Conditional Relevance and the Admissibility of Party Admissions

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I. INTRODUCTION

Among the most significant differences between the Federal Rules of Evidence and the California Evidence Code is the allocation between judge and jury of the responsibility for finding preliminary facts. The difference, however, did not emerge from conscious drafting choices in the original Federal Rules of Evidence and the original California Evidence Code. Initially, both appeared quite consistent in distinguishing between preliminary facts upon which the relevancy of evidence depends, and all other preliminary factual determinations. The divergence was created by the interpretation of the Federal Rules of Evidence by the United States Supreme Court in Bourjaily v. United States, and the subsequent...

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amendment of the Rules to conform to and expand the Bourjaily interpretation.2

This paper will advance the proposition that Bourjaily has injected inconsistency and confusion into the Federal Rules of Evidence that have been avoided under the California Evidence Code. I conclude that the treatment of the allocation of responsibility for the finding of preliminary facts currently embodied in the California Evidence Code is superior to the post-Bourjaily Federal Rules of Evidence and should be retained.

II. THE ALLOCATION OF RESPONSIBILITY FOR FINDING PRELIMINARY FACTS UNDER THE CALIFORNIA EVIDENCE CODE

The fundamental distinction made in the California Evidence Code in allocating responsibility for finding preliminary facts is the distinction between those preliminary facts that determine the relevancy of the proffered evidence, and the preliminary facts that determine some other aspect of the competency of the evidence.3 Section 403 of the California Evidence Code lists four categories of preliminary facts where the proponent need only present evidence sufficient to support a finding of the preliminary fact by the jury.4

Under section 403, the jury is instructed to first resolve the determination of the preliminary fact.5 If the jury finds the preliminary fact is true, they can then consider the evidence.6 If they determine the preliminary fact is not true, they are instructed by the judge to disregard the evidence.7 The four categories of preliminary facts listed in section 403 are:

The relevance of the proffered evidence depends on the existence of the preliminary fact; The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony; The preliminary fact is the authenticity of a writing; or The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.8

With some justification, Justice Otto Kaus accused the drafters of

2. FED. R. EVID. 104.
3. CAL. EVID. CODE § 403 (West 2004).
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
section 403 of being lovers of redundancy. Arguably, the categories listed in subsections (2), (3) and (4) are all examples of relevance, which is listed as the first category. Professor Miguel Méndez suggests that the personal knowledge requirement listed in subsection (2) does not rest upon concepts of relevance, but even that could be debated.

Section 405 then provides that all preliminary factual determinations not governed by section 403 (or section 404, not relevant to this discussion) are to be made with finality by the judge. The illustrative examples offered by the Assembly Committee on the Judiciary in enacting the Code cross reference each of the Code sections where a preliminary factual determination would be made in accordance with section 403, i.e., submission of the question to the jury after the proponent presents evidence sufficient to support a finding of the preliminary fact. They include: section 702, the requirement of personal knowledge; sections 1400-1402, the requirement of authentication of writings; and with respect to all hearsay exceptions in sections 1200-1341, the requirement of proof of the identity of a hearsay declarant.

Of particular interest for present purposes, the Assembly Committee Commentary to section 403 also lists each of the California hearsay exceptions for party admissions, noting that the preliminary factual questions which they raise will ordinarily be decided by the jury pursuant to section 403. The admissions of a party offered pursuant to section 1220 require the introduction of evidence sufficient to sustain a finding that the party made the statement. Authorized and adoptive admissions offered under sections 1221 or 1222 require introduction of evidence sufficient to sustain a finding that the statement was authorized or adopted by the party against whom it is offered. With respect to coconspirator statements, the comment provides: "The admission of a co-conspirator is another form of an authorized admission. Hence, the proffered evidence is admissible upon the introduction of evidence sufficient to sustain a finding of the conspiracy. Existing law is in accord."

The definition of the coconspirator exception itself again confirms the
role the jury is to play, providing the statement of a coconspirator must (a) have been made by the declarant while participating in an conspiracy and in furtherance of the objective of the conspiracy, and (b) have been made while the defendant was participating in the conspiracy, and must be offered "either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."  

