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A MODEST PROPOSAL: SCRAP THE RULES OF EVIDENCE

Professor James W. Jeans, Sr.[†]

I. INTRODUCTION

The movie classic “The Agony and the Ecstasy” purported to be a study of the life of the legendary Italian artist-craftsman Michelangelo.¹ A substantial portion of the film was devoted to the master’s work in the Sistine Chapel. Pope Julius II requested that the ceiling be adorned with grandiose reproductions of biblical characters and events. Michelangelo initially demurred claiming that his calling was that of a sculptor and painting only a side line. The Pope prevailed and Michelangelo began the task.

His first efforts were uninspiring and far below the master’s standard. Dejected, Charlton Heston, oops, Michelangelo, drags himself into a neighborhood tavern. There he sees a fellow patron order a goblet of wine, quaff a gulp, and disgustedly spit it out. “Your wine is sour,” he snaps at the owner. In response the proud owner, to redeem his reputation, rolls the offending barrel into the street, opens the spigot and drains the dregs into the gutter. Inspired by the bold integrity of the tavern keeper, Michelangelo returns to the chapel, paints over his “soured” efforts, and starts again with what may be called a pristine ceiling in the Sistine Chapel.

And the lesson for us? The existing Federal “Rules of Evidence” fall far short of the creative capabilities of contemporary judges, trial lawyers, and legal scholars. But we seem content to endure the confusing and complex expressions that comprise the present state of the art of evidence law. It is time that the “rules” (choose your metaphor) be consigned to the gutter or painted over and we begin again. Here is a list of the reasons to “scrap” the Rules of Evidence, followed by a few faltering steps on the road to reform.

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This Article was still in production when Professor Jeans passed away. The staff of the Liberty University Law Review has attempted to publish this piece with few editorial changes to allow the humor, creativity, and personality of this great man to radiate.

1. THE AGONY AND THE ECSTASY (20th Century Fox 1965).

II. THERE IS NO SENSE OF ORGANIZATION IN OUR FEDERAL RULES OF EVIDENCE

The initial rules, logically enough, deal with matters of basic concepts: Scope, Rule 101; and Purpose and Contradiction, Rule 102. Some argument can be made for the proper placement of the next few articles, but hope of continuing with logical sequencing, or even groupings of subject matter, lessens then vanishes.

Some years ago, a commentary on the Rules of Evidence began with a story of a servant who was asked to open a window of a medieval English cottage and report to his master the condition of the weather. The window was shuttered, and a pantry located nearby on an outside wall was similarly shuttered. Mistakenly opening the pantry shutter, the servant dutifully reported, "its hellish dark and smells of cheese."² The metaphor was appropriate. The disorganized compilation of the rules contributes to the hellish obfuscation and cheesy smell of the existing rules.

To begin with a reorganization, it should be acknowledged that there are decided differences in processing a civil trial and a criminal trial; therefore, the rules should recognize that difference by establishing separate categories for each. Some of those differences are obvious, others are more subtle, but distinctions undeniably exist.

A. Burden of Proof

Everyone who watches television crime shows knows of this difference. Society accepts the reality that proof necessary to recover damages for a whiplash is less than that necessary to deprive an accused of life or liberty. There is also an extralegal principle at work in criminal cases that injects an element that is just as significant as the formal imposition of a higher burden of proof. It is expressed in the maxim, "Better that ten guilty persons escape than that one innocent suffer."³ Although never expressed as a statute, a rule of court, or a jury instruction, the concept is a reality in criminal jurisprudence.

2. Edward W. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952). The amusing anecdote is originally from a novel by Robert S. Surtees. ROBERT SMITH SURTEES, *HANDLEY CROSS* 524 (Methuen & Co. ed. 1903).

3. WILLIAM BLACKSTONE, 4 COMMENTARIES *358.

B. *The Rules of the Game*

Trial judges in criminal cases are well aware that in the event of acquittal the case cannot be retried because of trial error favoring the accused.⁴ This threat of double jeopardy is a palpable presence at every evidentiary ruling. An improper ruling against the defendant can lead to reversal – memorialized by a printed decision that, for the offending judge, is a permanent (and public) reprimand from judicial peers. An improper ruling against the prosecution on the other hand results only in a temporary, private, peevish sulk from the prosecutor.

C. *The Trial Lawyers*

In a civil suit, we have opposing advocates, each obligated to zealously advance their client's cause.⁵ The rules impose upon that party seeking to change the status quo the burden of going forward with each procedure of the trial process: jury selection, opening statement, presentation of evidence, and closing argument. In order to balance these impositions, most jurisdictions allow the plaintiffs to have the last word by affording them rebuttal in closing argument.⁶ Some judges, by court rule or custom, allow the party with the burden of proof to be assigned a position at the counsel table of their choice.

Aside from such "housekeeping rules" of sequencing and seat selection, in civil matters the law regards each party and, more importantly, each party's counsel, as equals with similar obligations of ethical behavior and similar efforts of zealous advocacy. Not so in criminal cases. The prosecutor is not so much a zealous advocate as a seeker of justice.⁷ When the former role

4. *Kepner v. United States*, 195 U.S. 100 (1904). *See, e.g.*, *United States v. Wilson*, 420 U.S. 332, 346 n.15 (1975) (citing *Kepner* with approval); *United States v. DiFrancesco*, 449 U.S. 117, 113 n.13 (1980) (citing *Kepner* with approval). *See also* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (stating that the rule that an acquitted defendant may not be retried is "the most fundamental rule in the history of double jeopardy jurisprudence").

5. MODEL CODE OF PROF'L RESPONSIBILITY PREAMBLE 8 (1983). "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." *Id.* *See also* MODEL CODE OF PROF'L RESPONSIBILITY R. 1.3 cmt. 1 (1983) (stating "A lawyer must also act with commitment and dedication to the interests of the client and with *zeal* in advocacy upon the client's behalf"(emphasis added)).

6. JACOB A. STEIN, CLOSING ARGUMENTS § 1:6 (2d ed. West 2007).

7. MODEL CODE OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983 (stating that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate").

dominates the latter role, the behavior is not considered a permissible peccadillo; rather, it is condemned as “prosecutorial misconduct” that taints the entire process.⁸

D. Recognition Within the Rules

Some areas of the current Federal Rules of Evidence concern themselves exclusively with criminal cases, such as Rules 413 and 414, which expand admissibility of certain evidence in sexual assault and child molestation cases. Further, the role of the judge is differentiated when the litigation is criminal and not civil.⁹

E. Constitutional Issues

One further distinction between civil and criminal cases is the pervasive notice of constitutional issues that make irrelevant other principles of evidentiary law. Particularly in questions of hearsay, it is not enough to seek an exception to the exclusionary rule to gain acceptance. The overriding consideration concerns the defendant’s constitutional right of confrontation.¹⁰

Would not these differences be best addressed by recognizing them as discrete areas of evidentiary law and organizing them accordingly? That should be the first step in restructuring evidentiary law. Further, any recitation of principles designed to fulfill the expectations of a better statement of evidentiary law must recite those principles in such order that they are easily comprehended by practitioners, judges, and students of the law.

8. See *Berger v. United States*, 295 U.S. 78, 89 (1935) (ordering a new trial due to the prosecutor’s pronounced and persistent misconduct). See also *People v. Ray*, 467 N.E.2d 1078, 1084 (Ill. Ct. App. 1984) (stating that a “[s]tate’s interest in criminal prosecution is not that it must win at all costs, but to assure that justice is done”). See generally *United States v. Spain*, 536 F.2d 170 (7th Cir. 1976), cert. denied, 429 U.S. 833 (1976), for a fuller discussion of a prosecutor’s rights and duties.

9. See FED. R. EVID. 104(e) Hearings on Preliminary Matters; FED. R. EVID. 104(d) Effect of Accused Testifying on Preliminary Matters; FED. R. EVID. 201(g) Effect of Judicial Notice; FED. R. EVID. 410(4) Statements in Plea Discussions; FED. R. EVID. 612(2) Effect of Prosecutor’s Failure to Produce Writing Used to Refresh Memory Before Testifying; and FED. R. EVID. 704(b) Limitation of Expert Opinion Regarding Mental State of Accused.

10. See *Crawford v. Washington*, 541 U.S. 36 (2004). See also Rorry Kinnally, *A Bad Case of Indigestion: Internalizing Changes in the Right to Confrontation After Crawford v. Washington Both Nationally and in Wisconsin*, 89 MARQ. L. REV. 625 (2006); William D. Matthewman, *Crawford’s Impact on Florida Criminal Law*, 80 FLA. B.J. 10 (2006).

To that end, a review of the existing rules reveal that, scattered throughout, there are a number of discrete areas randomly addressed:

- Definitions;
- Goals of the trial process;
- Rules of fairness;
- The role of the judge;
- Sources of proof;
- Methods of proof; and
- Immaterial evidence.

By recognizing and clustering the rules in their appropriate classification, some of the mystery and angst of attempting to solve the law of evidence should be eliminated, or at least abated.

III. THE RULES PERPETUATE THE USE OF MISLEADING TERMS

Why do we still characterize certain evidence as being “inadmissible”? The meaning is unequivocal – “not admissible.”¹¹ That term is used to describe eleven discrete areas of evidence in the existing rules,¹² each of which though labeled “inadmissible” will, under certain circumstances be admitted into evidence. The evidence obviously isn’t “inadmissible.” A better term – “objectionable.”

