Introduction

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SYMPOSIUM: THE FEDERAL RULES OF EVIDENCE

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Perhaps least among the lesser arts is the art of introducing a law review symposium. The introducer should give no offense, which admonition brings one very nearly to the bottom of the subject. Between the exercise in undue proliferation, commanding the reader to contemplate the paltriness of the symposiasts' efforts when compared with those of the introduction's author, and the clipped salutation which mocks the scholarly protraction it purports to praise, the civil introducer must find a middle way.

No sooner said than done, when the symposium deals with the Federal Rules of Evidence. In force now for almost a decade,1 under discussion for years before that,2 the Rules are part of the common mental stock of all federal litigators. With the Federal Rules of Civil and of Criminal Procedure, they have become the context of every federal lawsuit, the system of coordinates upon which lawyers measure and position their case.

Well, how fare they? Do the Federal Rules of Evidence work well or poorly? Were the energies of those who conceived and nur-

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tured them wisely invested or foolishly spent? It begins to be time to
tell, although of course the next advance sheet may bring a decision
cancelling out even the most delicately considered assessment.

Four virtues mark a successful codification. The first is com-
pleteness. If a code treats part of a subject and leaves the remaining
part undisturbed, how can one justify codification at all? Surely a
codification ought to furnish answers to most and perhaps all the
questions likely to arise in connection with its matter. The second is
coherence. A codification should be so wrought that it supplies an-
swers to a lawyer's questions simpler, more comprehensible, and
more easily found than those the lawyer could discover without the
codification. The third is courage. Every field of the law has its net-
tles, difficult problems hard to solve. A codification should grasp
every nettle, conceding that the problem is difficult, yes, but braving
a resolution one way or another, to the end that a lawyer know as
nearly as possible where he\(^{\text{a}}\) stands. The fourth is correctness. A cod-
fication's position on controversial issues, its resolution of hard
problems, ought to be acknowledged by most lawyers as right, and if
not right then at least thoughtful.

When the Federal Rules of Evidence finally tumbled from the
printing press in 1975, they fell something short of a triumph of cod-
ification. They were deficient in three of the four necessary virtues.

First, the Rules are incomplete. They say nothing of substance
about privileges.\(^{4}\) They are silent on impeachment by eliciting bias,
prejudice, interest, or corruption.\(^{5}\) They make no mention in text of
judicial notice of legislative fact.\(^{6}\) The draftsmen had reasons for
these and other omissions, certainly, but omissions they remain, and
a lawyer bedevilled by a question involving one of the omitted sub-
jects cannot help but wonder why there is all the fuss over a code of
federal evidence law so partially codified.

Second, the Rules are sometimes incoherent. Under rule 609,
effectively what impeachment is permissible of a mere witness as op-

4. Fed. R. Evid. 501 (the general rule on privileges directs reference to principles of common law, or to state law if it supplies the rule of decision).
posed to the defendant in a criminal case? What precisely does “character” mean as the word is used in the Rules and how does it differ from “credibility”? Is material upon which an expert properly relies in formulating his opinion for that reason admissible and, if it is, for what purpose? To none of these important and troubling questions do the Rules supply a plain answer. For answers of any sort, a lawyer is relegated to the kind of research an uncodified subject requires, research complicated by the need to anatomize the Rules and try to tease out of their halt and sometimes opaque phrases an intention the very possibility of which, the lawyer will inevitably suspect, never once occurred to those responsible for enacting them.

Third, in some respects, the Rules are uncourageous. They fail to stake out a position on several of the principal controverted issues in the law of evidence. In addition to the examples mentioned above to illustrate the Rules’ incompleteness, consider the question of the effect (or lack of effect) of a presumption after it has shifted the burden of going forward. Does it stay in the case and serve as some evidence of the presumed fact? Or is it now gone, like the famous bursting bubble of Thayer and Wigmore? The interest of the question is as much practical as theoretical, yet the most attentive reading of the Rules fails to yield an answer. The nettle, alas, has gone ungrasped.

About the fourth virtue, a somewhat cheerier tone becomes possible. While the Rules contain a provision or two that some might argue to be not only dead wrong but also ill-informed, on the whole and especially in Article 8, dealing with hearsay, the Rules inspire

7. FED. R. EVID. 609(a) (begins by referring to “a witness,” but goes on in its first conditional clause to speak of “the defendant”).
9. See supra note 3.
10. See FED. R. EVID. 703.
11. See J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 313, 336 (1898); 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2491 (Chadbourn ed. 1981).
14. See, e.g., FED. R. EVID. 301 (“a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast”).
15. E.g., FED. R. EVID. 703 (Basis of Opinion Testimony by Experts).
16. In the writer’s opinion, this is the Rules’ most conspicuous success.
in their user an agreeable confidence that what the Rules say is, for
the most part, right and, at a minimum, bespeaks careful study.

With one mark out of a possible four, the Rules would seem to
be something of a failure, and as an exhibition of the art of codifica-
tion, fresh from the draftsmen's hand, they were. In 1984, however,
it would be unintelligent to think of the Rules as if they were brand
new, untempered by a decade's experience with them. So modulated,
so matured, one's judgment must be that the Rules are doing very
well indeed—not that their several deficiencies are to be ignored, but
that those deficiencies are outweighed by the Rules' one overriding
achievement. Their mere existence, however marred by correctible
imperfections, has brought about a new alertness to the recognition
of evidentiary problems and a more powerful ability to solve them.

That there is a single (though flawed) document distilling the law of
evidence to be applied in federal lawsuits has converted the rules of
evidence, long regarded as a sort of fogbank to be gotten through
pretty much on instinct, into the Rules of Evidence, a difficult but
clearly lit landscape the successful traversal of which by lawyers and
judges should be a point of intellectual pride no less than of profes-
sional obligation.

The doubting reader might turn now to the articles that follow,
where he will find immediate and ample proof of the remarkable
level of refinement to which the Federal Rules have brought the law
of evidence.

17. Some commentators point to the adoption of the Rules by many states as a salutary
development. Why? The prudence of uniformity of practice between federal and state courts is
hardly self-evident. And if the Rules were folly to begin with, their replication among the
states would not make them wise.

18. To avoid unnecessary contention, the writer concedes that he is unable to document
this assertion. It is not for that reason necessarily untrue.

19. A few splendid examples of judicial virtuosity in handling the Rules are United
States v. DiMaria, No. 83-1292 (2d Cir. Feb. 6, 1983); Clay v. Johns-Manville Sales Corp.,

20. See supra note 3.