Thus, the California Evidence Code consistently treats all preliminary questions of conditional relevance the same: the offering party need only present evidence sufficient to sustain a finding of the existence of the preliminary fact.19 The evidence will then be presented to the jury with an instruction to disregard it unless the jury finds the preliminary fact does exist.20 Additionally, the California Evidence Code makes it abundantly clear that the preliminary factual showings necessary to admit every form of party admission are questions of conditional relevance.21

Section 403(c)(1) further provides that if proffered evidence is admitted pursuant to section 403, the court "[m]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds the preliminary fact exists."22 Thus, California juries are routinely instructed to disregard evidence if a preliminary fact that determines the relevancy of the evidence is found not to exist.23 Typical is the standard instruction recommended by the California Judicial Council with respect to coconspirator's statements:

In deciding whether the People have proved that (the defendant) committed the crime charged, you may not consider any statement made out of court by (the coconspirator) unless the People have proved by a preponderance of the evidence that:

Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;
(The coconspirator) was a member of and participating in the conspiracy when he made the statement;
(The coconspirator) made the statement in order to further the goal of the conspiracy; AND

The statement was made before or during the time that (the defendant) was participating in the conspiracy.

18. CAL. EVID. CODE § 1223 (West 2004).
19. CAL. EVID. CODE § 403 (West 2004).
20. Id.
21. CAL. EVID. CODE § 403 (West 2004) law revision commission comments.
22. CAL. EVID. CODE § 403 (West 2004).
23. Id.
A statement means an oral or written expression, or nonverbal conduct intended to be a substitute for an oral or written expression. Proof by a preponderance of evidence is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [You may not consider statements made by a person who was not a member of the conspiracy even if the statements helped accomplish the goal of the conspiracy.] [You may not consider statements made after the goal of the conspiracy had been accomplished.24]

California appellate courts have held that the trial court has a sua sponte duty to give such an instruction whenever coconspirator statements are admitted, even if a request pursuant to section 403 has not been made.25

III. THE ALLOCATION OF RESPONSIBILITY FOR FINDING PRELIMINARY FACTS IN FEDERAL COURTS PRIOR TO BOURJAILY

Prior to the Bourjaily decision, every category of preliminary fact listed in California Evidence Code section 403 was treated as a question of conditional relevance governed by the Federal Rule of Evidence 104(b). Rule 104(b) refers generally to all cases where the relevancy of the evidence depends upon fulfillment of a condition of fact, providing that the court shall admit it upon the introduction of evidence sufficient to support a finding of the condition.26 Federal Rule 602, which requires personal knowledge as a prerequisite for any witness to testify to a matter, makes it clear that the requirement of personal knowledge is a Rule 104(b) question of conditional relevance by requiring the introduction of evidence sufficient to support a finding that the witness has personal knowledge.27 Federal Rule 901(a), which requires authentication or identification as a condition precedent to the admissibility of any evidence, also makes it clear that authentication is a Rule 104(b) question of conditional relevance by requiring the introduction of evidence sufficient to support a finding that the matter in question is what its proponent claims.28

The Federal Rules of Evidence do not spell out that the question of whether the particular person claimed to have made a statement or conducted himself in a particular way actually made the statement or so

25. People v. Smith, 231 Cal.Rptr. 897, 905-06 (1986); see JUDICIAL COUNSEL CAL. CRIM. JURY INSTRUCTION NO. 418 (2006), bench note.
26. FED. R. EVID. 104(b).
27. FED. R. EVID. 602.
28. FED. R. EVID. 901(a).
conducted himself was also a question of conditional relevance governed by Rule 104(b), as is done in category (4) of section 403(a) of the California Evidence Code.\(^2\) However, the Advisory Committee Comment to Federal Rule 104(b) offers examples that would clearly be governed by California Evidence Code section 403(a)(4) in a California court:

In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled "conditional relevancy."\(^3\)

The requirement of submission of the preliminary question to the jury is also implicit in the examples of the requirement of identification under Federal Rule 901(b).\(^4\) The identification of the speaker of a particular statement based upon the hearing of the voice or other circumstances is offered as an illustration in which identification requires evidence sufficient to support a finding.\(^5\) The Advisory Committee's note to Rule 901 confirms that this is being treated as a question of conditional relevancy: "Thus a telephone conversation may be irrelevant . . . because the speaker is not identified."\(^6\)

