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Evidence

Faust Rossi
Cornell Law School, ffr1@cornell.edu

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Evidence—Faust F. Rossi

Mr. Rossi is a Professor of Law at Cornell University.

The Federal Rules of Evidence have reached adulthood—they are almost twenty. Now is a good time to review their impact. Of course, the Rules have altered evidence in many ways since 1975, but what about major transformations? There have been three of these—three undeniable, remarkable developments spawned by the Rules.

The first is nationwide evidence codification. The Federal Rules created order out of the evidence disarray. In less than twenty years, they have provided a fairly uniform law of evidence in both state and federal courts. This alone is a stunning achievement. It is the main reason that most think the Federal Rules have been a success. Before the Rules, evidence was a confusing rag-bag of scattered statutes, cases, and rules varying from jurisdiction to jurisdiction. Local lore—state evidence peculiarities—could trap unwary out-of-towners. Long articles on a given state's treatment of dying declarations or business records were a staple of regional law reviews.

Uniformity Spreads

That has changed almost completely. Thirty-four states have evidence codes based on the Federal Rules. Even the few recalcitrant states—such as Illinois, Massachusetts, and New York—are slowly moving by court decision toward piecemeal adoption of the Rules. Many blessings flow from such evidence codification: Clarity and accessibility minimize judicial error and reduce judge-to-judge variations. Evidence is less likely to be simply whatever the judge says it is.

Of course, the Federal Rules are not beyond criticism. They are not, for example, very adventuresome. In fact, an important reason for their acceptance and influence is that they did not try to do too much. As drafted and modified by Congress, the Rules mostly represent mainstream evidence thinking. Those who saw codification as an opportunity for reform were disappointed. Perhaps that has been for the best. The drafters' infrequent excursions into the unconventional proved unwise: dramatic proposed changes in privilege law were cancelled by Congress. Treating party admissions as non-hearsay rather than as a traditional exception is wrong and has been roundly condemned. In addition, there have been sins of omission, ambiguous intent, and bad drafting—the kind of things that affect any code. But, in general, the Rules have worked, and, in less than two decades they have moved far beyond the federal courts.

The Rules have brought a second major change—the expanded admissibility of expert opinion. This expansion was intended, and it has been accomplished with a vengeance. Evidence Rules 702 through 705 toppled long-standing doctrinal barriers, increasing a trial lawyer's options in selecting and using experts. F. Rossi, *Modern Evidence and the Expert Witness*, 12 LITIGATION, No. 1, at 18 (Fall 1985).

Three rule changes are the main sources of this development. First, the test for what constitutes an appropriate subject for expert opinion was liberalized by Rule 702. It allows the admission of any expert testimony that "will assist the trier of fact." It substitutes a "helpfulness" test for the more conservative common law requirement that the subject matter must be beyond the comprehension of the jury. More than that, as the Supreme Court recently told us in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, _____ U.S. ____ (1993), Rule 702 supersedes the restrictive *Frye* standard that required a "generally accepted" foundation for scientific evidence.

Second, the permissible bases for expert testimony were expanded by Rule 703. No longer must the facts underlying the opinion be in evidence. It is enough if those facts, even if themselves inadmissible, are of a type reasonably relied upon by experts in the field when they make professional out-of-court decisions.

Finally, some traditional foundation formalities dictating the manner of presenting expert testimony have been eliminated. Rule 704 permits testimony on the ultimate issue. Rule 705 eliminates the need for the hypothetical question, and it permits the expert to give an opinion without first testifying to the supporting facts.

All of this has meant a presumption in favor of expert testimony. This attitude reflects confidence in jurors and their ability to detect charlatans. It also is based on an assumption that the adversary system—cross-examination and rebuttal testimony—can control and discredit unreliable experts.

These changes have been wildly successful. Expert evidence has flourished. But some now warn against too much success. Judges have begun to express concern about abuse of expert evidence. In the last few years, courts have retreated 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 scientific evidence is reliable. This entails assessment of "whether the reasoning or methodology underlying the expert opinion is scientifically valid." Some have said that the history of procedural reform is a tale of the undoing of undesirable by-products of prior reform. Perhaps that is the case here. By requiring judges to be active gatekeepers and to screen out speculative expertise, *Daubert* may be braking the last two decades' rush to admit expert testimony.