Let us use the metaphor of the animals seeking to board Noah’s ark to illustrate the difference. The only entrance is three feet wide and six feet high. Elephants and giraffes are “inadmissible.” They just can’t get in. Their exclusion is self-executing. Now *that* demonstrates the truth of “inadmissibility.”

Let us switch to a metaphor that is more appropriate to the reality of evidentiary law. Guests are invited to a charity ball. Admission is limited to those who have tickets and are formally attired. An attendant is stationed at the door to collect the tickets and check the propriety of the attire. A person with neither ticket nor tux walks toward the door. The attendant is either ignorant of the requisites for entry or is momentarily distracted and, *mirabile dictu*, the objectionable gate crasher gets in!

11. WEBSTER’S II NEW COLLEGE DICTIONARY 719 (3d ed. 2005).

12. FED. R. EVID. 402 Irrelevant Evidence, FED. R. EVID. 404(a) Character Evidence, FED. R. EVID. 407 Subsequent Remedial Measures; FED. R. EVID. 408 Compromise and Offers to Compromise; FED. R. EVID. 409 Payment of Medical and Similar Expenses; FED. R. EVID. 410 Pleas and Offers of Pleas; FED. R. EVID. 411 Liability Insurance; FED. R. EVID. 610 Religious Beliefs or Opinions; FED. R. EVID. 613(B) Extrinsic Evidence of Prior Inconsistent Statements; FED. R. EVID. 703 Basis of Opinion Testimony by Experts; FED. R. EVID. 802 Hearsay.

This scenario occurs with predictable regularity in courthouses throughout the land. The “Rules” of evidence are the tickets for admission, but if no one challenges the ticket-less evidence (through ignorance or inattention), the evidence comes in.

Consider the host of rules identified in footnote twelve above, in which certain evidence is incorrectly described as “inadmissible.” Experienced trial participants or observers know that in countless courthouses throughout the land these proscribed areas of evidence are being admitted every day. If hearsay, for instance, were truly inadmissible (forget the exceptions) then by definition it would be incapable of admission. But if opposing counsel doesn’t recognize the proffered evidence as hearsay or doesn’t make a timely and specific objection, the hearsay comes in (and is recognized as probative evidence).¹³ And so it is with irrelevant evidence, character evidence, subsequent repairs and all the proscribed topics.¹⁴ There is no self-executing force that makes it impossible for the fact-finder to hear such evidence. The “rules” merely identify those areas in which the efforts of the proponent to introduce such evidence *may* be thwarted by a timely and specific objection. That is why identifying these topics as being “inadmissible” is misleading. The more accurate term is “objectionable.” Such should be the mindset of the astute advocate and, such should be the verbiage of the rules.

Another danger in attempting to label certain evidence as “inadmissible” is that such a designation ignores the circumstances under which it is sought to be admitted. Good judges know this, and when asked in a motion in limine to declare that certain evidence be excluded, they respond, “We’ll cross that bridge when we come to it.” Why do the judges defer their rulings? Consider the following situations.

A person accused of a crime takes the stand and is confronted on cross-examination with a past felony conviction. Should the judge have ruled before trial that no mention should be made of the past conviction?

A plaintiff in a civil suit is a single mother with a six year old who suffers from a birth defect that demands continuing attention. Should the judge rule such evidence irrelevant in a pre-trial hearing? Seems irrelevant, but mom may

13. See, e.g. 29A AM. JUR. 2D EVIDENCE § 1441 (2005).

14. See Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L. REV. 893, 894 (1992) (“cases suggest an evidentiary error alone is not very likely to induce the reviewing court to term the error ‘reversible’ on the ground that the error affected a substantial right of a party”); Ellen T. Wry, *New Jersey Standards for Appellate Review: An Overview*, 169 N.J. LAW. 18, 18 (1995) (explaining that “[i]f you study appellate standards carefully, you’ll see that they convey this message: we will correct serious errors that have created an injustice, but most trial errors will not warrant reversal”).

testify that her bad back forecloses giving little Timmy the attention he needs and that as a result of her injury she has had to hire a nurse for Timmy. Relevance is established, and the evidence is admitted.

Consider too, another scenario that illustrates that the changing, dynamic nature of a trial will be determinative of admissibility rather than the static appraisal of evidence as “admissible” or “inadmissible.” As an example, suppose this question is posed on an evidence test:

The Plaintiff is on the stand.

Question: Did the defendant driver say anything to you after the collision?

Answer: Yes, he said that he had liability insurance, that he was sorry I was hurt, and that I should see a doctor and send him the bills.

Should this evidence be admitted? Explain.

The student responds: “The statements of defendant driver should be excluded. Federal Rule of Evidence 411 precludes evidence of liability insurance; Federal Rule of Evidence 409 eliminates offers to pay medical expenses as proof of liability; and expressions of commiseration are universally held to be irrelevant.”

Sounds like an A effort. But the truly perspicacious student would utilize that ever-popular lawyer-like response: “It depends.” And in this case it is most appropriate. “If the plaintiff’s lawyer asked the question, the answer is objectionable. If the defense lawyer asked the question, the error has been invited and the answer stands.” Now that’s an A.

Just another illustration that content alone does not dictate admissibility, and another reason to emphasize the reality that the law of evidence cannot be neatly expressed in rules that identify evidence as admissible or inadmissible. Too often, “it depends.” Best that we identify principles to guide the judge and jury, define their respective areas of responsibilities, and then, “Let the games begin.”

IV. THE RULES ARE DECEPTIVE AS TO THEIR PURPOSE AND CONSTRUCTION

The goals of our legal process as identified in the rules are: “fairness in administration,” “elimination of unjustifiable expense and delay,” and “promotion of growth and development of the law of evidence to meet the end that the truth may be ascertained and proceedings justly determined.”¹⁵

Nice expressions of lofty ideals – but are they true? Are the rules really designed so “that the truth may be ascertained”? Of course not. The entire thrust and perceived need for the Federal Rules of Evidence is *to prevent the jury from hearing all of the truth*. When the fact-finder is a jurist or a tribunal of jurists, as in most European countries, there are no rules of evidence.¹⁶ Witnesses stand at the bar and address the court in narrative form. The judges need no rules to direct them as to what information recited has probative value and what does not. No need for a lawyer to move that offending evidence be stricken or that testimony be disregarded or that a mistrial be declared just because the fact-finders have heard irrelevant, prejudicial, or inflammatory evidence. It is assumed that these upright professionals learned in the law can filter the good from the bad and fashion a just verdict using only the wheat and discarding the chaff.

That same assumption is made here in the United States of America when a jury is waived and the judge sits as a fact-finder. The Rules of Evidence are all but forgotten. Why should a judge exclude proffered evidence and risk reversal if he has ruled improperly? Compelled by reality, the judge as fact-finder lets everything come in, content in the realization that if the appellate court can glean sufficient evidence to support the trial judge’s finding, the verdict will stand. But what if “inadmissible” evidence has been admitted? Wouldn’t that taint the result? No, the assumption prevails that the judge, although admitting it in evidence, disregarded this improperly admitted evidence in reaching the final decision that he has “kept what is worth keeping and with the breath of discretion blown the rest away.”¹⁷

15. FED. R. EVID. 102.

16. JAMES W. JEANS, TRIAL ADVOCACY § 11.2 (2d ed. 1993). See also David Weissbrodt, *Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture*, 15 MINN. J. INT’L L. 43, 58 (2006) (stating that “[t]he European Court of Human Rights admits any kind of evidence without restriction”); Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 PACE INT’L L. REV. 93, 99-100 (2001) (reporting that “generally, European courts do not use the complex body of evidentiary rules that the Anglo-American system has developed”).

17. This statement is an allusion to a line penned by Dinah Mariah Mulock Craik. The

The lesson to be learned is this. Most of the rules of evidence are designed to prevent the “great unwashed” of the jury from hearing all the truth. The framers of the rules embraced a philosophy that jurors cannot be trusted. Their easily impressed, indiscriminating minds are incapable of hearing everything about the case. The rules mimic the voice of the cynic who secured a place in cinematic history by sneering, “You can’t handle the truth.”¹⁸

But there are other reasons than mistrust of the jury for denying them the truth. Consider the exclusion of:

- Subsequent remedial measures;¹⁹
- Offers of compromise;²⁰
- Payment of medical and similar expenses;²¹ and
- Privileged communications.²²

“Public policy,” the usual catch-all explanation, favors that dangerous conditions be remedied, that disputes be resolved, that acts of charity be encouraged, and that the confidentiality of certain communications be maintained. Indeed there may be some peripheral benefits from excluding such information from the jury but there is a price to pay – we are putting blinders on the fact-finders and frustrating the pronounced goal of these rules – “that the truth may be ascertained.”²³ (Ironic isn’t it that witnesses are sworn to tell the “whole truth” yet when preparing a client for a testimonial recitation of events, the lawyer advises, “You can’t mention that the defendant driver said he was insured, that an offer of compromise had been made, that he paid your medical expenses, and that immediately after the accident he had his brakes replaced.”)

An analysis of these exclusions reveals that they are merely specific instances reflecting the philosophy of Federal Rule of Evidence 403,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....²⁴

original quote reads: “Oh, the comfort – the inexpressible comfort of feeling *safe* with a person – having neither to weigh thoughts nor measure words, but pouring them all right out, just as they are, chaff and grain together; certain that a faithful hand will take and sift them, keep what is worth keeping, and then with the breath of kindness blow the rest away.” DINAH CRAIK, *A LIFE FOR A LIFE* 169 (Carleton 1866) (1859).