Prior to the adoption of the Federal Rules of Evidence, lower federal courts generally treated preliminary questions regarding the admissibility of party admissions, as questions of conditional relevance to be submitted to the jury for final determination after the presentation of evidence sufficient to support a finding.\(^7\) The only deviation appeared to be coconspirator statements, where some lower courts suggested that the judge should determine admissibility with finality.\(^8\) The overwhelming majority of federal courts treated the admissibility of coconspirator statements as an issue to be submitted to the jury, after prima facie showing of evidence sufficient to support a finding.\(^9\) In fact, the standard jury instruction not only submitted the question to the jury, but required the jury to find the

\(^{29.}\) CAL. EVID. CODE § 403 (West 2004).
\(^{30.}\) FED. R. EVID. 104 advisory committee's note.
\(^{31.}\) FED. R. EVID. 901(b).
\(^{32.}\) Id.
\(^{33.}\) Id.
\(^{34.}\) Id.
\(^{35.}\) EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY INSTRUCTIONS § 29.05 (2d ed. 1970).
existence of the conspiracy and the defendant’s membership in it beyond a reasonable doubt before coconspirator statements could be considered against a defendant. To be sure, there was cogent and weighty criticism of this instruction. For example, in Judge Learned Hand’s opinion in United States v. Dennis affirming the convictions for Smith Act violations, he offered dicta that was highly critical of the use of this standard instruction:

It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what the jury had already decided. In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all. The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments that this requires.

Relying upon Judge Hand’s dicta, the Ninth Circuit in Carbo v. United States held that coconspirator statements should be admitted with finality based upon the judge’s finding of a prima facie showing of the existence of the conspiracy and defendant’s membership in it. Judge Hand’s position was also endorsed by the Second Circuit in United States v. Geaney. All of these decisions, to be sure, begged the fundamental question of whether the defendant’s membership in the conspiracy was an issue of conditional relevance. Judge Hand clearly regarded it as a question of competence, rather than relevance, and concluded it should be treated the same as every other issue of competency of evidence, to be decided with finality by the judge.
At least with respect to coconspirator statements, the Federal Rules of Evidence did not explicitly address this question. Nevertheless, the standard jury instructions used in most federal criminal cases continued to require submission of the question to the jury, and continued to require a finding by the jury beyond a reasonable doubt.44 The Notes that accompanied this instruction made it clear that this treatment of the admissibility issue was consistent with Rule 104(b) of the Federal Rules of Evidence, rather than Rule 104(a):

Under Rule 105, Federal Rules of Evidence, an instruction restricting the scope of evidence should be given at the time the evidence is received, if requested. It would be prudent to give such an instruction at the time evidence of declarations of alleged coconspirators is received. Rule 104(b) gives the court discretion to receive evidence subject to its being connected up later.45

The Note was also critical of the views of the Second and Ninth Circuit, later joined by the Third Circuit:

It appeared that the Second Circuit may have a view of the law in this area which is less restrictive from the prosecution’s standpoint than that which prevails elsewhere, and it would appear that the instruction as set out in the text is safer. The second circuit’s view seems similar to that expressed in United States v. Bey, 437 F.2d 188 (3d Cir. 1971) and Carbo v. United States, 314 F.2d 718, 735 (9th Cir. 1963), containing valuable discussion. . . . In other circuits, the form on the text seems safer.46

IV. THE BOURJAILY DECISION AND ITS AFTERMATH

In Bourjaily v. United States, the U.S. Supreme Court addressed the admissibility of a coconspirator’s statement under the Federal Rules of Evidence.47 The question was whether a court could consider the out-of-court coconspirator statement itself in determining whether the statement was made in furtherance of a conspiracy of which the defendant was a member.48 The opinion of the Court, authored by Chief Justice William Rehnquist, assumed that this question would be resolved pursuant to Rule 104(a) of the Federal Rules of Evidence:

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44. EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.06 (3d ed. 1977).
45. Id. at 15.
46. Id. at 19.
47. Bourjaily, 483 U.S. at 173.
48. Id.
Federal Rule of Evidence 104(a) provides: “Preliminary questions concerning... the admissibility of evidence shall be determined by the court.” Petitioner and the government agree that the existence of a conspiracy and petitioner’s involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court.49

