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THE FEDERAL RULES OF EVIDENCE—PAST, PRESENT, AND FUTURE: A TWENTY-YEAR PERSPECTIVE

*Faust F. Rossi**

The Federal Rules of Evidence (Rules) have reached adulthood; their twentieth anniversary has arrived. Two decades of national experience are sufficient to assess their impact on the law of evidence. Now is a good time to ask: What has changed?

There have been many doctrinal modifications in evidence since Congress enacted the Rules in 1975. But our concern is with major transformations. What impact have the rules had? Everyone will have a unique view of what developments have been most significant. In this brief, descriptive Essay, I discuss three that strike me as major transformations.

The first is the striking success of the national codification movement. The Rules 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, together with its beneficial by-products, represents a stunning achievement.

A second transformation is the greatly enhanced admissibility of expert testimony—an expansion made possible by provisions that have eliminated preexisting common-law restrictions. This rule-driven broadening of the permissible scope, basis, and form of expert testimony has provoked controversy. There are recent signs of retrenchment. Some say the Rules have lowered the barriers too far and call for greater protection against unreliable expertise.[1]

Finally, a revolution of sorts is underway in the area of hearsay. The residual or catchall changes in Rules 803(24) and 804(b)(5) provide an open invitation to admit hearsay that fits none of the tradi-

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1. *E.g.*, Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537 (1994).

tional categorical exceptions.[2] Courts have used the residuals aggressively and often. The pattern of decisions reveals a gradual but serious erosion of the rule against hearsay. I consider each of these developments in turn.

The consensus is that the Rules, overall, have been successful. It would be hard to find a knowledgeable commentator, judge, or lawyer who now would say about the Rules: "better if you had never been born."[3] This perception of success is founded on one overriding achievement: By providing an easily accessible, compact body of evidence principles, the Rules have given us substantial uniformity in federal courts and beyond. As a consequence, clarity and predictability have been enhanced.

The blessings that flow from evidence codification are many. Clarity and accessibility minimize judicial error and enhance the predictability that is so essential to the trial lawyer. Disparity of rulings among individual judges is diminished. Evidence is less likely to be simply "whatever the judge says it is." In addition, the Rules have had enormous instructional value. Their existence has stimulated debate among judges, lawyers, and scholars in conferences, workshops, and classrooms.

That is not to say, of course, that there are no problems. The Rules are certainly not beyond criticism. For one thing, the Rules are not very adventuresome. One of the reasons for their acceptance and influence is that they do not try to do too much. As drafted and modified by Congress, the Rules mostly represent current mainstream opinion in evidence law. Those who regard codification as an opportunity for substantial reform were disappointed with the final product. Innovations, at least those intended as such, are few. Perhaps that is for the best. The drafters' infrequent excursions into the unconventional have proven unwise. Dramatic changes in privileges led Con-

2. FED. R. EVID. 803(24), 804(b)(5).

3. One exception might be Congress itself. In 1975, if Congress could have foreseen decisions overturning common-law precedents such as Bourjaily v. United States, 483 U.S. 171, 181 (1987) (overturning common-law rule that co-conspirator's statement is admissible only if the conspiracy is established by evidence independent of the statement), and Huddleston v. United States, 485 U.S. 681, 685 (1988) (overturning common-law rule prohibiting introduction of similar-act evidence unless trial court finds by preponderance of evidence that defendant committed act), and could have foretold the amount and kind of hearsay that would be admitted under the residual exception, who knows? Perhaps we would have no federal rules to discuss. In fairness, however, that kind of hindsight would likely doom many pieces of legislation.

gress to completely expunge them.[4] Treating party admissions as nonhearsay rather than as traditional exceptions is wrong and has been roundly condemned.[5] Leaving privileges to federal common-law development is an enormous gap for an evidence code that seeks uniformity and clarity.

In addition there are, as one might expect, sins of omission, unnecessary ambiguity, and bad drafting. Rule 407 codifies the well-established prohibition against the use of "subsequent remedial measures" to prove "negligence or culpable conduct."[6] But does the ban apply to actions based on "strict liability?"[7] Does Rule 407 cover a remedial measure taken before the accident but after manufacture of the product?[8] Does the Rule apply to remedial measures required by law?[9] The exceptions to the Rule raise other questions: When is feasibility controverted and how is feasibility defined?[10] Should federal

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4. Congress gutted the Supreme Court's proposed privilege rules by entirely deleting nine specific privileges and three general rules. S. REP. NO. 1277, 93d Cong., 2d Sess. 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058. These were replaced by Rule 501, which provides that the law of privileges shall be developed by the federal courts as governed by common-law principles, except in civil actions in which state law supplies the rule of decision with respect to which the state law of privileges shall govern. *Id.*

5. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 183-89 (1988); Freda F. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393 (1984).

