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Needed: A Rewrite

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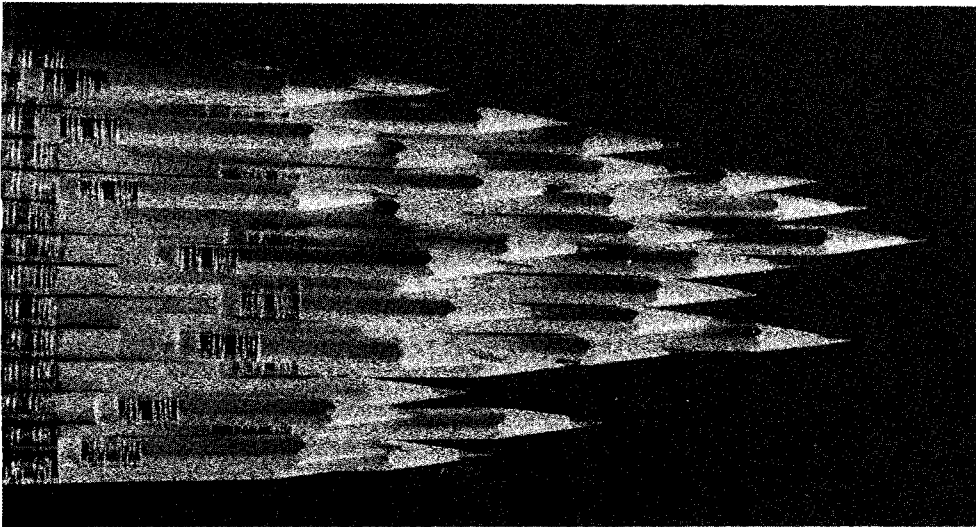
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Needed: A Rewrite

Where the Federal Rules of Evidence should be clarified



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Proposed far-reaching changes in the Federal Rules of Evidence are of major practical significance to every lawyer involved in the criminal justice process. The proposed changes are contained in a recent report by the American Bar Association Criminal Justice Section's Rules of Criminal Procedure and Evidence Committee. The report was selected for publication in *Federal Rules Decisions*, 120 F.R.D. 299 (1988), because of its interest to federal practitioners and judges. More than 40 judges, lawyers, and scholars were involved in the four-year study, and experts on each particular rule acted as "reporters" to the committee on those areas.

The report rewrites the rules on such important matters as prior convictions to impeach criminal defendants, expert testimony, character evidence, shielding rape

victims, presumptions, child witnesses in violence and sex abuse cases, jurors impugning their own verdicts, competency, judicial notice, judicial comment, and admissibility of pleas, plea discussions, and related statements.

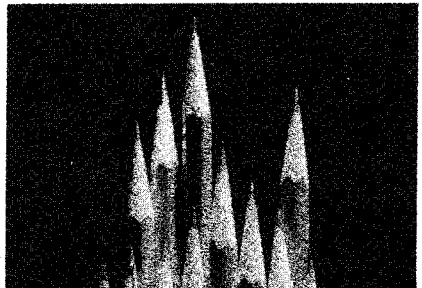
The report, entitled *Federal Rules of Evidence: A Fresh Review & Evaluation*, also makes a series of less formal suggestions. These concern, for example, general *in limine* procedures, the hearsay exception for government records, and the hearsay exception for statements of future intention to show conduct of others.

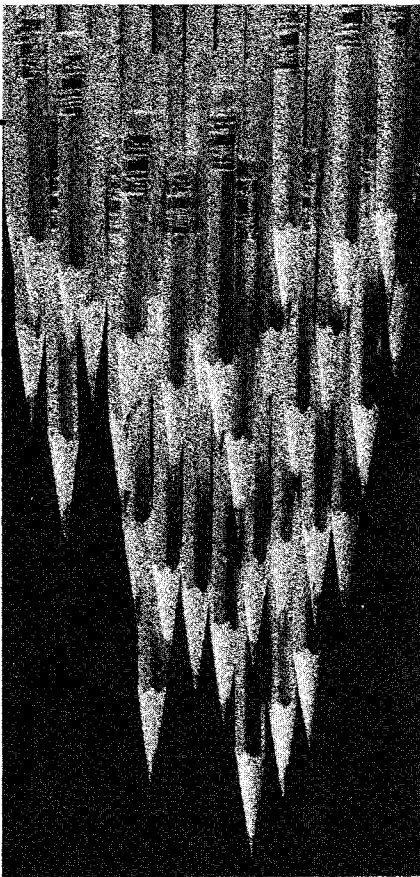
Additionally, the committee will study problems concerning, among other things, scientific evidence, privileges, the coconspirator rule in the light of recent Supreme Court rulings, expert summaries and charts in criminal cases, nonconvictions to impeach, other impeachment areas, habit evidence,

and *in limine* practice. This follow-up study is underway. Comments are invited on both the work done and the work yet to come.