Thus, the Court never considered any argument that the preliminary question should be decided under Rule 104(b), as a question of conditional relevance. It is readily understandable why both the government and the Petitioner saw tactical advantages to utilizing Rule 104(a) rather than Rule 104(b). The government could then utilize the “bootstrapping” provision of Rule 104(a), which provides, “[i]n making its determination [the court] is not bound by the rules of evidence except those with respect to privileges.”50 Ultimately, the Court found this language dispositive in ruling in the government’s favor, and allowing the court to consider the statement itself to determine the preliminary question.51 The petitioner, on the other hand, saw an advantage in arguing for a higher standard of proof on the preliminary question under Rule 104(a).52 Rule 104(b) explicitly requires only the introduction of evidence “sufficient to support a finding” of the preliminary fact.53 Rule 104(a), on the other hand, would require proof by a preponderance of the evidence.54 Petitioner argued that the proof had to be independent of the statement itself, relying upon statements to that effect in two previous precedents of the Court, Glasser v. United States,55 and United States v. Nixon,56 both decided before the Federal Rules of Evidence enactment in 1975.57 As the Court conceded, the courts of appeal widely held that in determining the preliminary facts relative to coconspirator’s statements, a court may not look at the hearsay statements themselves.58 A careful analysis might have revealed that the courts of appeal were widely requiring independent evidence not because they were ignoring Rule 104(a)’s adoption of a rule permitting bootstrapping, but because they were treating the issue as a question of conditional relevance pursuant to Rule 104(b). In any event, the Supreme Court concluded that the 1975 adoption of the Federal Rules of Evidence prevailed over the

49. Id. at 175.
50. FED. R. EVID. 104(a).
51. Bourjaily, 483 U.S. at 181.
52. See id. at 178-79.
53. FED. R. EVID. 104(b).
54. FED. R. EVID. 104(a).
55. 315 U.S. 60 (1942).
57. Bourjaily, 483 U.S. at 176-77.
58. Id. at 177.
contrary statements in both Glasser and Nixon, and permitted consideration of the statement itself in determining its admissibility.\textsuperscript{59}

We might have been left with a mildly mischievous exception for coconspirator statements after Bourjaily, but in 1997 the Advisory Committee on the Federal Rules of Evidence extended the mischief to authorized and agent admissions as well.\textsuperscript{60} Rule 801(d)(2) was adopted to not only codify the Bourjaily decision with respect to coconspirator statements offered under Rule 801(d)(2)(E), but also to permit Rule 104(a) bootstrapping for statements offered under (C) and (D):

The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).\textsuperscript{61}

Apparently, the Advisory Committee had no intention to disturb party admissions offered pursuant to Rule 801(d)(2)(A) or (B), in which the preliminary fact involves the direct conduct of the party himself in making the statement or manifesting an adoption or belief in its truth.\textsuperscript{62} No agency principles come into play in these settings.\textsuperscript{63} The Advisory Committee explained:

In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant’s authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).\textsuperscript{64}

With all due respect to the Advisory Committee, the suggestion that Bourjaily was based upon some sort of aversion to the use of the law of agency in determining preliminary facts finds no support whatsoever in the decision itself.

The distinction which the Federal Rules now make between direct and adoptive admissions on the one hand, and authorized, agent and coconspirator admissions on the other hand, ignores the consistency of the rationale that supports the admission of all five forms of party admissions.

\textsuperscript{59} Id. at 181.
\textsuperscript{60} FED R. EVID. 801(d)(2).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} See FED. R. EVID. 801 advisory committee’s note.
\textsuperscript{64} Id.
The reason such admissions are deemed to fall outside of the hearsay rule is not because of a heightened reliability of the circumstances in which they are made, but because cross examination is regarded as superfluous. The reason cross-examination is superfluous is because the person who made the statement is the person against whom it is now offered, and would only be cross-examining himself. However, that is not true if the person against whom the statement is now offered was not the person who made the statement. Thus, if correct identity is not established as a preliminary fact, the statement is excluded. However, it is excluded not just because it is now inadmissible hearsay, but also because it is irrelevant.

I am fully aware that many scholars and judges would dispute the suggestion that the mere failure to correctly identify the source of an alleged admission renders the statement irrelevant. Among those who fell victim to this heresy was my dear, departed friend Otto Kaus. I think Otto Kaus had a greater understanding of the law of Evidence than any Justice who ever sat on the California Supreme Court, but he never really understood conditional relevance.