6. FED. R. EVID. 407.

7. *Compare* Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) (holding rule excluding evidence of remedial measures applies in products liability cases) *with* Huffman v. Caterpillar Tractor Co., 908 F.2d 1470 (10th Cir. 1990) (holding evidence of remedial measures admissible in strict products liability cases).

8. *Compare* Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) (excluding evidence of alteration of forklift after manufacture but before accident) *and* Petree v. Victor Fluid Power, Inc., 831 F.2d 1191 (3d Cir. 1987) (reversing lower court's admission of evidence of label attached to hydraulic press after sale but before accident) *with* Cates v. Sears, Roebuck & Co., 928 F.2d 679 (5th Cir. 1991) (holding remedial measures taken after purchase but before accident admissible) *and* Chase v. General Motors Corp., 856 F.2d 17 (4th Cir. 1988) ("The change . . . occurred . . . after the plaintiffs' car was manufactured and sold to them. That was a 'measure' which was 'taken' before the 'event' mentioned in Rule 407. So Rule 407 does not exclude evidence with respect to that change." (quoting FED. R. EVID. 407)).

9. *Compare* Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) (holding FDA regulations for product warnings inadmissible to prove negligence in prior version of warning) *with* O'Dell v. Hercules, 904 F.2d 1194 (8th Cir. 1990) (listing of site on National Priorities List did not constitute remedial action and therefore inadmissible) *and* Kociemba v. G.D. Searle & Co., 683 F. Supp. 1579 (D. Minn. 1988) (holding evidence of remedial action mandated by law inadmissible).

10. *Compare* Meller v. Heil Co., 745 F.2d 1297 (10th Cir.) (holding subsequent installation of security devices admissible to show devices are feasible), *cert. denied*, 467 U.S. 1206 (1984) *and* Anderson v. Malloy, 700 F.2d 1208 (8th Cir. 1983) (stating "feasibility" is almost always in controversy and means successful in its intended performance) *with* Mid-

or state law govern this policy-based quasi-privilege?[11] On these questions, the Rules give no help, and as a result, the circuits and states are split. As one academic cleverly put it: "This is the kind of 'uniform' law that makes anarchy look good."[12]

Until the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[13] we had to live for almost twenty years with the question of whether the *Frye* "general acceptance"[14] standard for novel scientific evidence was dead or alive. And we had to live for fifteen years with Congress' unhappy draft of Rule 609(a) relating to prior conviction impeachment which left unclear its applicability in civil cases until it was finally amended.[15]

It has been correctly noted that two circumstances magnified omissions, ambiguities, and drafting errors.[16] One was the absence of an Advisory Committee on the Federal Rules of Evidence to monitor the need for amendments and to respond quickly to correct obvious defects.[17] Such a committee has now been established.[18] The other circumstance was the Supreme Court's application of "plain meaning" jurisprudence to the Rules.[19] Under this standard the literal language of the Rules controls, even in the face of arguably contrary policy, precedent, or legislative history.[20] As pointed out by Judge Becker and Professor Orenstein, the result has been to overturn established common-law consensus in situations where Congress, in all likelihood,

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dleton v. Harris Press and Shear, Inc., 796 F.2d 747 (5th Cir. 1988) (stating feasibility means only "physically possible").

11. *Compare* Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988) (state law applied) *and* Moe v. Avions Mareel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir.) (state law applied), *cert. denied*, 469 U.S. 853 (1984) *with* Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) (federal law applied) *and* Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) (federal law applied).

12. Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 304 (1990).

13. 113 S. Ct. 2786 (1993).

14. 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).

15. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

16. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 858 (1992).

17. *Id.* at 860-62.

18. STEVEN A. SALTZBERG ET AL., 1 FEDERAL RULES OF EVIDENCE MANUAL 6 (6th ed. 1994).

19. Becker & Orenstein, *supra* note 16, at 864.

20. *Id.* at 864 n.22.

did not intend to deviate from established and well-reasoned precedent.[21] Right or wrong, the Supreme Court's literalist approach greatly magnifies the consequences of drafting errors and the need for rule amendments.[22]

At worst we can say that the Rules as drafted, interpreted, and implemented have sometimes failed to give us the clear, uniform, and correct result. But fairness requires us to compare what the Rules have given us to what we had before. Overall they have filled an enormous need by providing, in most cases, a reasonably clear, compact, accessible code that has earned nationwide acceptance.

