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David P. Leonard

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FOREWORD: TWENTY YEARS OF THE FEDERAL RULES OF EVIDENCE

David P. Leonard*

The Federal Rules of Evidence are now twenty years old.¹ Their adoption was a watershed event in the evolution of evidence law. For decades after the codification movement for rules of civil procedure began, evidence rules remained a creature of the common law. The wisdom of codification was debated at the highest reaches of legal academia, splitting Wigmore, its most prominent common-law voice, from the ranks of those favoring a move to solidify the rules through legislation.² Only when both the American Law Institute and the National Conference of Commissioners on Uniform State Rules proposed codifications³ did the movement begin to gather steam; and even then, progress toward a code was neither swift nor steady.⁴ But in 1975 the movement came together in the adoption of the Federal Rules of Evidence (Federal Rules or Rules).

This event threw the codification movement into high gear. Prior to 1975 only a few states had codified their evidence rules; today, only a handful have not.⁵ Moreover, virtually all of the codifications are based on the Federal Rules,⁶ and though many states' versions differ

* Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles.

1. See Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings, 1 PUB. PAPERS 6 (Jan. 3, 1975).

2. John H. Wigmore, chief consultant to the American Law Institute's project to develop a Model Code of Evidence, ultimately dissented from the Code. See MODEL CODE OF EVIDENCE xii-xvi (1942) (noting Wigmore's participation in project and ultimate dissent); John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, A.B.A. J., Jan. 1942, at 23.

3. The American Law Institute's effort resulted in the *Model Rules of Evidence* in 1942, and the Commissioners' codification became the *Uniform Rules of Evidence* in 1953.

4. For an excellent review of the history of the codification movement that eventually led to the enactment of the Federal Rules of Evidence, see 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE* §§ 5001-5007 (1977).

5. For a review of the current status of state codification, see GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, *AMERICAN BAR ASSN., EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* (1987 & Supp. 1994); JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE, STATE ADAPTATIONS OF THE FEDERAL RULES OF EVIDENCE* T1-T184 (1994).

6. The Federal Rules even influenced the drafters of the Uniform Rules, who, in 1974, adopted a revised set of rules identical in structure and very similar in content to the Fed-

in some respects from the Federal Rules, the similarities far outweigh the differences. The time has not yet come when a lawyer from one state can try a case in any other state without suffering any rude surprises. But, the drafters' goal of achieving uniformity, at least in the *language* of the evidence rules, is far closer to realization than one might have imagined it would be at this time.

The Federal Rules are at once both conservative and innovative. On the one hand, they retain the lion's share of common-law rules; changes in specific rules from their common-law counterparts are mostly incremental rather than revolutionary.⁷ On the other hand, the Rules explicitly embrace certain values that may ultimately change the structure of evidence law and the face of the trial. Judges are explicitly instructed to construe the rules "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."⁸ They are required to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth, . . . avoid needless consumption of time, and . . . protect witnesses from harassment or undue embarrassment."⁹ Judges are also to lean in favor of admissibility rather than exclusion by admitting any relevant evidence that does not offend other rules.¹⁰ And they are given the tools with which to exclude evidence when they find that questions of prejudice and other dangers loom unacceptably large.¹¹

But there are significant tensions in the Rules. Some of the drafters' goals are in conflict. For example, the dual goals of promoting uniformity¹² and enhancing trial court discretion¹³ can work at cross-purposes. If uniformity is the overriding goal, rules should be drafted categorically; but uniformity can be the enemy of individualized justice. How should the courts apply rules that work at cross-purposes? In addition, some rules contain significant internal tensions, giving

eral Rules. See UNIF. R. EVID., 13A U.L.A. (1994). Additional revisions in 1986 did not alter the structure of the Uniform Rules. See *id.*

7. For example, opinion evidence of character is now admissible to the same degree as reputation evidence. See FED. R. EVID. 405(a), 608(a). One could hardly call such a change revolutionary.

8. FED. R. EVID. 102.

9. FED. R. EVID. 611(a).

10. FED. R. EVID. 402.

11. FED. R. EVID. 403.

12. *The Supreme Court, 1988 Term*, 103 HARV. L. REV. 40, 300 (1989).