- 18. *A FEW GOOD MEN* (Columbia Pictures 1992).
- 19. FED. R. EVID. 407.
- 20. FED. R. EVID. 408.
- 21. FED. R. EVID. 409.
- 22. FED. R. EVID. 501.
- 23. FED. R. EVID. 101.
- 24. FED. R. EVID. 403.

Interestingly, as stated, the probative value of the evidence is a given – the unfair prejudice is only a “danger.” Why a danger? Because the jury *may* be unduly influenced by emotion. So keep the truth from them.

One of the most perplexing exclusionary rules prevents evidence of “of other crimes, wrongs, or acts . . . [offered to] show action in conformity therewith.”²⁵ The rationale for excluding such evidence has been expressed by many scholars.²⁶

It isn’t that such proof has no relevance nor probative value. The average juror would no doubt think it helpful if they knew that the defendant accused of burglary had burgled before. The problem is not that such evidence is not probative enough – it is too probative.

Hearing of a past conviction of burglary, the jury would be compelled to reprise a similar conviction of a similar crime. So say the evidence gurus.²⁷

True, some jurors might respond to a prosecutor’s plea that “Once a burglar, always a burglar” or argument that “a leopard can’t change its spots.” But what of the myriad counter-pleas available to defense counsel? “America is the land of beginning again. We don’t look to see where we came from, but to where we’re going.” “The prosecutor’s case is so weak that they want you to penalize my client again for a debt to society that he has already paid.” And if religious themes seem in order, “Remember the thief on the cross. He ended up in paradise.”²⁸

The same contradictory idea we see again and again in determining the status of hearsay. A criminal defendant seeking to prove self-defense in response to a homicide charge calls a witness who testifies that: “He told me a week before the killing, ‘I’m scared stiff of Spike.’ He told me that the next time he sees me he is going to kill me.” This out of court statement by the defendant is received

25. FED. R. EVID. 404(b).

26. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 57 (Tillers rev., 1983); 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §14q (16th ed. 1899); CHARLES MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 43 (1954); FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 65 (9th ed. 1884).

As far back as 1865 it has been said, “The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to character.” *Michelson v. United States* 335 U.S. 469 (1948) (internal quotations omitted).

27. *Id.*

28. Alluding to the passion story of Christ in the Gospel of Luke, where Jesus took compassion on the dying brigand to his side, saying “Verily I say unto thee, Today shalt thou be with me in paradise.” *Luke* 23:43 (KJV).

by the jury, not to prove who was the aggressor, but merely to prove the defendant's state of mind on that occasion.

This never ending conflict is endemic with the rules of evidence. Can we trust the jury to hear it all? The answer is "of course we can," if (and it's a big if) the information can be properly introduced. If the criminal defendant takes the stand, then the jury hears of his past criminal behavior; not as evidence to prove the likelihood that he did it again, heaven forbid, but merely to help the jury to determine his credibility in denying that he did it again. The identity of the rider is not always the key to admissibility. It's often the horse that he rides in on.

Perhaps at one time laity was too naïve, too sheltered to handle the gritty realities of life that are intrinsic to litigation. Time was that ladies blushed on hearing words of endearment, blanched when profanity fell on their ears, and fainted at the sight of blood. As the poet lyricised, "In olden days a bit of stocking was thought of as something shocking."²⁹ Times have changed and now, with the advent of television, "Anything goes."³⁰ (A bit of courtroom trivia makes the point. During the celebrated Roaring Twenties murder trial of Nathan Leopold and Richard Loeb, evidence was adduced of a homosexual relationship between the two. Before receiving such inflammatory testimony, at the judge's order, the women were removed from the courtroom.³¹ "Heavens to Betsy!") Even historians, from whom we should expect unvarnished recitation of the truth, fell victim to Victorian prudery. Edward Gibbon, author of the epic "The Rise and Fall of the Roman Empire," confessed that "[m]y English text is chaste, and all licentious passages are left in the obscurity of a learned language" (Latin or Greek).³²

The general public, through the modern media, are exposed to vicious violence, maimed bodies, and depravities of every conceivable kind. Are there any reasons today to withhold photographs of an injured or killed victim of a civil wrong or criminal act because of "the inflammatory nature of the subject matter"?

The more the public is exposed to the grit of "reality shows," the brutishness of cop dramas, and the vulgarities of "shock jocks," the less justifiable are the exclusionary Rules of Evidence based on the premise that unsophisticated and

29. These lyrics are found in the 30s musical *Anything Goes*, co-written by Guy Bolton, P.G. Wodehouse, Howard Lindsay, and Russel Crouse, with lyrics and music by Cole Porter. COLE PORTER, lyrics to *Anything Goes*, in *ANYTHING GOES* (1934).

30. *Id.*

31. See Paula S. Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 *J. AMERICAN HISTORY* 919 (1993).

32. EDWARD GIBBON, *AUTOBIOGRAPHY* 198 (Dero A. Saunders ed., 1967) (1961).

uninformed jurors “can’t handle the truth.”³³ Any statement that the Rules of Evidence are designed “to the end that the truth may be ascertained” is a blatant falsehood.

V. THE RULES ARE, IN SOME INSTANCES, SELF-CONTRADICTIONARY

Rule 402 recites a principle and then ignores it in the rules that follow. The heading to that rule announces “Relevant Evidence Generally Admissible” and the text affirms, “all relevant evidence is admissible” and then notes “exceptions.”³⁴ But when these exceptions (particularly those “provided – by these rules”) are identified, the circumstances *denying* admission are expressed as the rule and those permitting admission are expressed as the *exceptions*. This flip-flop is not a one-time thing but is pervasive throughout. The rules regarding subsequent remedial measures,³⁵ compromise and offers to compromise,³⁶ payment of medical and similar expenses,³⁷ and liability insurance,³⁸ identify each area of evidence as being “not admissible,” then proceed to note *exceptions* of admissibility. But didn’t we learn that all relevant evidence is “generally admissible”?³⁹ Of course the classic example is the hearsay rule, condemning hearsay as “not admissible,”⁴⁰ then identifying twenty-nine exceptions!⁴¹

If it were only a matter of semantics, the inconsistency could be resolved by stating a rule confirming that evidence *is* admissible *unless*, instead of condemning evidence that *is not* admissible *except*. But semantics is not confined to the choice of words – it dictates mind-set. The choice of “half-full” or “half-empty” in describing a water glass identifies one as an optimist or a pessimist. And the “admissible unless” or the “inadmissible except” is decisive in deciding if the rules are true to the orthodoxy expressed in Rule 402 or express the view of a hypocritical heretic.

33. A FEW GOOD MEN, *supra* note 18.

34. FED. R. EVID. 402.

35. FED. R. EVID. 407.

36. FED. R. EVID. 408.

37. FED. R. EVID. 409.

38. FED. R. EVID. 411.

39. FED. R. EVID. 402.

40. FED. R. EVID. 802.

41. FED. R. EVID. 803, 804.

VI. THE RULES PROVIDE NO GUIDANCE RESPECTING A MOST SIGNIFICANT ASPECT OF THE TRIAL PROCESS – THE FORM OF QUESTIONING

Any compilation of rules or guidelines that seek to improve the trial process must address not only the content of interrogation but also the form. Indeed, if one were to audit at random a civil or criminal case one would discover that the overwhelming majority of the objections made during the trial are addressed to the manner in which the interrogation is being conducted and not to the information that is sought to be elicited. One reason for this reality is that many times questions of admissibility of evidence are resolved before the trial begins in pre-trial conferences, motions in limine, or in criminal trials, motions to suppress. Regardless of the reason, most trial objections deal with the form of the question. But, as the rules now exist, Federal Rule of Evidence 611, Mode and Order of Interrogation and Presentation, merely exhorts the court to “exercise reasonable control over the mode . . . of interrogating witnesses.”⁴² The only specific reference is to leading questions – and that effort is far from instructive:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness testimony.⁴³

In other words, don't use leading questions – unless you have to. And that is the way it works. When it is “necessary to develop” the testimony from a witness of tender age,⁴⁴ from one who is senile,⁴⁵ from one whose primary

42. FED. R. EVID. 611.

43. FED. R. EVID. 611(c).

44. *See, e.g.*, *United States v. Butler*, 56 F.3d 941 (8th Cir. 1995) (explaining that although leading questions are generally prohibited during direct examination except as necessary to develop witness's testimony, exception to this rule exists when witness is child.); *United States v. Wright*, 119 F.3d 630 (8th Cir. 1997) (allowing prosecution to ask leading questions of four-year-old child sexual abuse victim was not abuse of discretion); *United States v. Boyles*, 57 F.3d 535 (7th Cir. 1995) (use of leading questions when examining four-year-old child was proper where questions helped to elicit difficult testimony from child and they aided court in search for truth); *People v. Watson*, 629 N.W.2d 411 (Mich. Ct. App. 2001) (holding that a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses.)

45. *See, e.g.*, *In re Susser Estate*, 657 N.W.2d 147 (Mich. Ct. App. 2002) (holding that a trial court may allow a fair amount of leeway in asking questions of elderly and infirm witnesses); *Price v. State*, 748 So.2d 166 (Miss. Ct. App. 1999) (state was permitted to use leading questions on direct examination to elicit responses from 83-year-old female victim of rape and sexual battery, where victim was embarrassed to recount sexual aspects of crime).

language is not English,⁴⁶ even from one who is “nervous,”⁴⁷ leading questions are appropriate.

