way FED. R. EVID. 803(3) combines the testamentary exceptions to the *Shepard* limitation that California includes in CAL. EVID. CODE §§ 1251 (past state of mind) and 1260 (acts regarding declarant's will) (West 1968).

[150] There is probably no difference at all between the codes, because the declarant is a testator and thus unavailable due to death.

[151] The open-ended exceptions in the federal rules allow a judge to admit any

VII. PAST PHYSICAL CONDITION: SECTION 1251, RULE 803(4)

Before the enactment of the California Evidence Code, statements of past physical condition were not admitted to prove the truth of the matter asserted, not even statements to a physician consulted for diagnosis or treatment.[152] They were considered too unreliable and were not accorded the same treatment as past state of mind statements, even where there was some necessity for doing so.[153] Declarations of past physical condition were admitted, however, as the basis of a physician's opinion about what he diagnosed or treated. It was thought that juries could follow the judge's guidance in making this use distinction.[154]

Evidence Code section 1251 represents a major change from the common law because it admits statements of the declarant's past physical condition for the truth of the matter asserted.[155] Furthermore, it requires no specific trustworthy context, such as doctor-patient, in which the statement must be made; only the general section 1252 trustworthiness standard is applicable. California treats these statements no differently from declarations of past state of mind; it admits them only when past physical state is directly in issue and when the declarant is unavailable.

Prior to the enactment of the federal rules, federal law did not admit statements of past physical condition[156] or statements relating the history or causation of an injury,[157] if such statements were offered to prove the truth of the matter asserted. Federal rule 803(4), however, admits hearsay statements of past physical condition to prove the truth of the matter asserted only if the statements are made for purposes of diagnosis or treatment. Because the statements

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hearsay statement when there are circumstantial "guarantees of trustworthiness." FED. R. EVID. 803(24) and 804(b)(5). It is therefore possible for a past state of mind declaration to be admitted under the federal rules.

[152] *See* Willoughby v. Zylstra, 5 Cal. App. 2d 297, 42 P.2d 685 (2d Dist. 1935) (statement by plaintiff to doctor relating past pain suffered inadmissible for purpose of establishing truth of statement).

[153] Hearsay dangers of memory and untruthfulness were present. There was a general aversion to admitting them, despite any necessity, because of the declarant's suspected bias and the statement's self-serving nature. 6 WIGMORE (3d ed.), *supra* note 12, § 1722(b); *See* McBaine, *Admissibility in California of Declarations of Physical or Mental Condition*, 19 CAL. L. REV. 231, 240 (1931).

[154] People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958) (patient's statements relating her physical condition prior to illegal abortion performed by friend admissible as basis of doctor's opinion).

[155] *See* text accompanying notes 64-68 *supra*.

[156] *See, e.g.*, Reid v. Quebec Paper Sales and Transportation Co., 340 F.2d 34 (2d Cir. 1965) (plaintiff's statement to doctor that he suffered past headaches admissible only as basis of doctor's diagnosis, not to show truth of statement).

[157] *See, e.g.*, Lycan v. Walker, 279 F.2d 478 (8th Cir. 1960) (plaintiff's statement to doctor relating circumstances of motorcycle accident admissible only as basis of doctor's opinion and treatment, not to show history or cause of incident).

are deemed to be reliable in such a context, there is no requirement of unavailability nor of past condition being directly in issue. Even though rule 803(4) admits statements made for purposes of diagnosis or treatment, it does not require that such statements be made to a physician. The statements may also be made to hospital attendants, ambulance drivers, and members of the family.[158] The element of trustworthiness again appears to be satisfied because in making such a statement to any of these persons, the declarant is usually seeking aid and thus has no motive to deceive.

The differences between the California Code and the federal rules concerning statements of past physical condition are significant. California limits admissibility of such statements by the general trustworthiness standard of section 1252; there is no limitation on the class of recipients. The statements are admitted only where declarant is unavailable and past physical condition is directly in issue. The federal rules, on the other hand, limit the class of recipients,[159] and do not have an unavailability requirement. Perhaps most significantly, rule 803(4) does not expressly limit the use of such statements to cases in which past physical condition is directly in issue. The statements may be put to more than one use, apparently because reliability rather than necessity is the primary rationale under the federal rules. Thus, a statement of past physical condition may be offered to prove not only such past physical condition, but also to infer the declarant's conduct in accord with that past physical condition.

Suppose defendant-declarant is on trial for burglary, and the prosecution's major evidence is testimony of a witness who says he saw defendant running away "very fast" with the stolen goods. The defendant contends that he is not the perpetrator, that he was nowhere near the store. The defendant's conduct at the time of the crime is therefore directly in issue. The defense introduces a statement defendant made to his doctor, whom he consulted for treatment a week after the crime: "All last week I had terrible gout pains in my legs. It was killing me." The doctor's testimony is used to show that defendant in fact had gout all last week, that given this past physical condition he was unable to run without excruciating pain, and that therefore defendant was not the person the witness saw.[160] Under the federal rules this use of past physical condition

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[158] FED. R. EVID. 803(4), Advisory Comm. Notes.