In his classic critique of the then newly minted California Evidence Code, Kaus took the drafters to task for confusing identity with relevance. "This is nonsense," he asserts. "On D's trial for the murder of V, the statement 'D murdered V' is relevant whoever made it." He then cites a delightful example offered by Professor Maguire:

An anonymous memorandum, "I killed Cock Robin," is offered in the trial for murder of that notorious victim. The assertion is incompetent hearsay, and also irrelevant, unless authorship by the defendant makes it his admission. Should the trial judge admit the memorandum if there is enough evidence of such authorship to warrant a favorable finding to this effect, or should he exclude it unless he himself finds such authorship?

Justice Kaus then argues:

I must differ that the proffered evidence presents a problem of incompetency and irrelevance. Surely at the trial for the murder of Cock Robin, a confession is relevant whoever made it. The only difference between "D killed V" and "I killed V" is that different factual conclusions are drawn by the jury if the declarant is someone other than D. In this connection it should be pointed out that only a problem of relevance is presented where the dispute is whether the signature on a confession is that of D or whether it is a deliberate forgery; no rational trier of fact

65. Kaus, supra note 9, at 238.
66. Id.
67. Id. at 238 n.21 (citing JOHN M. MAGUIRE, EVIDENCE – COMMON SENSE AND COMMON LAW 224-25 (1947)).
would find a deliberately forged confession probative of the facts asserted therein. It should not even be necessary to instruct the jury not to base a guilty verdict on a confession which it finds to have been written and signed by the arresting officer.68

What is going on here is a classic evidentiary error, treating relevance as an abstraction somehow disconnected from the inferences one seeks to draw from the evidence. It is quite common that evidence which is irrelevant to prove one fact may meet the test of relevance if it is offered to prove some other fact. Under these circumstances, we give the jury a limiting instruction telling them to use the evidence only for the relevant purpose. The reason for the limitation, of course, is that the evidence is irrelevant for the purposes for which it was not admitted. For example, the statement “D killed V” is hardly relevant for any purpose if it was made by a drunk in a bar-room who expresses his opinion on every murder he hears about on TV. Unless we can connect the statement with an identified person who had personal knowledge, it is irrelevant. The statement “I killed Cock Robin” might give rise to different factual conclusions if it was uttered by the defendant or if it was uttered by someone else. Assume a room full of goodfellas boasting about their homicidal misadventures. An eavesdropper overhears one of them brag, “I killed Jimmy Hoffa.” If this was offered by the prosecution as an admission, but the prosecutor could not prove the defendant was the person who said it, would it nonetheless have relevance? It conceivably could have relevance if offered by the defendant with proof that someone else said it, to support a SODDI [Some Other Dude Did It] defense, but that possibility would not overcome a relevancy objection if it was offered against the defendant. Without proof of identity, the evidence would be irrelevant to prove the fact it is offered to prove, that the defendant acknowledged he murdered Jimmy Hoffa.

The relevancy point might be clearer if we eliminate the hearsay objection altogether by putting the declarant on the witness stand at trial. Suppose in the midst of trial, the prosecutor calls as a witness an employee of the defendant to simply testify that the defendant did, in fact, kill Jimmy Hoffa. We would ask, alternatively, “were you there,” in which case the testimony would meet the threshold requirement of personal knowledge, or “do you have authority to speak on behalf of the defendant,” in which case the testimony would be an authorized admission. If the answer to both our questions were “no,” we would promptly throw the witness out of court and instruct the jury to disregard his testimony. We would do so because his testimony is irrelevant. Personal knowledge and authorization are both

68. Id. at 238-39 n.21.
ADMISSIBILITY OF PARTY ADMISSIONS

questions of conditional relevancy. We would not say to the defendant, “we will now permit you to cross examine this witness.”

If the identity of the person who made a statement, or who adopted a statement made by another, is a question of conditional relevance, what logical basis is there to conclude that the existence of authority to speak on behalf of another is not a question of conditional relevance? The theory of admissibility is the same, i.e., that if you authorize others to speak on your behalf you will be treated as though you made the statement yourself. Here is how the U.S. Supreme Court explained the rationale for admission of coconspirator statements:

It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

Thus, the absence of authority renders the statement inadmissible for the same reason: because the unauthorized statement is irrelevant. The only rationale that supports the admission of authorized, agent or coconspirator statements is the existence of express or implied authority to speak on behalf of the party against whom the statement is offered. It is the same rationale that supports the admission of direct or adopted admissions.