Confusion regarding leading questions is further exacerbated by the indefinite nature of the term itself and the fact that there are precious few, if any, appellate decisions that have defined the term. The result is that trial judges are free to implement their own version of “leading.” (One judge’s solution is to consider any question as leading if it calls for a “yes” or “no” answer. When confronted with the example of “Are you married?” the rule is doggedly retained, and the “proper” questions identified as, “What is your marital status?”) Perhaps nonsense such as this can be avoided if the improper aspect of the question is more properly identified as “suggestive” rather than “leading.”

But in any case, talk about leading questions is more an issue of effective advocacy than evidentiary law. Good lawyers do not employ questions that suggest the answer, not because such questions may draw an objection, but rather because they diminish the value of the response. Jurors know when lawyers are “putting words in the mouth of the witness” (a good layman-like definition) and discount the scripted answer. The objection that a question suggests the answer is easily remedied, and one might wonder why the objection is made at all.

To illustrate:

“Did you return home after the show?”

Object leading and suggestive.

Sustained.

46. See, e.g., *United States v. Ajmal*, 67 F.3d 12 (2d Cir. 1995) (holding that trial court did not abuse its discretion in allowing the principal witness in drug prosecution, who spoke little English and testified primarily in Urdu through translator, to testify almost entirely by way of leading questions); *United States v. Rodriguez-Garcia*, 983 F.2d 1563 (10th Cir. 1993) (asking leading questions of witness who could only speak Spanish and was speaking through an interpreter is permissible as necessary to develop witness’ testimony).

47. See, e.g., *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (permitting government to ask witness leading question on direct examination was not abuse of discretion when question was necessary to develop testimony and elicit information from nervous witness); *United States v. Grey Bear*, 883 F.2d 1382 (8th Cir. 1989) (holding that the prosecution was not improperly allowed to ask leading questions during its direct examination of witness; record indicated leading questions were used infrequently and judiciously in order to develop testimony given by an unusually soft-spoken and frightened witness).

Option One:

“Where did you go when you left the show?”

Option Two:

“Did you *or did you not* return home after the show?” (strangely enough the presentation of a choice satisfies some judge’s objections to the question).

And what of the host of other objectionable forms of interrogation? The rules are not adverse to incorporating “illustrations”⁴⁸ so why not identify and illustrate additional objectionable forms of interrogation?

VII. THE RULES DO NOT LEND THEMSELVES TO OBJECTIVITY

Consider a few axiomatic observations. The law of evidence is distinctly different from any other subject in the field of jurisprudence. Aside from skills courses, the balance of a law school curriculum will consist of discrete areas of substantive law: torts, contracts, property, criminal law, etc., each of which is a compilation of constitutional, legislative, and judicial pronouncements that form the respective body of law. The law of evidence on the other hand is part of the process by which these areas of substantive law interact with the litigation – inducing event for the purpose of affecting a just resolution. As observed by Jeremy Bentham, “Evidence is the basis of Justice.”⁴⁹

This process of doing justice embraces other areas of study, such as criminal and civil procedure. But the law of evidence focuses solely upon the dynamics of the trial: the role of the judge and jury; the manner of presentation of proof; the qualifications of witnesses; the admissibility of evidence; the conduct of counsel, and the sum of all these factors that constitute what the litigants and society seek – a fair trial.

In that respect, the law of evidence cannot reach that level of objectivity and standardization that characterizes areas of substantive law. We can readily codify the requisites for a valid will, a bill of lading, or a testamentary trust. The rules are set, and the test is not whether it is fair to require two witnesses to validate a will or that a transfer of land must be in writing, but rather, is the rule clear so that the result can be predictable? Not so in the trial of a case. There are too many variables, too many unanticipated blips, too many factors that feed

48. FED. R. EVID. 901(b).

49. 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 490 (Garland Publ’g, Inc. 1978) (1827).

into the process that the goal of achieving justice would be impaired, not advanced, by attempting to objectify or standardize that process.

The common law, as it develops with any subject, grows incrementally, one fact-driven case after another fact-driven case. A compilation of the opinions of a number of these cases might justifiably result in the pronouncement of a “rule of law,” but the proliferation of unique facts (in substantive areas of the law) and unique factors (in evidentiary law) continues as inexorably as germs in a Petri dish. Consequently any compilation of “rules of evidence” is merely a snapshot of contemporary (and temporary?) rulings regarding the admission of evidence.

Those who compiled the “Rules” for use in federal courts recognized this dynamic and evolutionary aspect of the subject of their study and admonished that their contemporary snapshot be construed to secure the “promotion of *growth and development* of the law of evidence.”⁵⁰ When well-meaning souls attempt to codify the process they find that their “rules” are riddled with exceptions in their creation and elasticized with discretion in their application.

So, how do we understand and apply the law of evidence if it defies codification? Can case law be of help? Yes, but only in criminal cases where the Supreme Court of the United States has ruled on matters where constitutional rights pre-empt the process. In civil matters, case law is of little value because the pronouncement of propriety seldom reaches the appellate level. Objections as to the *form of inquiry* are usually finessed by re-stating the question and even if issues as to the form of interrogation are presented for appellate review, they concern particular trial situations that have little, if any, precedential value. Even those rulings concerning *substantive evidence law* frequently fall within that increasingly broad area of “judicial discretion” and escape evaluation by an appellate court.⁵¹

Incidentally, whether broadening the area of judicial discretion is desirable or not is a matter of dispute. For the pragmatic practitioner, the answer depends on “Who’s the judge?” For the scholars, there is a Goldilocks trifurcation: the Papa bears, too much discretion,⁵² the Mama bears, too little,⁵³ and the Baby

50. FED. R. EVID. 102 (emphasis added).

51. See *United States v. Leonard*, 439 F.3d 648 (10th Cir. 2006) (upholding the trial court in allowing multiple damning pieces of evidence).

52. Eleanor Swift, *One Hundred Years of Law Reform: Thayer’s Triumph*, 88 CAL. L. REV. 2437, 2441 (2000) (commenting that too much discretion is a “serious challenge to our system of adjudication, and to the values of fairness, equality, and individual autonomy that underlie it”). See also Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65 (2005).

bears, just right.⁵⁴ Regardless of the scope of the trial judge's discretion, the ruling, for or against admission, is condoned as long as it is not an abuse of discretion. This praise by faint damning provides little guidance to either judge or lawyer as to the legitimacy of the proffered evidence. The decision stands, but do not rely on it in making decisions in the future.

The recognition of reality discloses another aspect of evidentiary law that exempts it from the usual precedent-setting rulings of an appellate court. The appellate opinion will hold that the trial judge's evidentiary ruling might well have been erroneous but under the circumstances of the case it was "harmless error." "No harm, no foul" preserves the validity of the trial judge's ruling but what does it do to the validity of the rule that identified the foul? Need either judge or lawyer be concerned when the error is meaningless and no sanction results from the aggressive effort by the lawyer proposing the evidence or the errant ruling of the trial judge?

Another application of the "no harm, no foul" maxim dictates that only the losing party can complain of an erroneous ruling by the trial judge in admitting improper evidence or excluding proper evidence. (Further, in criminal cases, if the loser is the prosecution, "double jeopardy" forecloses any review of a trial judge's decision in admitting or excluding evidence.⁵⁵)

What then is the effect of these enumerated realities? In matters of evidence, any thinking judge realizes:

1. Discretionary rulings will almost always be upheld on appeal; and
2. Only the losing party can complain of an erroneous ruling; so there is a 50-50 chance that there will be no appellate review of the trial judge's decision to admit or exclude evidence; and

53. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. Cal. L. Rev. 937, 939 (1990) (commenting that trial judges "do not possess the degree of freedom of choice that is thought to characterize true discretion"). See also Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693 (2005); Eric G. Barber, *Judicial Discretion, Sentencing Guidelines, and Lessons From Medieval England*, 27 W. NEW ENG. L. REV. 1 (2005).

54. Thomas M. Mengler, 74 Iowa L. Rev. 413, 415 (1990) (concluding that the Federal Rules of Evidence have successfully created a "middle course" and that the "overall policy on trial court discretion and appellate review is sound"). See also Hon. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004).

55. See *supra* note 4 and accompanying text.

3. Even if there is a review, chances are that the evidence, admitted or excluded, was not of such significance so as to affect the outcome and thus was “harmless error.”

Now add some procedural realities that further protect the trial judge and consequently lessen the vigor and objectivity of “rules of evidence”:

1. Any objection to proffered evidence must be both timely and specific.⁵⁶
2. Any sustained objection to evidence must be accompanied with an offer of proof as to the content of the excluded evidence.⁵⁷
3. All objections, even when properly made, must be ruled upon before qualifying for review by an appellate court. (The bright-eyed neophyte might ask, “Aren’t all objections ruled upon?” The slack-jawed veteran knows the tactic of some wily judges who seek to foreclose appellate review by simply finessing a ruling with a cryptic, “Move on counsel.”)⁵⁸
4. Further, the timely and specific objection must be ruled upon and included in the record.⁵⁹ It is not unusual for many evidentiary problems to be presented and argued in the court’s chambers without the presence of a court reporter. The judge presents his ruling, the lawyer voices his objection but it is only “written on the wind.” No record, no chance of appeal.