In particular, the impact of the Rules on state evidence law deserves tribute. The Rules changed the landscape. Thirty-seven states now have evidence codifications based on the Rules.[23] Even the few recalcitrant states that resist codification—like Illinois, Massachusetts, and New York—are slowly moving by court decision toward piecemeal adoption of the Rules. In short the codification movement has swept across our country. Since most litigation occurs in state courts, this is a huge accomplishment.

Twenty years ago the evidence law of many individual states, much more so than on the federal side, resided in a confusing "rag bag" of scattered statutes and cases—including some very old cases and some very old statutes. The result was that it was often hard to find the law on a given issue. Even more disturbing was the fact that on some surprisingly basic points of evidence, the law was uncertain. That is true today in the few remaining jurisdictions without modern codes.

For example, if one were to ask in New York—which is without a codification—whether a prior inconsistent statement used to impeach can be admitted substantively for its truth, a clear answer would be impossible. The response would have to be something like: "Proba-

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21. *Id.* at 858.

22. *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 786 (1990); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1330-32 (1992).

23. By 1994 35 states had adopted codes based on the federal model: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Washington, and Wyoming.

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 1.2, at 4 n.2 (1995). Since 1994 Indiana and Maryland also have adopted codes based on the federal model. *See* IND. CODE ANN. §§ 101 to 1101; MD. REGS. CODE tit. 5, §§ 5-101 to 5-1008.

bly not, but there was this 1968 decision by the highest court of the state which suggests a yes answer, but since then the lower courts have ignored it."[24] If one were to ask in Georgia—another state without a federal based code—whether a witness on the stand may offer his own prior out-of-court statement for its truth, or whether that would be hearsay, the answer would also be unclear.[25]

Moreover, in precodification times, a surprising number of states had antiquated, bizarre rules of evidence that sophisticated national practitioners simply would not believe. Until its law was codified, North Carolina, for example, allowed certain prior convictions to impeach. But one had to take the answer of the witness. If the target witness denied being convicted, the court could not receive extrinsic evidence in the form of the certificate of conviction.[26] In addition, it used to be the rule in several states that a photograph could not, as they say, speak for itself. A witness had to have seen and must testify to what the photograph revealed. It could not be independent evidence: an old doctrine that the courts had never reexamined until the advent of codification.[27]

So, now, for many states, new evidence codes based on the Rules have created order out of the disarray, have cleared up confusion on basic principles, and have prompted reexamination and modernization. This has been an enormous benefit to state courts and state litigants.

Why do some states resist the trend to uniformity? Lawyers used to the old ways tend to say things like "We got along without a code for 200 years, why do we need one now?" Or to paraphrase again one of our witty colleagues, "Why sacrifice superiority for uniformity?"[28]

To be fair, there is more to it than that. Codifications like the Rules, in keeping with modern trends, tend to facilitate admissibility. The more expert testimony admitted, the more hearsay comes in. More admissible evidence is good if you represent clients who have

24. *Compare* Vincent v. Thompson, 377 N.Y.S.2d 118 (N.Y. App. Div. 1975) (holding collateral estoppel did not apply to earlier New York Supreme Court decision) *and* Letendre v. Hartford Accident & Indem. Co., 236 N.E.2d 467 (N.Y. 1968) (stating prior inconsistent statements are admissible for their truth) *with* People v. Raja, 433 N.Y.S.2d 200 (Sup. Ct. 1980) (stating prior inconsistent statements are admissible only to impeach).

25. *See* GA. CODE ANN. § 38-301(a) (1990) (defining hearsay as evidence "which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons").

26. *See, e.g.*, State v. King, 30 S.E.2d 230 (N.C. 1944).

27. *See, e.g.*, Pearson v. State, 31 A.2d 624 (Md. 1943); State v. Gardner, 46 S.E.2d 824 (N.C. 1948).