V. POST-BOURJAILY CONFUSION IN THE FEDERAL COURTS

The failure to identify a rationale that supports treating authorized admissions differently than direct or adopted admissions has led some federal courts to ignore the distinction altogether, and treat the preliminary questions for all party admissions as Rule 104(a) questions to be decided by the judge. An example is the recent case of United States v. Garza. Garza was charged in federal court with two sales of crack cocaine to an informant working for a New Hampshire State Narcotics officer. The transactions allegedly took place eight years before the charges were filed, and tape recordings of telephone conversations between the informant and seller had been destroyed. However, the state had transcripts of the

69. FED. R. EVID. 602, 901; CAL. EVID. CODE § 403(a)(2),(3) (West 2004).
71. United States v. Garza, 435 F.3d 73, 77 (1st Cir. 2006).
72. Id.
73. Id. at 74.
74. Id. at 74-75.
conversations and offered them as evidence.\textsuperscript{75} The trial judge admitted them as "past recollection[s] recorded," a somewhat problematical ruling under Federal Rule of Evidence 803(5).\textsuperscript{76} But, the court of appeal concluded it need not address that problem since the admission of the transcript could be sustained as a party admission under Rule 801(d)(2)(A).\textsuperscript{77} The defendant argued that the transcript was not properly authenticated as containing his own statements.\textsuperscript{78} The court of appeal concluded there was no problem as long as there was sufficient evidence to establish that Garza himself made the statements in the transcript, applying a preponderance of the evidence standard.\textsuperscript{79} Citing \textit{Bourjaily}, the court concluded:

Questions of admissibility are decided by the court, Fed.\textsuperscript{78}R.\textsuperscript{78}Evid. 104(a), using the preponderance of the evidence standard. \textit{Bourjaily}, 483 U.S. at 175-76, 107 S.Ct. 2775. So long as there is a preponderance of evidence indicating that it was Garza's voice on the tapes, the transcripts could be treated as containing his admission.\textsuperscript{80}

For two reasons, I believe this conclusion was wrong. First, the identification of the defendant's voice is a question of authentication, to be decided by the jury after presentation of independent evidence sufficient to support a finding.\textsuperscript{81} Secondly, the use of Rule 104(a) to determine the admissibility of party admissions is limited to admissions offered under Rule 801(d)(2)(C), (D) and (E), but not under Rule 801(d)(2)(A), as was the case in \textit{Garza}.\textsuperscript{82}

The confusion on this issue is not limited to the federal courts, but extends to leading commentators as well. To give you one example of a court that got it exactly right, in \textit{United States v. Gil}, the Ninth Circuit Court of Appeals upheld the admission of ledgers showing drug transactions against two co-defendants.\textsuperscript{83} What's especially interesting about this case is that two ledgers were found, one in the possession of defendant Montoya, and one in the possession of defendant Gil.\textsuperscript{84} The court found sufficient circumstantial evidence of their involvement in the preparation of the ledgers to admit both as party admissions: Montoya's

\textsuperscript{75} Id. at 76.
\textsuperscript{76} Id. at 76-77.
\textsuperscript{77} \textit{Garza}, 435 F.3d at 77.
\textsuperscript{78} Id. at 76.
\textsuperscript{79} Id. at 77.
\textsuperscript{80} Id.
\textsuperscript{81} FED. R. EVID. 901(b)(5) advisory committee's note.
\textsuperscript{82} \textit{Garza}, 435 F.3d at 77.
\textsuperscript{83} United States v. Gil, 58 F.3d 1414, 1421 (9th Cir. 1995).
\textsuperscript{84} Id. at 1417-18.
ledger was admitted against him as a party admission and Gil's ledger was admitted as a party admission against him.\textsuperscript{85} However, the court held that Montoya's ledger was admissible against Gil, and Gil's ledger was admissible against Montoya, because both came within the coconspirator exception.\textsuperscript{86} Under the Federal Rules of Evidence, the court ruled that two separate evidentiary paths must be traversed to consider this evidence.\textsuperscript{87} To consider the ledgers as party admissions against the defendant who prepared them, Rule 104(b) applies, and upon the presentation of evidence sufficient to support a finding, the question of whether the defendants personally prepared the ledgers must be presented to the jury.\textsuperscript{88} But, to consider them as coconspirator statements against the co-defendant, the preliminary questions of membership in a conspiracy and its furtherance were questions for the court under \textit{Bourjaily} and required applying Rule 104(a).\textsuperscript{89} Thus, the ledgers could be admitted based upon a preponderance of the evidence.\textsuperscript{90} As bizarre as that seems, that is precisely what the Federal Rules currently require, and I believe the Ninth Circuit Court got it right. Yet, in their analysis of the \textit{Gil} decision, Professors Saltzburg, Martin and Capra take the court to task: "In our view, the question of whether a proffered statement is that of the party is governed by the preponderance standard of Rule 104(a), rather than the \textit{prima facie} evidence standard of Rule 104(b). We believe this result is mandated by \textit{Bourjaily v. United States}."\textsuperscript{91}