VIII. THE RULES DO NOT REFLECT COMMON SENSE IN EVIDENCE GATHERING

One final note. Laying jury trials aside, the general belief is that if, in non-judicial matters, we want to get at the truth we ignore such niceties as evidentiary rules. Do protective parents, anxious to discover after hour activities of their teenage children, limit their inquiries to non-hearsay statements? Fat chance. Does the United States Constitution shackle congressional hearings, which are designed to probe matters of national

56. FED. R. EVID. 103(a)(1).

57. FED. R. EVID. 103 (a)(2).

58. FED. R. EVID. 103.

59. FED. R. EVID. 103(a)(1).

interest, with rules of evidence? Of course not.⁶⁰ What is the usual condition imposed by lawyers before arbitration or mediation begins? “No rules of evidence.”⁶¹ And what fact-finding procedures are followed in those areas of basic concern to a law student and a licensed practitioner when disciplinary hearings threaten expulsion from law school or revocation of the privilege to practice their profession? Who could be more sensitive to the importance of ascertaining the truth while providing due process to the accused? Yet law school honor code disputes,⁶² and the rules that govern bar disciplinary hearings,⁶³ reveal that rules of evidence are all but ignored.

VII. CONCLUSION

The above observations reflect how the game is played. The trial of a case is not controlled by a set of objective rules, interpreted and applied uniformly so as to dictate a predictable and certain result.

“But,” you say, “don’t we have ‘Rules’ of Evidence?” The question triggers recollection of a story that is part of the Lincoln lore. In a mischievous mood, Ol’ Abe asked a friend, “If you call a horse’s tail a leg, how many legs does a horse have?” The friend answered “Five.” But Lincoln reminded him with irrefutable logic, “The answer is four. Calling a tail a leg doesn’t make it a leg.” Nor does labeling as “rules” a compilation of evidentiary examples to which a party may object, make them so. A rule by definition, courtesy of Black, is “a general norm mandating or guiding conduct or action in a given type of situation.”⁶⁴ Dare we refer to the hearsay “rule” as a regulation prescribing or directing action when it is followed by twenty-nine exceptions as is done with the hearsay “rules”? The Rules of Evidence, in civil cases, are, at

60. The United States Constitution provides that “[e]ach house may determine the Rules of its Proceedings.” U.S. CONST. art. I, § 5, cl. 2. See Michael J. Davidson, *Congressional Investigations and Their Effect on Subsequent Military Prosecutions*, 14 J.L. & POL’Y 281, 293 (2006).

61. Soia Mentschikoff, *The Significance of Arbitration: A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698 (1952).

62. Edward N. Stoner, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 28 J.C. & U.L. 311 (2002). See also *Schaer v. Brandeis University*, 735 N.E.2d 373 (Mass. 2000).

63. For example, Virginia Supreme Court Rules provide that: “In any Disciplinary Proceeding, evidentiary rulings shall be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence received shall be commensurate with its evidentiary founding and likely reliability.” Rules of the Virginia Supreme Court, Part 6, Section 4, Paragraph 13, Subsection E(3).

64. BLACK’S LAW DICTIONARY 1357 (8th ed. 2004).

best, an identification of certain types of information that an alert counselor by timely and specific objection, may prevent the fact-finder from receiving.

A recital of the shortcomings of the existing evidentiary law, however, doesn't solve the problem. Well known among farm folks is the maxim, "Any jack-ass can kick down a barn. It takes a man to build one."

If we are to assume a manly task and construct a new evidentiary edifice, we must adopt a fresh mind-set, more appropriate terminology, and express old principles in a new, orderly, and easily understood manner. The following blueprint is humbly submitted.

PROFESSOR JIM JEANS' (REVISED) CIVIL RULES OF EVIDENCE

It will be noted that much of the verbiage of the existing rules are maintained and only the organization, often through consolidation, is altered. When changes are made, commentaries will follow.

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I. DEFINITIONS

A. DECLARANT

A person who makes a statement. Rule 801.

B. DUPLICATE

A counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original. Rule 1001.

C. HEARSAY

An out-of-court statement offered in evidence to prove its truth. Rule 802.

D. INFERENCE

A conclusion that the jury may reach through circumstantial evidence.

E. JUDICIAL NOTICE

The recognition of a court of a fact not subject to reasonable dispute that is either generally known within the territorial jurisdiction of the trial court; or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Rule 201 revised.

F. MATERIAL EVIDENCE

Evidence that directly relates to an essential element in a claim or defense.

G. ORIGINAL

The writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original. Rule 1001.

H. PHOTOGRAPH

Still photographs, X-ray films, video tapes, and motion pictures.

I. PRESUMPTION

A finding that is mandated by operation of law upon recognition by judicial notice, pleadings or evidence of a fact that dictates a logical conclusion.

J. RELEVANT EVIDENCE

Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401.

K. STATEMENT

Either (1) an oral or written assertion; or (2) a nonverbal conduct of a person, if it is intended by the person as an assertion.

L. TESTIMONY

Evidence given at a trial, hearing, or in deposition which is under oath and subject to the penalty of perjury.

M. UNAVAILABLE WITNESS

Unavailability as a witness includes situations in which the declarant:

1. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
2. Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
3. Testifies to a lack of memory of the subject matter of the declarant's statement; or
4. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Rule 804.

N. WRITINGS AND RECORDINGS

Letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

II. RULES REFLECTING THE PHILOSOPHY OF THE TRIAL PROCESS

A. PURPOSE AND CONSTRUCTION

These Rules shall be construed 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. Rule 102.

COMMENTARY 1

Let us remind ourselves of the hypocrisy that the purpose of the trial is that “truth may be ascertained.” The goal is “justice” – best explained as the community’s perception of the “truth.”

B. RULINGS ON EVIDENCE

1. *Effect of Erroneous Ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
2. *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if specific ground was not apparent from the context; or
3. *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
4. *Renewal of Objections.* Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer proof to preserve a claim of error for appeal. Rule 103.

III. RULES OF FAIRNESS

A. PLAIN ERROR

Plain errors affecting substantial rights although they were not brought to the attention of the court may be noted in considering an appeal. Rule 103(d).

B. RULE OF COMPLETENESS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Rule 106.

C. WEIGHING OF PROBATIVE VALUE AND PREJUDICIAL EFFECTS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403.

D. SUMMARIES

If summaries are to be proposed as evidence, the originals or duplicates shall be made available for examination, copying or both by other parties at a reasonable time and place.

IV. ROLE OF THE JUDGE

A. PRELIMINARY QUESTIONS

1. *Questions of Admissibility Generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (2). In making its determination, the court is not bound by the rules of evidence except those with respect to privileges.
2. *Relevancy Conditioned on Fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. Rule 104.

B. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

1. *When Discretionary.* A court may take judicial notice, whether requested or not.
2. *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information. Rule 201.

C. MODE AND ORDER OF INTERROGATIONS AND PRESENTATION

1. *Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for obtaining a just result from the litigation, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. Rule 611.

COMMENTARY 2

This is another example of the existing rule expressing the “ascertainment of truth” as the goal of the presentment of evidence. A “just result” is a more realistic goal.

D. CALLING AND INTERROGATION OF WITNESSES BY COURT

1. *Calling by Court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
2. *Interrogation by Court.* The court may interrogate witnesses, whether called by itself or by a party.
3. *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present. Rule 614.

E. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize (1) the exclusion of a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present. Rule 615.

F. COURT APPOINTED EXPERTS

1. *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
2. *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation is payable from funds which may be provided by law in criminal cases and civil actions and proceedings invoking just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
3. *Disclosure of Appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness. Rule 706.

G. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (1) whether the asserted writing ever existed, or (2) whether another writing, recording, or photograph produced at the trial is the original, or (3) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. Rule 1008.

V. SOURCES OF PROOF

A. JUDICIAL NOTICE

See Definitions.

B. PRESUMPTIONS

In all civil actions a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut the presumption and failure to rebut the presumption establishes the truth of the issue to which the presumption applied. Rule 301 amended.

COMMENTARY 3

The existing rule obscures the difference between a presumption and an inference. The definitions of each (in section I(4) and I(9) above), state those differences and finesses the confusion that has arisen in attempting to bifurcate presumptions into irrebuttable and rebuttable.

C. WITNESSES

1. *Qualifications.* Every person is competent to be a witness except the judge presiding at the trial, a member of the jury, or anyone who, by reason of age or disability, does not, in the judgment of the trial judge, possess sufficient capacity to perceive, retain, or recite matters within the witness' personal knowledge or has a conscience incapable of being awakened by an oath or affirmation. If the disability of a witness consists of an inadequacy in understanding or speaking the English

language, a person shall be appointed capable of interpreting the native language of the witness and willing to swear or affirm to make a true translation. Rules 601, 602, 603, 604, 605 consolidated and amended.

2. *Impeachment*

- i. The credibility of a witness may be questioned by any party by attacking the witness himself by evidence of:
 - a. The witness' character for untruthfulness (proven by opinion or reputation); or
 - b. Conviction of a crime involving dishonesty or false statement; or
 - c. Conviction of a felony involving a punishment of more than one year unless the conviction involves a juvenile adjudication or the conviction has been the subject of a pardon, annulment, or certificate of rehabilitation.
- ii. A witness' religious beliefs or opinions are specifically excluded as an element of credibility. Rules 607, 608, 609, 610 consolidated and amended.
- iii. The credibility of the testimony of the witness may be attacked by evidence of a prior statement contradicting the witness' testimony. If such evidence is extrinsic in nature (that is manifested by a written statement, voice recording, videotape, or transcript), the witness must be afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness regarding the impeaching evidence. Rule 613, 806 consolidated and amended.

