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SYMPOSIUM ON THE FEDERAL RULES OF EVIDENCE

INTRODUCTION

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After a protracted pregnancy[1] and a difficult delivery,[2] the Federal Rules of Evidence[3] are celebrating their first birthday—an event deserving of a symposium devoted to how the new arrival is faring. All complex statutes, it seems fair to venture, suffer growing pains, as possible ambiguities in draftsmanship, inconsistencies between sections, and omissions of coverage are probed by attorneys, the courts and, of course, contributors to law reviews in articles such as those which follow.

Although some unresolved problems remain, it is already clear that the infant evidence code is destined to be a leader. As of July 1, 1976 (its first anniversary), five states—Arkansas,[4] Maine,[5] Nebraska,[6] New Mexico,[7] and Wisconsin[8]—had adopted some version of the Federal Rules. Florida's enactment bears an

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1. The Advisory Committee which drafted the Federal Rules of Evidence was appointed in March 1965. Its Preliminary Draft was published in March 1969. 46 F.R.D. 161 (1969).

2. After promulgation by the Supreme Court on November 20, 1972, the Rules were transmitted to Congress and were to take effect on July 1, 1973, unless disapproved by Congress within ninety days. Congress proceeded to defer the effective date of the Rules until such time as they were affirmatively enacted, which finally occurred in December 1974. The Rules were signed into law on January 2, 1975.

3. 28 U.S.C.A. FEDERAL RULES OF EVIDENCE 101-1103 (1975) [hereinafter cited as FED. R. EVID.].

4. ARK. STAT. ANN. § 28-1001 (1976) (effective July 1, 1976).

5. ME. REV. STAT. ANN. tit. 14, § 6101 (Supp. 1975) (effective Feb. 2, 1976).

6. NEB. REV. STAT. § 27-101 to § 27-1103 (Supp. 1975) (effective Aug. 24, 1975).

7. N.M. STAT. ANN. § 20-4-101 to § 20-4-1102 (Supp. 1975), *as amended* N.M. STAT. ANN. § 20-4-105 to § 20-4-1101 (Interim Supp. 1976) (originally effective July 1, 1973; amendments effective Apr. 1, 1976).

8. WIS. STAT. ANN. § 901.01 to § 901.07 (1975) (effective Jan. 1, 1974).

effective date of July 1, 1977,[9] and other states as well are contemplating adoption.[10] On the basis of this sample, it seems safe to predict a bright future; the new rules may even prove as influential as the Federal Rules of Civil Procedure. This will mean that virtually all practicing attorneys, including those who seldom or never venture into federal court, will be affected.

For some this will require a shift in approach. New burdens have been imposed on the bar and bench by the Federal Rules' rejection of a mechanical test which automatically excludes certain categories of evidence in favor of a flexible approach which focuses on the impact of the proffered proof in the context of the case.[11] Instead of relying on black letter law to resolve evidentiary problems, the attorney has to articulate the various factors on which admissibility or exclusion turns. The trial judge, too, must be prepared to explain, or the appellate court will be unable to determine whether he properly exercised his discretion. Three recent federal cases are instructive.

In the first, *United States v. Iaconetti*,[12] the crucial issue was whether defendant had solicited a bribe from the president of a corporation seeking a government contract or had been offered a bribe by the president. The trial judge permitted the president's business partner and his attorney to testify in rebuttal, over hearsay objections, that the president had reported the bribe attempt to them on the day of his meeting with the defendant. The trial court analyzed the statements and found that they satisfied Rule 803(24),[13] the residual hearsay exception which permits state-

9. FLA. STAT. ANN. § 90.01 to § 92-39 (1960), *as amended* FLA. STAT. ANN. § 90.01 to § 92.40 (Supp. 1976).

10. *E.g.*, New York, North Dakota.

11. *See* FED. R. EVID. 401-403.

12. 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

13. FED. R. EVID. 803(24) provides:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

The trial court also found the statements admissible as prior consistent statements

ments not meeting any other exception to be admitted if they possess equivalent circumstantial guarantees of trustworthiness and satisfy certain additional requirements.[14] The trial court found these requisite indicia of reliability in defendant's being available for cross-examination, and in the fact that the statements were made so close in time to the event as to minimize the risks of insincerity and faulty memory. The requirement of subdivision (A) that the statement be relevant to a material proposition of fact—which seems redundant in view of the general relevancy requirement of Rule 401—was interpreted to mean that this hearsay exception should only be used for evidence of highly probative value. The president's timely report of the alleged bribe to his partner and attorney was found to meet this test, since it made "more probable that something of consequence to the business occurred during the meeting with the defendant."[15] The requirements in subdivisions (B) and (C) of Rule 803(24) were satisfied as well. Because the statements were the best evidence available to corroborate the president's testimony, and to resolve doubt about what had actually occurred at the meeting, they were needed to help the jury resolve the crucial issue of credibility.[16]

The Second Circuit affirmed, agreeing with the trial judge that the statements were admissible pursuant to Rule 803(24). It apparently also agreed with his analysis because it undertook no independent examination of how the statements met the requirements of the rule.