13. *Id.*

trial courts perhaps far more breathing room than the drafters had intended.¹⁴

The very leanness of the Rules has created profound interpretation problems. For example, what is to be made of the drafters' failure to mention a widely used common-law doctrine? The Rules, for instance, say nothing about the use of evidence of bias or interest to impeach the credibility of a witness. Does this omission mean the drafters intended to abrogate the common-law rule allowing such impeachment?¹⁵ While the failure to mention bias impeachment was not particularly troubling because the solution was relatively obvious, the drafters' complete omission of any reference to the *Frye* "general acceptance" standard,¹⁶ which had governed the admissibility of novel scientific evidence in the federal courts for half a century, became the center of enormous controversy until its—at least tentative—resolution in 1993.¹⁷ The fact remains that large areas of the law of evidence, all of which have rich common-law backgrounds, are simply not covered by the terms of the Federal Rules; and in the twenty years since codification, the explicit scope of the Rules has not been broadened.

After twenty years of litigation, and little formal amendment, it is now appropriate to look back at our experience with the Federal Rules of Evidence. There are several categories of questions we can ask. *First*, to what extent has the broad "discretion" that the Rules grant to trial judges proven effective in serving the Rules' stated goals, as well as other goals and values that codification should serve? In particular, have we achieved a measurable degree of uniformity and predictability? Has this heightened power granted to trial judges led to any desirable or unfortunate changes in the way lawyers construct their presentation of evidence?

Second, what effect has the grant of broad powers to the trial court had on the appellate function in evidence cases? Are all questions of evidence law to be reviewed under an "abuse of discretion"

14. See, e.g., FED. R. EVID. 404(b), 901.

15. The Supreme Court, of course, held that bias impeachment was retained by the rules even though the drafters provided rules governing other impeachment methods and failed to include impeachment by bias. *United States v. Abel*, 469 U.S. 45, 49-50 (1984).

16. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), *superseded by* FED. R. EVID. 702, *construed in* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

17. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993). The Supreme Court decided that the drafters intended to abrogate the *Frye* standard in favor of what it considered to be a more lenient relevancy-based standard more in line with the general structure of the Federal Rules.

standard, as some courts would assert?¹⁸ Or is a more searching inquiry sometimes justified? Has the appellate role—to the extent it was ever meaningful in the context of evidentiary rulings—been reduced to a largely meaningless task? If so, is this necessarily a bad development?

Third, when matters of interpretation arise, by what standards should the courts measure the meaning of the Rules? Should the Federal Rules be viewed as if they were a normal statute enacted through the usual legislative process? Or is a different approach to interpretation justified? The brevity of the Rules makes this a particularly important question, as does the fact that many states have adopted the Rules in whole or part with little or no recorded legislative history to which the courts can turn.

Fourth, has the fact that many states have adopted large portions of the Federal Rules led to a degree of uniformity in practice, and not merely in language? Have the state courts followed the federal courts' interpretations of the Federal Rules? Has the states' adoption of the Federal Rules slowed or terminated state evidence law development? If so, is this a good or bad thing?

18. See, e.g., *Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994) ("Our standard of review for determining whether the district court committed reversible error in either the admission or exclusion of evidence is abuse of discretion."); *Holmes v. Elgin, Joliet & E. Ry.*, 18 F.3d 1393, 1397 (7th Cir. 1994) ("We review the trial court's admission of evidence under the abuse of discretion standard, inquiring not whether we would have ruled the same way but rather whether any reasonable person would have agreed with the trial court."); *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 960 (10th Cir. 1993) ("We will uphold the district court's evidentiary rulings over objections properly made at trial unless the court abused its discretion . . . and caused 'manifest injustice to the parties.'") (citation omitted) (quoting *Comcoa, Inc. v. NEC Tels., Inc.*, 931 F.2d 655, 663 (10th Cir. 1991)); *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1534 (10th Cir. 1993) ("We review the trial court's admission of evidence under the abuse of discretion standard.").

Decisions of the sort just quoted are legion. It is far more unusual to find courts recognizing that some evidentiary rules do not grant discretion to the trial court and, therefore, should not be reviewed using the "abuse of discretion" standard. One such unusual decision is *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993), where the court wrote:

Usually when an appellant seeks a new trial by reason of a district court's alleged error on a ruling on the admissibility of evidence, we review the ruling on an abuse of discretion basis. But here our review is plenary as the district court's ruling on the admissibility of Mrs. Lippay's hearsay evidence implicates "the application of a legally set standard."