D. ORAL TESTIMONY

1. *Scope.* A witness may testify to matters of which the witness has personal knowledge, opinions, inferences, or knowledge of reputation.

2. *Former Testimony of a Witness is Admissible If:*
 - i. The declarant is not available to testify, and, the testimony was given at a hearing or at deposition, and, the party against whom the testimony is now offered had an opportunity, and, motive to develop the testimony by direct, cross or redirect examination, or
 - ii. The declarant is subject to cross examination, and, the statement is inconsistent with declarant's testimony, or, the statement is consistent with declarant's testimony and is offered to rebut, express or implied charge against the declarant of recent fabrication, or improper influence or motive.
3. *Admissions of Party Opponent.* A statement offered against a party and is (a) the party's own statement, in either an individual or a representative capacity or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant made during the existence of the relationship. Rule 801, 804 consolidated and revised.

COMMENTARY 4

Those matters relating to criminal proceedings are excised and included in the appropriate rule of Criminal Evidence.

4. *A Statement or Conduct of Others If:*
 - i. The subject matter of such speech or conduct is the very essence of the litigation (i.e., defamation, oral contract), or
 - ii. The circumstances under which the statement or conduct occurred was such that a reasonable person could infer that the statement was true or the conduct valid, such as:
 - a. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Rule 803(1).

- b. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Rule 803(2).
- c. A statement describing or explaining an event or condition such as pain and bodily health made while the declarant was perceiving the event or experiencing the condition, or immediately thereafter. Rule 803(3).
- d. A statement of the declarant's then-existing state of mind, such as intent, plan, motive, or design. Rule 803(3) revised.
- e. A statement of memory or belief to prove the fact remembered or believed as it relates to the execution, revocation, identification, or terms of declarant's will. Rule 803(3) revised.
- f. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Rule 803(4).
- g. General information shared among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history. Rule 803(19).
- h. General information shared in the community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located. Rule 803(20).
- i. Any statement not specifically covered above but having equivalent circumstantial guarantees of trustworthiness if the statement is offered as evidence of a material fact that the proponent would not otherwise be able to prove through reasonable efforts. Rule 807.

- iii. The declarant is unavailable, as defined in these rules, and
- a. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. Rule 804(b)(2).
 - b. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Rule 804(b)(3) revised.

COMMENTARY 5

Hearsay is that area of evidence law that generates the most attention from scholars, the most grief for law students, provokes the most mischief for trial judges and trial lawyers, and creates contention and fractures a spirit of community among appellate judges. Inquiring minds should ask, "Why the fuss?" The answer lies, as so often is the case, in the past. The fuss has been with us a long time and an understanding, but not an explanation, is to be found in the historic role of witnesses and the pervasive influence of the oath in our system of jurisprudence.

Historically we must begin before the current form of our jury system existed. It was pre-dated by a panel of decision makers drawn from the community who had personal knowledge of the matter to be litigated.⁶⁵ They were put under oath to properly apply that knowledge in rendering a verdict. Having personal knowledge themselves, they needed no witnesses to aid in their rendering of a verdict. If they felt the need to supplement their own knowledge, fact witnesses were summoned but the role of the fact witness was limited to what they had personally seen or heard.⁶⁶ As expressed by Thayer, "When juries, who were themselves, originally, witnesses as well as triers,

65. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 498-500 (1898).

66. *Id.* at 499.

caused to be helped regularly by testimony of other witnesses, it was only by such as personally knew the truth of what they were saying, and not by witnesses who only knew what someone else had said to them.”⁶⁷ This early expression of a fact witness’ limited contribution to matters “seen or heard” illustrates a basic feature of the Common Law.⁶⁸ English judges dealt with the specific facts before them and seldom made pronouncements of general principles. Certainly, if a witness had knowledge of relevant information based on another sense (“I smelled smoke,” or “I felt the sword in my back”), the testimony would have been received. The “see and hear” limitation sufficed for the case that generated the pronouncement, so there it stayed.

To repeat, these fact witnesses supplemented information that the primary “witnesses,” jurors, already knew, and indeed, had been selected as witness-jurors because of that knowledge of the litigation-inducing event. What then constituted the basis of the verdict? What was relied upon to reach the right decision? Primarily the “general knowledge, *hearsay*, their own private knowledge including *hearsay*, and the inferences from it and the reasoning and conclusions involved in comparing and digesting all that they knew and had heard from others.” So says Thayer.⁶⁹

Obviously it wasn’t that hearsay evidence would taint the verdict, it was merely a matter of who was the source of hearsay, the supplemental secondary fact witnesses or the witness-jurors. Why the difference? Although both were under oath, their status and the roles they played were substantially different. That fact witnesses were involved in the litigation by happenstance. By chance they had some personal knowledge of matters relevant to the dispute. They were put under oath to relate the knowledge truthfully to the decision makers, the witness-jurors so, as previously stated, had been deliberately selected from people of repute within the community to serve more as a panel of judges. The witness-jurors too were under oath to tell the “truth” not in the form of testimony but in the form of a verdict. The failure of either the witness or the jurors to tell the truth was considered perjury but since the significance of their roles was substantially different so too were the penalties. A perjurious witness who swore falsely as to the facts could suffer a fine and imprisonment at the discretion of the judge.⁷⁰

67. *Id.* at 519.

68. This rule was expressed in the maxim, “*quod vidi et audivi; de visi suo et auditu.*” *Id.* at 499.

69. *Id.* at 500.

70. WILLIAM BLACKSTONE, 3 COMMENTARIES *138. *See also* HAROLD BERMAN, LAW AND REVOLUTION 66 (1983).

The jurors who affirmed through their oath a false verdict suffered the loss of their chattels, one-year imprisonment, and forever bore the mark of “infamous.”⁷¹ The point is this. Decision-making in English jurisprudence involved contributions from many sources; personal knowledge, hearsay, general knowledge, reputation, inferences, and as one report reveals, “what their father told them.”

Let us pause to consider how the role of the jury has been to recast in view of changes that have taken place. The witness-jurors have been replaced by our present jurors, selected at random from the community, screened by the attorneys and placed under oath to return a verdict, not on the litany of information recited by Thayer, but solely on “the law, the evidence, and the reasonable inferences to be drawn from the evidence.” But present jurors are given a hint of some of the supplementary sources that their forebears had available to them. What trial lawyer in closing argument has not admonished the jury “Don’t leave your common sense in the courtroom. Take it to the jury room and use it to reach your verdict.”

So history tells us that hearsay *information* was a valid basis for decision-making. Only hearsay *evidence* was excluded, a distinction that did not make much of a difference.

A second factor which has contributed to the confusion regarding the admission of hearsay evidence has been the evolving significance of the oath.

The diminution of the importance of the oath has been so gradual that we have hardly noticed. Historically a vow made to God (that’s what an oath is) was a sure-fire assurance that the promise would be fulfilled.⁷² Consider Jephthah’s vow that if God helped him defeat the Ammonites that he would offer up for a burnt sacrifice the first person to greet him upon his victorious return.⁷³ Who was that? His daughter and only child. Bummer. And what was Jephthah’s response? “I have made a vow to the Lord that I cannot break.”⁷⁴ No attempt to waffle despite the awful consequences. Compliance was the only option.

Shakespeare provides insight into the historical importance of the oath existing in the Elizabethan era. Richard III had imprisoned his nephew, the rightful heir to the crown and his younger brother in the Tower of London. Their mother and grandmother came to visit them and are told that Richard has forbidden any visitors. They entreat the guard to honor their request. His

71. 2 ENCYCLOPÆDIA BRITANNICA 879 (11th ed. 1910) (under heading Attaint, Writ of).

72. BERMAN, *supra* note 66, at 65-66.

73. *Judges* 11:31.

74. *Judges* 11:35 (NIV). See also *Numbers* 30:2 (KJV), “If a man vow a vow unto the Lord, or swear an oath to bind his soul with a bond; he shall not break his word, he shall do according to all that proceedeth out of his mouth.”

discussion ending reply was “I am bound by oath.”⁷⁵ No further explanation was needed.

Nor can we dismiss these examples as irrelevant relics of bygone days. Mark Twain reflects that attitude towards the oath as it existed in post-Civil War mid-America, when he records in *Tom Sawyer* the response of his co-protagonists upon hearing Injun Joe lie under oath. “Then Tom and Huckleberry stood dumb and staring, and heard the stony-hearted liar reel off his serene statement, they expecting every moment that the clear sky would deliver God’s lightning upon his head, and wondering to see how long the stroke was delayed.”⁷⁶

How many contemporary Americans believe that instant heavenly retribution will befall either the judge who violates the oath by ignoring constitutional restraints; the lawyer who violates the oath by ignoring constitutional restraints; the lawyer who violates his or her oath by engaging in unethical conduct; the juror who violates his oath by substituting his judgment for the law as pronounced by the court in its instructions; or the witness who commits perjury?

During President Clinton’s travails regarding his relationship with Monica Lewinsky a poll was conducted to determine the public’s response to the president’s denial of the affair. Among the questions presented by the pollster were these two, “[d]id Clinton commit perjury” and “should [the House Judiciary] Committee vote to impeach Clinton.”⁷⁷ As most of you will recall, the answer of “yes” to the first did not discourage an answer of “no” to the second.⁷⁸

Lying of course, was condemned by most but the fact that his falsehoods were made under oath was of little significance. Relating this phenomenon to our evidentiary regard of hearsay, the circumstances under which statements are made, other than the absence of being made under oath, seem to be more significant.