Embodying a wealth of study and interpretive materials, the report is intended to be used as a resource by state and federal judges, lawyers, legislators, and commentators concerned with making, amending, inducing, or interpreting evidence rules and rulings. Slightly more than a decade has passed since evidence codification (beginning with and patterned on the Federal Rules of Evidence) swept the country. Even uncodified states use the Federal Rules as exemplary. Lawmakers and judges are ripe now to examine—and are examining—whether in the light of this intervening experience the rules and their current interpretations are working as designed. For example, among those following the work of the committee has been the U.S. Judicial Conference's Advisory Committee on Criminal Rules, officially charged with initiating amendments to the Federal Rules of Evidence. So far the advisory committee has adopted the suggestion to clarify the judge's discretion to exclude convictions offered to impeach in civil and criminal cases, which is expected to become law shortly. Further, in May 1989 it adopted the proposal for reasonable advance notice to a defendant when uncharged crimes, wrongs, or culpable acts are offered other than for impeachment.

Matters in the Rules of Criminal Procedure and Evidence Committee's report will, from time to time, be recommended by the Criminal Justice Section for further ABA action. This was recently done with the proposal recommending that before evidence of other crimes may be permitted pursuant to an exception to the ban on such evidence other than for impeachment, the fact that defendant committed the other





crime must be proved to the judge by clear and convincing evidence. This is contrary to the U.S. Supreme Court ruling in *Huddleston v. U.S.*, ___ U.S. ___ (1988), which adopted the minority position among the circuits requiring only evidence sufficient to support a finding. The ABA House of Delegates adopted this proposal as ABA policy in February 1989; their resolution calls on the state and federal governments to carefully reconsider the *Huddleston* position in view of the risk of prejudice to the defendant. The U.S. Judicial Conference's Advisory Committee is currently considering the proposal as well.

Convictions used to impeach

Impeachment of witnesses with their prior convictions has always been troublesome because of the potential for prejudice, particularly when the witness is a party. The Federal Rules of Evidence added to the confusion with a number of ambiguities. The current rule (Rule 609) provides in part, "For purposes of attacking the credibility of a witness, . . . a crime shall be ad-

mitted . . . if the crime (1) was punishable by death or imprisonment . . . in excess of one year . . . and [its] probative value outweighs its prejudicial effect to the defendant . . . or (2) involved dishonesty or false statement. . . ."

The report proposes that the phrase "[crimes of] dishonesty and false statement" (used to describe one category of admissible convictions) be replaced by the phrase "[crimes of] untruthfulness or falsification." This eliminates the broad reach of a word like "dishonesty" (isn't theft dishonest? is a narcotics dealer honest?) and confines the category to conduct having the most to do with witness incredibility, such as perjury or forging records. To avoid satellite litigation, the statutory elements of the crime must necessarily involve untruthfulness or falsification.

The proposal also requires exclusion of any conviction found wanting upon a weighing of probative value against prejudice. This determination must be articulated in detail in the record. Also corrected is the ambiguity about what parties (both sides?) to what kinds of suits (criminal? civil?) can assert what kind of prejudice (only to the case or to other interests?) accruing to whom (party? witness? society?). It is made clear that all parties in all kinds of cases may assert prejudice to themselves, their cases, or their witnesses.

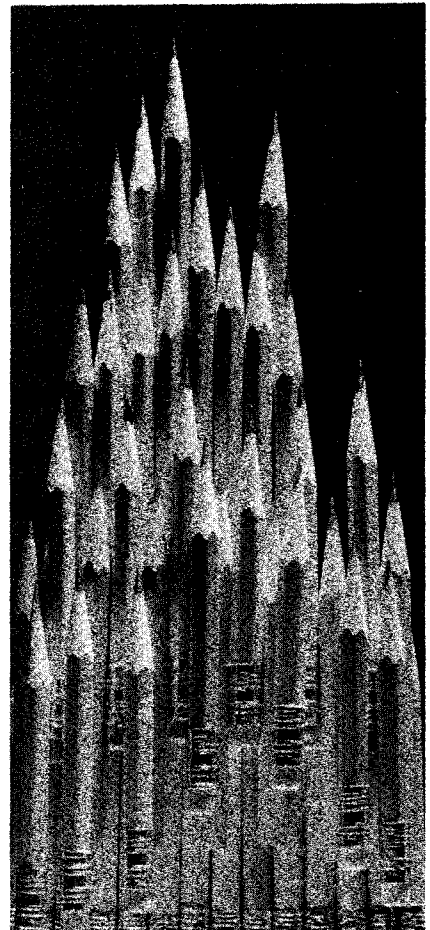
The U.S. Judicial Conference's Advisory Committee has moved to clarify the ambiguity noted in the report. Most recently, on May 22, 1989, the U.S. Supreme Court, majority and dissent, cited the report approvingly on this matter in its landmark decision on convictions, *Green v. Bock Laundry Machine Co.*, ___ U.S. ___ (1989). There have been numerous other approving citations to the report as well.