Hearsay Misuse

A third fundamental change involves the use of the "residual" or "catchall" clauses in Rules 803(24) and 804(b)(5) to admit a surprising amount of hearsay. This has produced a gradual but undeniable reworking of the hearsay rule, a development not intended by Congress.

Congress enacted Rules 803(24) and 804(b)(5), and did so reluctantly, to provide flexibility in rare cases where highly reliable necessary hearsay could not fit within an exception. Congress envisioned a limited role for these safety valves. It meant to keep the hearsay exclusion operating along traditional lines. According to the Senate Judiciary Committee, "the residual exceptions will be used very rarely, and only in exceptional circumstances."

This admonition has been mocked by the courts. Rules 803(24) and 804(b)(5) give trial judges discretion to admit hearsay statements that fail to meet the requirements of any of the itemized exceptions. Judges have not been shy about

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using this power. In fact, they now admit categories of hearsay for which Congress explicitly failed to provide an exception. The trend has been well documented: F. Rossi, *The Silent Revolution*, 9 LITIGATION, No. 2, at 13 (Winter 1983); M. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 Loyola Los Angeles L. Rev. 925 (1992).

This change is starkly illustrated by use of the grand jury testimony of an unavailable witness. Can such testimony be admitted against the accused in a criminal case? Before 1975, no court would have seriously considered receiving it. Today, its admissibility under the residual exceptions is commonplace. This is a startling development. As a general matter, it is hard to find special guarantees of trustworthiness (as required by the residuals) in grand jury statements. The grand jury is an ex parte proceeding largely controlled by the prosecutor. Witnesses may feel pressure to testify. They frequently respond to leading questions, and there is no opportunity for cross-examination. Except for the oath, a grand jury statement usually has no special reliability. Congress would never have imagined that this kind of testimony would be received against the accused in a criminal case.

When judges admit residual hearsay, they must find "equivalent circumstantial guarantees of trustworthiness." Where do they find that? Often they rely on corroboration: If the hearsay statement is corroborated in whole or in part by other evidence in the case, then the hearsay is deemed reliable enough.

Recently, however, the Supreme Court discarded corroboration as acceptable evidence of reliability under the Confrontation Clause. In *Ida v. Wright*, 110 S. Ct. 3139 (1990), the Court reasoned that "allowing corroborative evidence to be considered would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." It went on to say that the presence of evidence corroborating the truth of a hearsay statement "would be no substitute for cross-examination of the declarant at trial." Here, as with expert testimony, retrenchment may occur.

What does the future hold for the Federal Rules? We probably can expect more rulemaking. The last twenty years have seen only a few substantive amendments. Omissions, ambiguities, and poor draftsmanship have mostly been left for the courts to work out. Now, however, there finally is an Advisory Committee on the Federal Rules of Evidence to monitor the situation. Twenty years of scholarship analyzing the Rules has created a ready agenda for change, and it will occur.

Lingo On The Loose—Steven M. Umin

Mr. Umin is a partner with Williams & Connelly in Washington, D.C.

It doesn't take a rocket scientist to notice that lawyers' language has changed. That's a no-brainer, full stop.

Whereinas hereinbefore the problem was, without limitation, that notwithstanding the present availability of alternative locutions, lawyers declined to cease and desist from developing a private language, perhaps to mystify the public and justify their claim to expensive expertise; henceforth, however, it would appear, the problem is contrariwise.

They are into hip talk.

To cut to the chase, what we used to agree to instantly, we now do in a heartbeat. No more unpredictable person, she is now a loose cannon. And why take less money when you can get a haircut instead? The ball is in your court to give me your take on that one.

I say we should put all of this behind us, even though if that phrase is used once more there won't be any more room there. In that case, we may actually have to reinvent the wheel and come up with still spiffier ways to say the same thing. Anyone who believes this trend is at an end is simply not playing with a full deck or is an accident waiting to happen. So we better learn all the cutesy phrases just for belts and suspenders. Trust me—it is no use asking why the old lingo wasn't good enough. That would be comparing apples and oranges. And if you have to ask, you must not be on the same page as the rest of us. Wake up and smell the coffee!

As for getting the money "up front"—that's another trendy phrase. But for goodness sake let's not get rid of the idea! That would be throwing out the baby with the bath water. □

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