[159] Possibly there is little difference between the Evidence Code and the federal rules regarding the class of recipients. Section 1252 may be merely another way of requiring the same degree and kind of trustworthiness generally existing in the context of treatment or diagnosis.

[160] Even in this doctor-patient context, a trial judge in California might find a motive to deceive by the declarant and exclude the evidence as lacking trustworthiness. *See* text accompanying notes 165-169 *infra*.

statement to infer past conduct would be admissible; under the California Code it would not.[161]

The foregoing example illustrates a use of past physical condition statements on which there is as yet no case law. Because prior federal case law does not identify this as a possible use of such statements, it is unclear whether the federal rules drafters were conscious of it. If they were not, the foresight of the California Code drafters in specifically limiting the use of such statements to cases in which past state of mind is directly in issue becomes apparent. Nevertheless, the potential to exploit such a use exists under federal rule 803(4) but not under Evidence Code section 1251.

VIII. DISCRETIONARY POWERS OF THE JUDGE

Even though a hearsay state of mind declaration is introduced for a proper purpose under the exception, the judge may still exclude the evidence by exercising certain discretionary powers. Under the Evidence Code, the California trial judge may exclude state of mind evidence when he determines that the declarant had a motive to deceive.[162] Additionally, under both the Evidence Code[163] and the federal rules,[164] the trial judge is given discretion to exclude any evidence when its probative danger outweighs its probative value.

A. TRUSTWORTHINESS: SECTION 1252

As mentioned earlier,[165] the combination of the reliability and

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[161] This is similar to use of statement of present state of mind to prove past conduct of the declarant. *See* text accompanying notes 99-102 *supra*. But now it is a statement of *past* physical condition used to infer the declarant's past conduct. Although the House Committee Report, note 126 *supra*, limits the *Hillmon* doctrine (state of mind to infer conduct) to subsequent conduct of the declarant, that Report refers to rule 803(3) (present state of mind-physical condition), not rule 803(4) (physical condition statements made for diagnosis or treatment). Moreover, *Hillmon* is a present state of mind case, not a past physical condition case.

[162] CAL. EVID. CODE § 1252 (West 1968):

> Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

[163] CAL. EVID. CODE § 352 (West 1968):

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

[164] FED. R. EVID. 403:

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

[165] *See* text accompanying notes 48-68 *supra*.

necessity rationales justifies the admission of hearsay state of mind declarations. The reliable nature of the statements minimizes the first three hearsay risks (perception, memory, narration). Even though the risk of untruthfulness remains, necessity warrants admissibility. At common law, the courts recognized the need to minimize the risk of declarant's untruthfulness and thus developed a procedural safeguard. The judge carefully scrutinized hearsay statements of state of mind for declarant's motive to deceive. By exercising his wide discretion in applying this safeguard, a judge excluded the statements when he found trustworthiness lacking.[166]

For example, the California Supreme Court, in *People v. Hamilton*,[167] ruled inadmissible statements of a murder victim that she feared the defendant. Because a charge of carrying a concealed weapon was pending against the victim, and her statements had been made to justify possession of the weapon, the court found a probable motive to deceive and ruled that the statements were untrustworthy. Although *Hamilton* has been repudiated on other grounds,[168] its trustworthiness analysis reflects existing law and is codified in Evidence Code section 1252. Both sections 1250 and 1251 are subject to the judge's discretion in applying the trustworthiness standard. This standard is applied by looking to the circumstances surrounding the declaration to infer the motives of the declarant. It is a test of the declarant's motive to deceive; it is not a test of the witness's credibility.[169]

The federal rules do not have a general trustworthiness standard as a condition of admissibility. The reasons for this are apparently that (a) the jury can determine a declarant's motive to deceive as well as the judge, and (b) admissibility of past state of mind or physical condition statements, inherently suspect, is limited to traditional necessity situations and specific trustworthy contexts. The declaration is therefore admitted, and the trier of fact uses the possible existence of a motive to deceive in evaluating the weight of the evidence.

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[166] People v. Cruz, 264 Cal. App. 2d 350, 70 Cal. Rptr. 603 (2d Dist. 1968) (statement excluded because declarant had strong motive to deceive police); People v. Talle, 111 Cal. App. 2d 650, 245 P.2d 633 (1st Dist. 1952) (statement excluded for lack of trustworthiness because made to attorney in preparation of declarant's case).

[167] 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961).

[168] CAL. EVID. CODE § 1252, Law Rev. Comm'n Comment (West 1968).

[169] People v. Spencer, 71 Cal. 2d 933, 947, 458 P.2d 43, 53, 80 Cal. Rptr. 99, 109 (1969) (hearsay state of mind statement not excludable under § 1252 because witness at trial had motive to deceive; the § 1252 standard is applied to the declarant's motive).