28. Graham, *supra* note 12, at 301.

the burden of proof; not so good if you represent defendants whose preference is to keep evidence out. That explains, I suppose, why most of the opposition to codification in recalcitrant states like New York, Illinois, and Massachusetts comes from an unusual alliance of lawyers who represent corporate defendants—insurance companies, product manufacturers, and the criminal defense bar.[29]

In addition, in states like New York and several others, the legislature controls the codification and the amendment process. Given the popularity with voters of "tough on crime" issues, criminal defense lawyers fear the politization of evidence law. They trust judges more than legislators.[30]

Aside from the growth of evidence codification, there has been a second major alteration in the evidentiary landscape. One of the most significant developments has been the acceptance accorded expert opinion under the Rules. Expanded admissibility was intended and has been accomplished. Evidence Rules 702 through 705 toppled longstanding doctrinal barriers. As a result, a trial lawyer's options in selecting and using expertise have increased manyfold.

Changes favoring admissibility have occurred at three levels. First, Rule 702 liberalizes the test for what constitutes an appropriate subject matter for expert opinion.[31] It allows the admission of any expert testimony that "will assist the trier of fact."[32] It substitutes a "helpfulness" test for the more conservative common-law requirement that the subject matter must be beyond the comprehension of the jury. And, as the Supreme Court has now told us in its 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[33] the language of Rule 702 supersedes the restrictive *Frye* standard that used to require a "generally accepted" foundation for scientific evidence.[34]

Second, Rule 703 expanded the permissible bases for expert testimony.[35] No longer is it required that facts underlying the opinion be in evidence. It is enough if the underlying facts, even if themselves

29. Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 663 (1992) ("The opposition [to codification] is mainly the criminal defense bar, joined by civil lawyers who generally represent defendants.").

30. *Id.* at 697 ("The criminal defense bar's fear that the law of evidence will become hostage to public opinion is the most pervasive and in some ways persuasive argument against codification.").

31. FED. R. EVID. 702.

32. *Id.*

33. 113 S. Ct. 2786 (1993).

34. *Id.* at 2799.

35. FED. R. EVID. 703.

inadmissible, are of a type reasonably relied upon by experts in the particular field in making professional out-of-court decisions.[36]

Finally, Rules 704[37] and 705[38] have eliminated some traditional foundation formalities restricting the manner of presenting expertise. The former permits testimony on the ultimate issue.[39] The latter eliminates the need for the hypothetical question and permits the expert to give an opinion without first testifying to the underlying facts which support it.[40]

The result has been a presumption in favor of expert testimony. This liberality is in the tradition of evidence reform. It reflects greater confidence in the modern jury and its ability to see through the charlatan. It assumes the effectiveness of the adversary system—of cross-examination and of opposing testimony—to control and discredit the unreliable expert.

The rules and the decisions implementing them have been so successful in admitting claimed expertise that some have begun to warn against the danger of abuse. Only within the last several years have courts started to retreat from the expansive welcome given to experts, especially in the area of novel scientific evidence.

In *Daubert*, for example, the Supreme Court announced that trial judges must ensure, as a condition to admissibility, that any and all scientific evidence is reliable.[41] This entails a judicial assessment of whether the reasoning or methodology underlying the expert opinion is scientifically valid.[42]

It has been said that the history of procedural reform is the history of undoing the undesirable by-products of a prior reform. Perhaps that is the case here. By requiring judges to be active gatekeepers in screening out speculative expertise, *Daubert* may be signalling a gradual end to the expansive admissibility of expert testimony that has characterized the last two decades.

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36. If an expert bases his opinion on facts and data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Id.*

37. FED. R. EVID. 704.

38. FED. R. EVID. 705.

39. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704.

40. An "expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise." FED. R. EVID. 705.

41. *Daubert*, 113 S. Ct. at 2796.

42. *Id.*

There has been yet another fundamental change in evidence law under the Federal Rules. It involves the use of the so-called residual or catchall clauses—Rules 803(24)[43] and 804(b)(5)[44]—to admit a surprising amount of hearsay. The result has been a gradual but notable reworking of the rule against hearsay—a development clearly not intended by Congress.