Once the diminished role of the oath in assuring truth telling is accepted and the historical role that hearsay has played in fact finding and decision making is acknowledged, the angst of dealing with out of court statements should be

75. William Shakespeare, *Richard III*, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* 654 (Gramercy Books 1975).

76. MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* 100 (Harper & Bros. ed. 1920).

77. *Poll: Most Americans Think Clinton Committed Perjury*, CNN.COM, Dec. 10, 1998.

78. 71% of those polled believed Clinton perjured himself, while only 34% believed he should be impeached. *Id.* Despite the suspicions of perjury, Clinton’s approval rating hovered in the mid 60 percent range during the same time period. Susan Pinkus, *Poll Analysis: Clinton Gets High Marks for Doing His Job, Which Propels Strong Sentiment to Keep Him In Office*, LATIMES.COM, Jan. 31, 1999.

relieved and the test of their admissibility simply stated is whether “the circumstances under which the statement was made or the conduct occurred was such that a reasonable person could infer that the statement was true or the conduct valid.”⁷⁹

The examples are preserved, not as exceptions to a general rule excluding maligned hearsay branded as inadmissible, but as examples of out of court statements historically and logically recognized as worthy of belief.

5. *Routine Practice.* Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Rule 406.
6. *Opinion Evidence.*
 - i. **Expert Opinion.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect. The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. Rules 703, 705 consolidated.
 - ii. **Lay Opinion.** If not based on scientific, technical or other specialized knowledge, the witness may testify in the form of an opinion or inference when such testimony is helpful to a clear understanding of the witness’ testimony or the determination of a function issue and is rationally based on a summary of perceptions

79. JIM JEANS, PROFESSOR JIM JEANS’ REVISED CIVIL RULES OF EVIDENCE (V)(D)(4)(ii), *supra* page 33.

of the witness, such summary being acceptable by reason of the difficulty of expressing the individual perceptions which form the opinion.

E. NON-TESTIMONIAL EVIDENCE

1. *Recorded Recollection.* A memorandum or note made or adopted by the witness when the matter recorded was fresh in the witness' memory and the memorandum or note so recorded accurately reflected that memory, if, at time of trial, the witness has insufficient recollection to fully and accurately testify to the subject matter of the memorandum or note. Rule 803(5).
2. *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation in any form of acts, events, conditions, opinions or diagnosis:
 - a. Made at or near the time of the recording,
 - b. By a person with knowledge or from information transmitted by a person with knowledge,
 - c. If customarily kept in the course of a regularly conducted business activity,
 - d. As shown by the custodian of such record or other qualified witness or by certification. Rule 803(6) revised.

COMMENTARY 6

When there are multiple foundational elements to be considered in determining the admissibility of a record, why not isolate them so that they may be easily recognizable? Excessive verbiage further complicates understanding. The twelve-word element expressed in iii above is far clearer than the thirty-one word effort expressed in the current rule.

3. *Public Records and Reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (1) the activities of the office or agency, or (2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (3) in civil

actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority warranted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Rule 803(8).

4. *Records of Vital Statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of Rule 803(9).
5. *Records of Religious Organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. Rule 803(11).
6. *Marriage, Baptismal, and Similar Certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter. Rule 803(12).
7. *Family Records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like. Rule 803(13).
8. *Records of Documents Affecting an Interest in Property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office. Rule 803(14).
9. *Statements in Documents Affecting an Interest in Property.* A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. Rule 803(15).

10. *Ancient Documents.* Statements in a document in existence twenty years or more, upon a showing of the authenticity of the document. Rule 803(16).
11. *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. Rule 803(17).
12. *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. Rule 803(18).
13. *Judgment of Previous Conviction.* Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. Rule 803(22).
14. *Judgment as to Personal, Family, or General History, or Boundaries.* Judgments as proof of matters of personal family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. Rule 803(23).
15. *Summaries.* The contents of voluminous writings, records, or photographs that cannot conveniently be examined in court, may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. (See Rules of Fairness). Rule 1006.

COMMENTARY 6

It seems much more logical to identify non-testimonial evidence as a distinct source of proof rather than include them as hearsay exceptions. But once the broad condemnation of Rule 802 is pronounced that is what the existing rules are stuck with. Each of these exceptions has intrinsic characteristics which merit their admissibility.

VI. METHODS OF PROOF

A. WRITING, RECORDING OR PHOTOGRAPH

To prove the content of a writing, recording, or photograph, the original or a duplicate will suffice unless a genuine question is raised as to its authenticity of the duplicate, or upon a showing that it would be unfair to admit the duplicate in lieu of the original under the circumstances.

B. ALTERNATIVE METHODS OTHER THAN ORIGINAL

Evidence of the contents of a writing, recording or photograph is admissible if:

1. *Originals Lost or Destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
2. *Original Not Obtainable.* No original can be obtained by any available judicial process or procedure; or
3. *Original in Possession of Opponent.* At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
4. *Collateral Matters.* The writing, recording, or photograph is not closely related to a controlling issue. Rules 1002, 1003, 1004 combined and revised.

C. SELF-AUTHENTICATING DOCUMENTS

1. Printed materials purporting to be newspapers or periodicals.
2. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
3. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
4. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
5. Public Documents
 - i. A document bearing a seal purporting to be that of the United States of America, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
 - ii. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
 - iii. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (a) of the executing or attesting person, or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United

- States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.
- iv. A copy of an official record or report or entry therein or a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
 - v. Books, pamphlets, or other publications purporting to be issued by public authority.

VII. IMMATERIAL EVIDENCE

COMMENTARY 8

The historical proclivity of the scrivener to utilize a profusion of words to make sure the purpose was clear (sell, convey, transfer, bargain, etc.) has tainted the speech of the advocate. There echoes in countless courtrooms today the objections “irrelevant, immaterial and inadmissible.” The difference is that the scrivener was expressing a single concept employing synonyms. The advocate with his triune objection is lumping three discrete concepts together and in doing so blurs the distinction and trivializes the meaning of immaterial. Black’s classic definition of immaterial is, “lacking any logical connection with the consequential facts.”⁸⁰ An elaboration of that definition may be helpful.

Think of a case, plaintiff’s or defendant’s, as requiring certain elements of proof – building blocks as it were, to erect an edifice of recovery or defense. If the evidence proffered is not of the proper material to build those blocks, it is “immaterial” and of no value in establishing the essential elements of the case. The rules identify such evidence and limits their admissibility. The first four categories (subsequent remedial measures, offers of compromise, payment of

80. BLACKS LAW DICTIONARY 764 (8th ed. 2004).

medical bills, and existence of liability insurance) might be relevant to certain issues but they are of no probative value in establishing the building blocks of liability. Thus they are grouped together and declared to be “immaterial.”

A. SUBSEQUENT REMEDIAL MEASURES

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. However, such evidence is admissible when offered to impeach, or to prove ownership, control, or, if controverted, the feasibility of precautionary measures. Rule 407 revised.

B. COMPROMISE AND OFFERS OF COMPROMISE

Evidence of negotiations, either by conduct or statements, or conclusion of a settlement of a disputed claim is not admissible to prove liability or damages. However, such evidence is admissible to refute a contention of undue delay, or prove bias or prejudice of a witness. Further, information disclosed in compromise negotiations that is otherwise discoverable is not excluded. Rule 408 revised.

C. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for injury. Rule 409.

D. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. However, such evidence is admissible to prove agency, ownership, control, bias, or prejudice of a witness. Rule 411 revised.

E. PRIVILEGED COMMUNICATIONS

Evidence of the content of a communication between the declarant and another whose relationship is such that a reasonable person would assume such communication to be confidential is inadmissible unless the circumstances,

content, or subsequent behavior is such that confidentiality cannot be assumed. Rule 501 revised.

COMMENTARY 9

For purposes of civil actions, this truncated version is sufficient (and is further illustration of the need to bifurcate the rules of evidence). Most states identify privileged communications by statute. If statutes are silent, the common law can be relied upon to recognize those relationships which are of such intimacy (attorney-client, priest-penitent, doctor-patient, etc.) that we as a society have decided that the guaranty of confidentiality is of more importance than the resolution of legal disputes.

PROFESSOR JIM JEANS' (REVISED) CRIMINAL RULES OF EVIDENCE

(Rules Peculiar to Criminal Proceedings*)

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* Professor Jeans was unable to finish the Criminal Rules. We have printed only what he had completed. We hope that the small amount of material available will help to prompt discussion on the issue, as Professor Jeans would have wanted.

I. DEFINITIONS

A. SEXUAL ASSAULT

An “offense of sexual assault” includes:

1. Any conduct proscribed by chapter 109A of title 18, United States Code;
2. Contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person;
3. Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body;
4. Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
5. An attempt or conspiracy to engage in conduct described in paragraphs 1-4 above. Rule 413 (d) 1-5 Revised.

B. CHILD

“Child” means a person below the age of fourteen. Rule 414 Revised.

C. CHILD MOLESTATION

“Offense of child molestation” means a crime that involves:

1. Any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
2. Any conduct proscribed by chapter 110 of title 18, United States Code;
3. Contact between any part of the defendant’s body or an object and the genitals or anus of a child;
4. Contact between the genitals or anus of the defendant and any part of the body of a child;

5. Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
6. An attempt or conspiracy to engage in conduct described in paragraphs 1-5 above. Rule 414 Revised.

II. RULES OF FAIRNESS

A. PLAIN ERROR

Plain errors affecting substantial rights although they were not brought to the attention of the court may be noted in considering an appeal. Rule 103(d).