B. PREJUDICIAL EFFECT: SECTION 352, RULE 403

The Law Revision Commission comments to the Evidence Code indicate that a blanket exclusion of all statements relating prejudicial past acts of the defendant is improper. They emphasize the trial judge's discretion under section 352 "to weigh the need for the evidence against the dangers of misuse" on a case-by-case basis.[170] The trial judge could, of course, exclude the evidence when probative danger of misuse or prejudice is too great even with a limiting instruction. An issue, however, that arises frequently is how to deal with the prejudicial aspects of state of mind declarations if a limiting instruction is unlikely to prevent jury misuse of the evidence, but the declarations have such high probative value that the court feels compelled to admit them.[171] Some courts have suggested trimming the statements to a less prejudicial form.[172]

For example, if the victim of a knifing, a week before his violent death, told a friend, "I am afraid of Joe [the defendant] because he threatened to cut my guts out," the statement does more than just show the victim's fear.[173] What more it shows is clearly prejudicial to Joe. The statement would probably be trimmed to exclude Joe's threat. But even if the trimmed statement "I am afraid of Joe" is offered, it still tends to relate that Joe must have done something to warrant such fear, and further that Joe was probably the perpetrator of the subsequent crime.[174] If so, it implies past conduct of the defendant.[175] But if the judge trims the statement further to

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[170] CAL. EVID. CODE § 1252, Law Rev. Comm'n Comment (West 1968).

[171] *See* text accompanying notes 103-111 *supra*.

[172] In Adkins v. Brett, 184 Cal. 252, 259, 193 P. 251, 254 (1920), Justice Olney discussed this trimming exercise to reduce prejudicial aspects of a state of mind declaration:

> It may also be that the portions of the declaration which there is danger may be misused by the jury are not so interwoven with the balance of the declaration but that they can be disassociated from it without impairing the meaning or effect of the declaration for the purpose for which it is admissible. In such a case evidence of such portions of the declaration may be excluded. . . . The point of the matter is that the opponent of such evidence, so likely to be misused against him, is entitled to such protection against its misuse as can reasonably be given him without impairing the ability of the other party to prove his case, as depriving him of the use of competent evidence reasonably necessary for that purpose.

For approval of this method to avoid prejudice, *see* United States v. Brown, 490 F.2d 758, 778 (1973); MCCORMICK (2d ed.), *supra* note 12, § 294 at 696-97 n.67.

[173] Assume the victim's subsequent conduct is put in issue by the defense. It is therefore directly in issue. *See* text accompanying notes 76-82 *supra*.

[174] For discussion of implied assertions *see* text accompanying notes 18-47 *supra*.

[175] If the statement is construed as an assertion of Joe's past conduct, admitting it would be a technical violation of the *Shepard* limitation. However, when the declarant's conduct is directly in issue, a limiting instruction is adequate to prevent misuse. *See* text accompanying notes 109-111 *supra*.

"I am afraid," it loses almost all its probative value. It appears, then, that the judge should give a limiting instruction and trim the declaration to the point where the prejudice no longer outweighs probative value. In the foregoing example, "I am afraid of Joe" would probably be the statement's admissible form, accompanied by a limiting instruction.[176]

The form in which evidence is admitted has a significant impact on the weight the trier of fact will give to the evidence. Both the Evidence Code and the federal rules give the trial judge wide discretion in making this determination,[177] and the exercise of that discretion is rarely overturned on appeal. This balancing of factors to arrive at an admissible form of the evidence occurs with sufficient frequency that the California attorney must incorporate it into his analysis and application of the state of mind exception.

IX. CONCLUSION

Because of its potential to consume the hearsay rule, the state of mind exception may well be one of the most elusive and most difficult to apply of all the hearsay exceptions. Even the initial determination of whether a statement used to show state of mind is hearsay is fraught with uncertainties. Determining whether declarations of state of mind are admissible is similar to negotiating an obstacle course. If a declaration is classified as a hearsay statement of state of mind, it must clear a succession of obstacles before it will be admitted under the exception. It must be made under circumstances indicating trustworthiness. It may not be used to prove a fact remembered or believed. Moreover, present state of mind declarations may be used only for certain purposes, which are different from the purposes for which past state of mind declarations may be used. Even when a declaration clears these statutory hurdles, it is still subject to exclusion. Because the inferences in the highly subjective area of state of mind are often tenuous, a judge may be more prone to exercise his discretion to exclude state of mind statements than with other, more objective kinds of statements.

Nevertheless, because people frequently make state of mind declarations, and because such statements can be used to show the declarant's mental state or his conduct, two issues which are often crucial in a case, the obstacle course is well worth negotiating.

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[176] *See* United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973). In *Brown*, Judge MacKinnon termed this process "prophylactic measures for minimizing prejudicial dangers." *Id.* at 777-78.

[177] FED. R. EVID. 403 set forth in note 164 *supra;* CAL. EVID. CODE § 352 (West 1968) set forth in note 163 *supra.*