Apparently, the professors would go beyond the Rules Committee, and read \textit{Bourjaily} as obliterating the conditional relevance rule for all five categories of party admissions under Rule 801(d)(2). Some have suggested \textit{Bourjaily} even goes beyond that, obliterating conditional relevance for all hearsay exceptions.\textsuperscript{92} For example, imagine a claim that a prior inconsistency was actually uttered by someone other than the witness being impeached, or that an excited utterance actually was spoken by another person in the crowd, not the person to whom a party attributes it. Federal Rule 901 would only require evidence sufficient to support a finding, but the broad reading some are giving to \textit{Bourjaily} would obliterate Rule 901 as well.

\textsuperscript{85} \textit{Id.} at 1420-21.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 1419-20.
\textsuperscript{88} \textit{Id.} at 1419.
\textsuperscript{89} \textit{Gil}, 58 F.3d at 1420.
\textsuperscript{90} \textit{Id.} at 1420-21.
\textsuperscript{91} STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 4 FEDERAL RULES OF EVIDENCE MANUAL § 801, at 152-53 (8th ed. 2002).
\textsuperscript{92} United States v. Harvey, 117 F.3d 1044, 1050 (7th Cir. 1997).
VI. WHAT DIFFERENCE DOES IT MAKE?

I realize that many courts, and many Evidence professors, may not view with any particular alarm the potential demise of the conditional relevance rule. Why not have the judge make all determinations of the preliminary facts that determine the admissibility of evidence? Wouldn't it be a lot simpler, and wouldn't we get more reliable determinations of preliminary facts? Pondering that question led me back to the origins of the conditional relevance rule, long before either the California Evidence Code or the Federal Rules of Evidence existed. I found that a great deal of inconsistency characterized the pre-rule era, and the leading scholars were not particularly enamored with the idea of allowing juries to disregard evidence if they concluded a foundational fact had not been established. Here's how Professor Morgan put it:

Although it is a clumsy and intellectually dishonest expedient, it cannot be condemned as utterly foreign to common law methodology. Many an anachronistic doctrine has found its way out of the common law by some such devious path. Usually on its journey out, however, it has sorely discomfited litigants, lawyers and judges. If the time has come for these rules of evidence to cease to trouble the course of litigation, it is to be hoped that a more speedy and merciful means of extermination will be found.93

However, there does seem to be a grudging acceptance of the proposition that a litigant may be deprived of his or her right to a jury trial if the judge were allowed to decide a preliminary question of conditional relevance with finality. The dilemma is neatly illustrated by the example offered in the Comment of the Assembly Committee on Judiciary to section 403 of the California Evidence Code:

For example, if the question of A's title to land is in issue, A may seek to prove his title by a deed from former owner O. Section 1401 requires that the deed be authenticated, and the judge, under Section 403, must rule on the question of authentication. If A introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence, were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic

factual issue in the case and A would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient to warrant a jury finding in his favor.\footnote{CAL. EVID. CODE § 403 (West 2004) law revision commission comments.}

One might fairly ask whether this is a scenario that could occur in the context of a party admission. It certainly could, but only where the judge excludes the evidence rather than admitting it. If the evidence is admitted, even with finality, the jury will still wield power to give the evidence whatever weight it wishes. If the party admission is excluded, however, the party offering it may be deprived of a jury determination of whether liability was admitted, even though there is evidence sufficient to warrant a finding that the admission was, in fact, made, adopted or authorized by the opposing party.