B. STATEMENTS TO BE CONSIDERED CONTEMPORANEOUSLY

If a statement made in the course of plea discussions is introduced in evidence, other statements made contemporaneously with it are admissible. Rule 410(4) revised.

C. REQUIREMENT OF NOTICE

If the prosecution intends to introduce at trial evidence of other crimes, wrongs, or acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, the prosecution shall, upon request by the accused, provide reasonable notice in advance of trial of the general nature of such evidence it intends to introduce at trial. Rule 404(b) revised.

D. PAST SEXUAL BEHAVIOR

A party intending to offer evidence of the sexual predisposition or other sexual behavior of an alleged victim must:

1. File a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered, unless the court, for good cause, requires a different time for filing or permits filing during trial,
2. Serve the motion on all parties and notify the alleged victim or the alleged victim's guardian or representative, and

3. The court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard (all filings and the record of the hearing must be sealed unless the court orders otherwise). Rule 412 revised.

E. PAST SIMILAR OFFENSES

If, in a case in which the defendant is accused of an offense of sexual assault or child molestation and the prosecution intends to offer evidence of the defendant's commission of a similar offense or offenses of sexual assault or child molestation, the prosecution must disclose to the defendant, at least 15 days before the scheduled date of trial, the statements of witnesses or a summary of any testimony that is expected to be offered. Rule 413(b), Rule 414(b) consolidated and revised.

III. ADMISSIBILITY

A. RELEVANT TRAIT OF CHARACTER

1. If an accused offers evidence of a relevant trait of character of himself or a victim, the prosecution may offer evidence of the same nature in rebuttal.
2. In a homicide case, if the accused invokes a claim that the victim was the first aggressor, the prosecution may offer evidence of the peacefulness of the victim. Rule 404(a) revised.

B. OTHER CRIMES OR WRONGFUL ACTS

The evidence of other crimes, wrongs or acts is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Rule 404(b) revised.

C. SEXUAL MISCONDUCT OF VICTIM OF SEXUAL MISCONDUCT

In any proceeding involving alleged sexual misconduct, evidence of an alleged victim's sexual behavior or predisposition is admissible but only if such evidence is offered to prove:

1. That a person other than the accused was the source of semen, injury, or other physical evidence, or

2. Consent of the alleged victim by evidence of specific instances of a sexual relationship between the accused and the alleged victim. Rule 412 revised.

D. SIMILAR OFFENSES BY ACCUSED OF CHILD MOLESTATION OR SEXUAL ASSAULT

In a criminal case in which the alleged offense is child molestation or sexual assault, evidence of the accused's commission of a similar offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant. Rule 413(a), Rule 414(b).

E. STATEMENT OF CO-CONSPIRATOR

A statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy is admissible but, unless corroborated, the contents of the statement are insufficient to prove the authority of the declarant to make the statement, or to prove the existence of, or the identity of the participants in the conspiracy.

IV. IMMATERIAL EVIDENCE

A. OPINION OF EXPERT

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of the fact alone. Rule 704(b).

APPENDIX: EXAMPLES OF TRIAL OBJECTIONS AND RULINGS

Any compilation of rules or guidelines that seeks to improve the trial process must address not only the content of interrogation but also the form. Indeed, if one were to audit at random a civil or criminal case, one would discover that the overwhelming majority of the objections that are made during the trial are addressed to the manner in which the interrogation is being conducted and not to the information that is sought to be elicited. This Appendix seeks to illustrate at least some of the more common objections for the benefit of the reader.

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A. ASSUMING FACTS NOT IN EVIDENCE

Usually a simple matter of chronology. The interrogator fails to develop the testimony so that one fact builds on another in a logical timeline. If such is the case, the remedy is to rearrange the interrogation in proper order. But sometimes, this objection is necessitated by an attorney's attempt to introduce information that has not yet and may never be provided by the testimony of a witness.

To illustrate: A policeman is called to testify that he found an overturned automobile thirty feet from the roadway. He is asked, "After the driver lost control, how far did the car travel from the roadway?" The cause of the misadventure is in issue. There has not been any evidence that the driver "lost control" (Plaintiff claims a product defect). The seemingly innocuous prefatory phrase adduces a theory favorable to the defense. It assumes facts not in evidence and is objectionable. The offending phrase should be stricken and the jury instructed to disregard.

B. CALLS FOR CONCLUSION

A generic phrase that encompasses a number of complaints many of which are not apparent until the answer is given. To illustrate: The question, "Describe the plaintiff's actions." Sounds legitimate enough, but what if the witness responds in any of the following ways:

1. "He was drunk."
2. "He wasn't capable of driving."
3. "He was driving negligently."

Conclusions all. Are any properly admitted? The first may be considered as one of those conclusions which are commonly made as a short-cut alternative to describing a host of collective facts. Should a witness be permitted to conclude that someone was "tired", "angry", "confused"? Try breaking those conclusions into their component parts and the wisdom of allowing such testimonial conclusions is apparent.

"Drunk" is another matter. It is frequently an issue of pre-eminent importance. But ironically the lawyer who objects to such a conclusion triggers a host of questions directed to the witness to justify the short-cut conclusion.

"Did you smell his breath?"

"Yes, he smelled like a brewery."

“Did you see him walk?”

“I saw him try. He stumbled and fell down.”

“Did you hear him talk?”

“His speech was slurred and incoherent.”

The second, “He wasn’t capable of driving,” may very well be a decisive issue in a case. It is objectionable.

The third, “He was driving negligently,” goes directly to the ultimate issue and may evoke an objection that the question “invades the province of the jury.” In either case, the response is objectionable and the answer should be stricken and the jury instructed to disregard.

C. CALLS FOR A NARRATIVE

“What’s wrong with that”? And sundry trial judges would respond, “Nothing.” The normal method of relaying information is for one to speak in a narrative, story-telling fashion. The difficulty in a court setting is that an invitation to “Tell us everything that happened” will encompass matters that are irrelevant or objectionable. And so it is that the interrogation must proceed in bite size increments so that your opponent is properly alerted to proposed areas of inquiry and have an opportunity for a pre-emptive, pre-answer objection (“Subject, calls for a narrative”) rather than a remedial post-answer request (“Move that the jury be instructed to disregard”).

D. ASKED AND ANSWERED

Federal Rule of Evidence 102 identifies “elimination of unjustifiable . . . delay” as one of the purposes of the rules themselves and Rule 403 further condemns “waste of time” and “needless presentation of cumulative evidence.” The “asked and answered” objection intersects the lawyer’s irrepressible inclination to be repetitious and the equally strong desire of the judge to move things along. Chances are this objection will be sustained – if it truly is a repetition of a previously asked question. The difficulty comes when the subject matter is the same but the form of eliciting the subject matter is different. Suppose the witness has described the details of an intersection collision, including directions of travel, point of impact, and final resting places of the vehicles. He is then asked to identify a plat of the intersection and, with the aid of this visual representation of the intersection, is asked to indicate on

the exhibit, direction of travel, point of impact, etc. “Asked and answered”? The judge could go either way.

E. CUMULATIVE

Same basis for objection as “asked and answered.” The judge is trying to save time. But as long as a different witness is the source of similar information elicited from a previous witness, what’s the fuss? If the testimony deals with a matter of import, a zealous advocate will seek corroboration from as many witnesses as possible. If it is a matter of little import and no dispute (the time of the incident, the prevailing weather condition, etc.) then calling for a stipulation would seem more appropriate than sustaining an objection because the information sought is cumulative.

Frequently the cumulative objection is imposed by the court *sua sponte* as in those cases where a criminal defendant is limited in the number of character witnesses that can be called.

F. COMPOUND

The Senate inquiry into the Watergate scandal provided a classic example of the compound question. “What did he (the president) know and when did he know it”? A negative response to the first inquiry eliminates the need of the second. Proper interrogation demands one question at a time.

G. NON-RESPONSIVE

One of the basic characteristics of our adversary proceedings is that the interrogator controls the subject matter to be presented to the jury. When an answer does not respond to the question asked by the lawyer but introduces subject matter supplied by the witness, the roles are reversed and the answer is objectionable as “non-responsive.” Normally merely evasive answers do not warrant an objection. Good advocates know how to deal with that without whining to the judge and requesting his honor to instruct the witness to respond. But when a witness on cross-examination volunteers information of substance, then the objection is warranted with the request that the answer be stricken and the jury instructed to disregard.

H. MISSTATES THE EVIDENCE

Evidence can be misstated during examination or in closing argument. It can be either innocent or a most egregious ethical violation. Whenever or why-ever, the error must be identified by an alert counsel and an objection made. The problem is that the counsel cannot rely on the court to provide a remedy. Trial judges are prohibited from commenting on the evidence so the usual judicious response from the bench is, “The jury will recall the evidence. Proceed counsel.” A recognition that the court will seldom, if ever, set things right mandates that the manner and content of the objection provides both the reason and the remedy. (Indignantly) “I object your honor. The witness didn’t say ‘about thirty miles an hour,’ he said ‘thirty five miles an hour.’” A much more effective effort to right a wrong than a mild, “I object your honor, he has misstated the evidence.” Purists will claim that the example given violates a rule against speaking objections. So be it. Without supplying your version of the evidence in the context of the objection, your challenge is merely generic and not specific. This is particularly intolerable when evidence is misstated in closing argument and there is no opportunity for rebuttal — unless the rebutting evidence is stated in the objection.