In *United States v. Robinson*,[17] on the other hand, the appellate court analyzed the evidence at great length. Defendant had denied involvement in sales of narcotics to an undercover policeman. The trial court permitted the policeman to testify on rebuttal that defendant's alibi witness had chauffeured defendant to a sale, had himself sold drugs to the policeman, and had been identified by the defendant as his partner in the narcotics

rebutting charges of recent fabrication pursuant to FED. R. EVID. 801(d)(1)(B), but the appellate court did not reach this question. The appellate court agreed that one of the statements qualified as an authorized admission pursuant to FED. R. EVID. 801(d)(2)(C), but declined to fit the other statement into this category.

14. United States v. Iaconetti, 406 F. Supp. 554, 557 (E.D.N.Y. 1976).

15. The final requirement of FED. R. EVID. 803(24)—that the proponent give pretrial notice of intended use—was found by both the trial and appellate courts to be inapplicable under the circumstances.

16. United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976).

17. 530 F.2d 1076 (D.C. Cir. 1976).

scheme. On appeal defendant claimed that this testimony was inadmissible because it constituted extrinsic evidence of conduct for which there had been no conviction. The appellate court found that the testimony was not being offered to discredit the alibi witness' general character or veracity, which the court agreed could not be done by extrinsic evidence,[18] but rather to demonstrate bias, which may always be shown extrinsically. The court noted that defendant and his witness, both on direct and cross, had characterized their relationship as a simple friendship involving periodic personal loans to each other and had forsworn any business dealings or contracts with the policeman. Accordingly, the policeman's testimony was relevant to show that the witness' venture in drugs gave him an incentive to testify falsely on defendant's behalf.

In addition to showing bias, the evidence had a high potential for prejudice because it also showed that the witness was engaged in a criminal enterprise. After noting several factors in the case which diluted this possible prejudice, however, the court concluded that the evidence had been admitted properly. "Here," said the court, "as elsewhere in the law of evidence, what is required of the judge is a balancing of the probative value of and need for the evidence against the prejudicial impact."[19]

The appellate court apparently wished its extensive discussion to serve as a model for future trials. The court suggested that it expected more from a trial court than a "cursory" analysis which "appears only by implication":[20]

> [I]f the prejudice outweighs the benefit, the judge sometimes excludes the evidence with the conclusory comment that the case involves only "collateral" character impeachment; while if high probative value offsets slight prejudice, he may say that the evidence is admissible impeachment for bias. To avoid the possibility that confusion may lurk in such labeling and shorthand, it would be preferable to confront the problem explicitly, acknowledging and weighing both the prejudice and the probative worth of impeachment in the spirit of balancing stressed in the newly effective Federal Rules.

While the court was directing its comments to the bench, the implication for the bar is clear. Counsel must be prepared to

18. *See* FED. R. EVID. 608.
19. United States v. Robinson, 530 F.2d 1076, 1081 (D.C. Cir. 1976).
20. *Id.* (footnote omitted).

assist the trial court in its inquiry, or risk a retrial if the appellate court finds that the analysis of probative worth and prejudice was cursory.

Unfortunately, at times, despite the attorneys' best efforts, the record will be deficient for appellate review. In *United States v. Dwyer*[21] defendant asserted lack of criminal responsibility. When the defense expert unexpectedly failed to testify adequately, counsel requested permission to call a second psychiatrist. It was then Friday and the psychiatrist was unavailable until the following Monday morning, at which time he appeared in court. At the voir dire granted on the prosecution's request, the defense's offer of proof indicated that the psychiatrist would supply the lacking medical testimony. The prosecution moved to preclude on three grounds: 1) prejudice because the government's expert was no longer available, 2) negligence by the defense in not obtaining the psychiatrist's services earlier, and 3) taint resulting from the expert's weekend discussion of the case with defense counsel. Thereafter, the judge barred the expert's testimony without relying on any of the prosecution grounds. Despite repeated requests by defense counsel, the judge refused to state any reasons for his action. The appellate court had no difficulty in ascertaining the high probative value of the proffered expert testimony, but it stated that the judge's refusal "to put his reasons for exclusion on the record substantially impairs our ability to ascertain the source of the 'prejudice' to which he referred in his ruling."[22] Quoting from the *Robinson* opinion, the appellate court concluded that "[t]he spirit of Rule 403 would have been better served had the judge 'confront[ed] the problem explicitly, acknowledging and weighing both the prejudice and the probative worth' of the proffered testimony."[23] Accordingly, the appellate court held that exclusion of the psychiatrist's testimony constituted an abuse of discretion requiring a reversal.

This decision too, though explicitly concerned with the trial court's obligation to analyze, contains a lesson for counsel. Defense attorney's offer of proof and persistence in making his objections known was in keeping with the spirit of the Rules and highlighted the trial judge's error for the appellate court. All participants in a trial conducted pursuant to the Federal Rules must

21. 539 F.2d 924 (2d Cir. 1976).
22. *Id.* at 5097.
23. *Id.*

be able to explain the significance of a given item of evidence—reliance on traditional formulae and labels will not suffice.