I find it interesting that one of the justifications offered for the Bourjaily rule is that a higher standard of proof (a preponderance rather than evidence sufficient to support a finding) will result in more frequent exclusion of proffered coconspirator statements. For example, the current authors of McCormick on Evidence attribute the Bourjaily ruling to “the court’s understandable wish to limit the use of conspiracy charges by prosecutors.”\footnote{KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 105 (6th ed. 2006).} That suggestion is laughable since the availability of the “bootstrapping” procedure under the Bourjaily ruling more than offsets the higher evidentiary standard, and assures the admission of coconspirator statements in a great many more cases. Yet, the fact remains that whether coconspirator statements are admitted or excluded will often determine the outcome of a jury trial of a conspiracy case.

I must express real doubts whether, apart from the “bootstrapping” rule, the difference between evidence sufficient to support a finding and proof by a preponderance will make any difference whatsoever. I have never met a judge who, when presented with evidence sufficient to support a finding that a coconspirator statement is admissible, will not make the finding and admit the statement. So the virtue of the conditional relevance rule is simply that it preserves the right to a jury trial, for whatever it is worth. Either way, the jury hears the coconspirator statement. But under the conditional relevance approach of the California Evidence Code, counsel can seek to persuade the jury to disregard it.\footnote{CAL. EVID. CODE § 403 (West 2004).}

Many will argue that it is not worth much in this setting. If the statement is admitted subject to a jury finding of admissibility, will the jury be able to disregard the statement itself in determining, by a preponderance of the evidence, that all of the prerequisites for an admissible coconspirator
statement have been met? Is a jury capable of understanding and applying the convoluted requirements of CALCRIM. No. 418? I, for one, believe they are. Accordingly, we should not abandon the protection of a jury determination in this setting, unless we are prepared to disenfranchise the jury in every setting where we deem limiting instructions too complex. I am not aware of a "complexity" exception to the constitutional guarantee of trial by jury.

The greatest vulnerability of my position may be the suggestion that my real objection is not to turning all questions of admissibility over to the judge, but it is to allowing the judge to consider the questioned evidence itself in determining whether the evidence is admissible. Is my real objection to the hated (by me) "bootstrapping" rule? California made a very conscious choice to reject "bootstrapping" when the California Evidence Code was adopted, 97 and I believe that choice was a wise one. The California Law Revision Commission recommended that "bootstrapping" be permitted in making section 405 admissibility determinations, but the Legislature rejected that recommendation. 98 What if we modified the California Evidence Code to make the admissibility of party admissions section 405 questions, rather than section 403 questions, without abandoning the California Evidence Code's forthright rejection of the "bootstrapping" rule? I must confess that such a proposed change would not get me as worked up as the prospect of totally federalizing the California Evidence Code by adding Rule 104(a) to its provisions, even though it would reduce the level of protection we give to the right to a jury trial. But what principle would justify limiting such a change to party admissions? Why should preliminary questions about the identity of a declarant or the existence of adoption or authority be treated differently than preliminary questions of personal knowledge or authentication? They are all questions of conditional relevance, and I have yet to hear an argument that justifies treating them differently in allocating the responsibility between judge and jury to decide them. Otto Kaus concluded his critique with a pertinent observation: "Admittedly, to desire structure for structure's sake is childish. If a particular departure from orthodoxy is commanded by sound policy, one should give it a try." 99

I would like to conclude with the same observation. I do not find in the Bourjaily opinion any sound principle or policy to single out coconspirator statements and treat them differently than other questions of conditional

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97. FED. R. EVID. 104, advisory committee note; see CAL. EVID. CODE § 405 (West 2004).
98. MÉNDEZ, supra note 10, at 341, § 17.05; cf. FED. R. EVID. 104(a) advisory committee's note.
99. Kaus, supra note 9, at 252.
relevancy. I do not find in the report of the Federal Rules of Evidence Advisory Committee recommending the subsequent amendment of Rule 801(d)(2) any sound principle or policy to single out authorized or agent admissions and treat them differently than direct or adopted admissions, or, for that matter, any other questions of conditional relevancy. I do not find in any of the reported federal decisions any sound principle or policy to treat all party admissions differently than other questions of conditional relevancy. The structure erected in the California Evidence Code by sections 403 and 405 should be maintained, not just because it is rational and symmetrical and protects the right to jury trial, but because there is no sound principle or policy to justify changing it.