Congress enacted Rules 803(24) and 804(b)(5), only reluctantly, to provide flexibility in rare instances when highly reliable and necessary hearsay could not fit within the precise confines of a specified categorical exception.[45] Congress envisioned a limited role for the residuals, intending to keep the hearsay exclusion intact and operating along traditional lines.[46] Thus, the Senate Committee on the Judiciary announced its view that "the residual exceptions will be used very rarely, and only in exceptional circumstances."[47]

This admonition has been mocked by the courts. Rules 803(24) and 804(b)(5) give federal trial judges the discretion to admit hearsay statements which fail to meet the requirements of any of the itemized class exceptions. They have not been shy about using this power. What is happening is that courts are admitting categories of hearsay for which Congress explicitly failed to provide an exception, a trend that has been well documented.[48]

We have many examples. Congress limited the substantive admissibility of unsworn prior inconsistent statements in Rule 801(d)(1)(A).[49] It provides that such statements are admissible only to impeach credibility, not for their truth. But they can and often do

43. FED. R. EVID. 803(24).

44. FED. R. EVID. 804(b)(5).

45. S. REP. NO. 1277, *supra* note 4, at 19, *reprinted in* 1974 U.S.C.C.A.N. at 7065.

46. "The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions. . . . The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions." *Id.* at 20, *reprinted in* 1974 U.S.C.C.A.N. at 7066.

47. *Id.*

48. *See, e.g.*, Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986); Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925 (1992); Faust F. Rossi, *The Silent Revolution*, LITIG., Winter 1983, at 13; Glen Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 TUL. L. REV. 335 (1984).

49. FED. R. EVID. 801(d)(1)(A).

find their way in for their truth under Rule 803(24).[50] Congress limited the substantive admissibility of prior consistent statements to those offered to rebut charges of recent fabrication or improper motive.[51] But those that do not so qualify can be admitted under Rule 803(24).[52] Former testimony of an unavailable declarant is admissible under 804(b)(1)[53] only if the party against whom it is offered or that party's predecessor had the opportunity to cross-examine with a similar motive. What if one of these conditions is missing? The decisions tell us that it might still be admitted under Rule 804(b)(5).[54]

The fundamental nature of the change becomes obvious if we consider use of the grand jury testimony of an unavailable witness. Can such testimony be admitted against the accused in a criminal case? Before enactment of the Federal Rules in 1975, no court would seriously consider receiving such evidence. Today, its admissibility under the residual exceptions is a commonplace occurrence.[55]

Admission of this category of evidence is particularly startling since, as a general matter, it is difficult to find special guarantees of trustworthiness in grand jury statements. The grand jury is an ex parte proceeding largely under the control of the prosecutor. Witnesses appearing in this closed setting may feel pressured to testify. They frequently respond to leading questions, and there is no opportunity for cross-examination. Except for the fact that it is under oath, a grand jury statement usually has no special reliability. Congress made no provision for this kind of evidence. Given its importance, this category as a possible fixed hearsay exception could not have been overlooked. The truth is that Congress would never have imagined that this kind of testimony would be received against the accused in a criminal case.

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50. *See, e.g.*, United States v. Valdez-Soto, 31 F.3d 1467, 1469-73 (9th Cir. 1994); United States v. Williams, 573 F.2d 284, 288-89 (5th Cir. 1978); United States v. Leslie, 542 F.2d 285, 289-91 (5th Cir. 1976).

51. FED. R. EVID. 801(d)(1)(B).

52. United States v. Iaconetti, 540 F.2d 574, 577-78 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

53. FED. R. EVID. 804(b)(1).

54. United States v. Deeb, 13 F.3d 1532, 1536-37 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1093 (1995).

55. United States v. Marchini, 797 F.2d 759, 764 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); United States v. Thomas, 705 F.2d 709, 711-12 (4th Cir.), *cert. denied*, 464 U.S. 890 (1983); United States v. Boulahanis, 677 F.2d 586, 589 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982); *see also* S. REP. NO. 1277, *supra* note 4, at 19-20, *reprinted in* 1974 U.S.C.C.A.N. at 7066 (discussing scope of Rules 803(24) and 804(b)(5)).

Perhaps this erosion of hearsay would have happened even without the Rules, but I doubt it. It grows almost entirely out of the grant of discretion provided by the residual exceptions.

Congress' attempt to limit this discretion by listing requirements in the catchalls has, for the most part, failed. The materiality and interest of justice tests are too vague to have any meaning. The absolute pretrial notice criteria often is rejected as impractical. The "more probative" requirement has been equated to a test of simple relevance and the "equivalent guarantees of trustworthiness standard" has been quite liberally construed.

What does the future hold for the Rules? We can expect, I think, much greater rule-making activity. The last twenty years have produced only a handful of substantive amendments. Omissions, ambiguities, and poor draftsmanship in the Rules have been largely left for the courts to work out. Now, however, there is a newly created distinguished Advisory Committee on the Federal Rules of Evidence with responsibility for monitoring federal evidence. The buildup of twenty years of scholarship analyzing the Rules constitutes a ready agenda for change. We can expect it.