Id. at 1496 (citation omitted) (quoting *Savarese v. Agriss*, 883 F.2d 1194, 1200 (3d Cir. 1989) (quoting *In re Japanese Elec. Prods. Litig.*, 723 F.2d 238, 257 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986))).

The Author has explored the question of the proper standards for appellate review of evidentiary decisions in David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1188-93 (1992).

Finally, as we look to the future, and especially as the newly appointed Evidence Advisory Committee undertakes its review of the Rules, what specific rules, or areas of evidence law, are in need of reform? And despite the particular reforms that appear wise, what types of reforms are we actually likely to see?

At the 1995 Annual Meeting of the Association of American Law Schools, held in New Orleans, three distinguished legal academics addressed some of these questions in the Evidence Section's Program. Professor Faust Rossi of Cornell Law School was "present at the creation," and warned at a fairly early date of the dangers of too much trial court discretion.¹⁹ Professor Paul Rothstein of Georgetown University Law Center advised Congress on the drafting of the Federal Rules and has been an active observer of the courts' application of the Rules.²⁰ Professor Eileen Scallen of the University of California, Hastings College of the Law, has considered the question of how the Federal Rules should be interpreted.²¹

The Essays that follow are based on the papers presented at the Conference. Professor Rothstein's Essay, *Intellectual Coherence in an Evidence Code*,²² begins with the premise that an intellectually coherent code should not "contain contradictory and inconsistent mandates that do not make theoretical sense."²³ Unfortunately, in many respects the Federal Rules of Evidence do not meet this standard. The result, he writes, is to grant the courts unlimited discretion because they can choose to apply a rule by focusing on one of its contradictory bases or the other.²⁴

Professor Rothstein uses two illustrations. The first is Rule 404(b), which governs evidence of "other crimes, wrongs, or acts." This rule purports to forbid propensity evidence, but at the same time admits evidence that depends on propensity inferences for its relevancy. Professor Rothstein offers some thoughts on how the rule can be made coherent, and, in the process, rejects the "doctrine of chances" approach recently advocated in the literature.²⁵ He suggests

19. See Faust F. Rossi, *The Silent Revolution*, LITIG., Winter 1983, at 13.

20. Professor Rothstein's early article, *Some Themes in the Proposed Federal Rules of Evidence*, FED. B.J., Winter 1974, at 21, remains a very useful examination of the general themes and biases of the Federal Rules.

21. Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning and the Law of Evidence*, 44 AM. U. L. REV. (forthcoming May 1995).

22. 28 LOY. L.A. L. REV. 1259 (1995).

23. *Id.*

24. *Id.*

25. *Id.* at 1260-65.

that we distinguish among different kinds of propensities, excluding evidence that requires reasoning through character-based propensity, but not other propensity evidence.²⁶

Professor Rothstein's second illustration is Rule 901, which governs authentication and identification.²⁷ There is an incongruence, he writes, between the two parts of the rule, the first of which appears to be a simple requirement of minimal relevancy, and the second of which requires more.²⁸ Judges, therefore, can do anything they want with these conflicting mandates, "[a]nd they do."²⁹

Unfortunately, Professor Rothstein writes, these intellectual incoherencies have not worked themselves out in the cases.³⁰

Professor Rossi's Essay, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*,³¹ focuses on three "major transformations" caused by the Federal Rules.³² First, he notes the "striking success" of the national codification movement.³³ The Federal Rules, he writes, "have created order out of the disarray that once ruled the landscape. They have given us a reasonably uniform national law of evidence applicable in both state and federal courts. This evolution, and its beneficial by-products, represents a stunning achievement."³⁴ Professor Rossi states that the Rules have enhanced clarity and accessibility, but, by taking a very conservative approach to existing doctrine, the drafters missed the opportunity for more substantial reform.³⁵ In addition, he writes, the failure to codify rules in some areas has sacrificed uniformity and clarity, as has the drafters' decision to eschew detailed rules in favor of general rules which left many questions unanswered.³⁶ Professor Rossi also critiques the Supreme Court's "plain meaning" jurisprudence, which has led to overturning established common-law rules that the drafters probably intended to leave intact.³⁷ The Court's approach, he writes,

26. *Id.* at 1264-65.

27. *Id.* at 1265.

28. *Id.* at 1265-70.

29. *Id.* at 1270.

30. *Id.*

31. 28 LOY. L.A. L. REV. 1271 (1995).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1272.

36. *Id.* at 1272-73.

37. *Id.* at 1274-75.

“greatly magnifies the consequences of drafting errors and the need for rule amendments.”³⁸

Second, Professor Rossi notes the greatly enhanced admissibility of expert testimony, despite recent signs of retrenchment.³⁹ Expanded admissibility in this area was the drafters’ intent, and it has been accomplished.⁴⁰ The result, he writes, is a presumption in favor of expert testimony.⁴¹ This, in turn, reflects greater confidence in a jury’s ability to see through the charlatan, and assumes the adversary system’s effectiveness.⁴²

Finally, the residual exceptions have begun a revolution of sorts in the hearsay area. The courts have used these exceptions aggressively and often, a development Congress did not intend.⁴³ Indeed, courts have “mocked” the Senate Judiciary Committee’s admonition that the residual exceptions were to be used very rarely, and only in exceptional circumstances.⁴⁴ Professor Rossi focuses on several particularly troubling uses of the residual exceptions.⁴⁵

Looking to the future, Professor Rossi sees much greater rule-making activity, some of which can draw on the large buildup of scholarship on the Federal Rules, which provides a “ready —agenda for change.”⁴⁶

Professor Scallen’s Essay, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*,⁴⁷ is a specialized application of the principles of interpretation about which she has written and on which her Conference paper focused. In particular, she critiques Justice Scalia’s public choice theory of statutory interpretation, which holds that it is wrong to rely on committee reports or other legislative history because this allows Congress to abdicate its law-making responsibilities.⁴⁸ Even if this is a proper position with respect to some legislation, Professor Scallen writes, it does not apply to the Notes of the Advisory Committee on the Federal Rules of Evidence because under the Rules Enabling Act, Congress and the

38. *Id.* at 1275.

39. *Id.* at 1277.

40. *Id.*

41. *Id.* at 1278.

42. *Id.*

43. *Id.* at 1279.

44. *Id.*

45. *Id.* at 1279-81.

46. *Id.* at 1281.

47. 28 *LOY. L.A. L. REV.* 1283 (1995).

48. *Id.* at 1286.

judiciary share the power to make rules of procedure, including evidence rules.⁴⁹ Thus, the Advisory Committee has a “special role . . . in the legislative process,” making its Notes significant.⁵⁰ She writes that the Advisory Committee Notes are a legitimate source of legislative history concerning the Federal Rules.⁵¹ In fact, because the Advisory Committee is comprised of judges, practitioners, and legal academics; because it is appointed by the Chief Justice; and because it has close contact with the realities of law practice, it “acts as buffer between the highly politicized interests of the general bar and the judiciary responsible for promulgating the rules.”⁵² For various constituencies to believe that their voices have been heard, “the compromises—or ‘deals’—described in the Notes must be given some real weight.”⁵³

Professor Scallen then reviews the use and abuse of the Advisory Committee Notes in *Tome v. United States*,⁵⁴ in which the Court interpreted the prior consistent statement hearsay exemption to retain a common-law requirement that is not mentioned in the rule.⁵⁵

Finally, Professor Scallen explains why the “practical reasoning” approach is the most appropriate way to engage in the interpretive task.⁵⁶ Professor Scallen concludes that the Supreme Court’s “most ‘solid’ constructions manifest the qualities of candor and completeness, qualities essential to the persuasiveness and the educative function of the Court.”⁵⁷ Vital to this process is consideration of the drafters’ thoughts embodied in the Advisory Committee Notes as well as in the more traditional congressional materials.⁵⁸ To say, as Justice Scalia does, that the Notes are not binding “is to beg the question of what value they have.”⁵⁹

Though the Essays presented here begin to address some of the important questions we must ask as the Federal Rules of Evidence mature, they represent only a beginning. Twenty years is enough time to begin a serious evaluation. But it is the responsibility of the courts, the Congress, and academia to make the evaluation process a continuing one. Anything less would sanctify momentum over principle.

49. *Id.* at 1287.

50. *Id.* at 1288.

51. *Id.*

52. *Id.* at 1292.

53. *Id.* at 1293.

54. 115 S. Ct. 696 (1995).

55. Scallen, *supra* note 47, at 1293-1301.

56. *Id.* at 1301.

57. *Id.*

58. *Id.*

59. *Id.* at 1302.