Specific procedural safeguards are also added by the report: Advance notice must be given of convictions that are going to be used; details of a conviction ordinarily must not be evidenced; and a list of factors to consider in the weigh-

ing is provided. The impeachment may take place during cross examination or at another time, and if done by extrinsic evidence, the public record is required unless properly unavailable. There must always be a fair opportunity to reply. There are provisions for convictions based on *nolo* pleas and for verdicts of conviction that are not yet solidified in a judgment. The latter are made inadmissible.

Expert testimony

What criminal trial lawyer has not been frustrated by an opposing expert witness who, during direct examination, orally dumps into the record for the jury to hear, hearsay statements of others, the contents of inadmissible documents, and loads of other inadmissible evidence, upon which the expert says he "relied" in forming his opinion? The expert may know the opposing



Herbert Jackson/ABA Press

lawyer hasn't heard this material earlier and isn't prepared for it. For all the opponent, court, and jury know, it may be extremely unreliable.

The Federal Rules of Evidence leave the door open for experts to make this end run around hearsay and other rules. Rule 703 provides in relevant part that the "facts and data" underlying expert opinions need only be "of a type reasonably relied upon by experts in the particular field. . . ." Reliance by an expert is generally deemed to license admissibility. The opponent has little opportunity to confront underlying people and sources and expose weaknesses. This may discourage cross examination altogether. In consequence, the jury may be deceived into thinking a weak opinion is unassailable. The system (as well as the opponent) is the loser.

The problem is exacerbated by the fact that the Rules have lowered the qualifications required of experts (Rule 702 requires only that the expert have any "specialized knowledge" from any skill or experience); eased restrictions on when they may testify (i.e., whenever they would "assist the trier of fact" in any degree, Rule 702); and all but abandoned regulation of the quality of the material upon which they may rely (allowing hearsay and other inadmissible evidence, Rule 703). The theory, questionable at best, is that all these matters can be handled by the jury as a matter of weight. The result is that the expert testimony industry is burgeoning.

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Hardly a trial goes by without at least one and probably more hired experts, frequently of marginal expertise, presenting opinions based on hidden foundations of sand, yet deeply affecting the jury.

The report proposes restrictions (with exceptions) on the admissibility of an expert's basis material that is not independently admissible. The committee is also considering other reforms in the area of expert testimony.

Character evidence

Rule 404(b) currently provides that "evidence of other crimes, wrongs, or acts is not admissible to prove character to show an act in conformity therewith [but] may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The central dilemma in the area of character evidence has been the unworkable distinction

between evidence of other crimes, wrongs, or acts offered for the so-called *prohibited* purpose ("to prove character in order to prove an act in conformity with the character") and such evidence offered for a *permissible* purpose (to prove "plan" or "systematic course of conduct," "identity," "motive," "intent," "preparation," "knowledge," "absence of mistake or accident," etc.). In many cases, both theories of offer amount to the same thing—there is no real distinction. This puts the judge in the position of making an unprincipled choice and deprives attorneys of the predictability necessary for planning. Irreconcilable decisions abound.

The problem is that both theories involve "propensity" reasoning. This reasoning says that because a person did something before (or did it a certain way, or with certain intent), he is more likely to have done it again—he has a propensity for it and has probably acted in accord with that propen-

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sity. This "propensity" reasoning in many cases constitutes, at the same time, both an impermissible purpose ("character to prove act in accord") and a permissible purpose (e.g., a "plan" in the sense that both crimes proceeded in accord with the same blueprint or *modus operandi* even if not planned together).

Instead of this vaguely differentiated bifurcation of purposes, the report proposes a more defined and workable bifurcation. It distinguishes between propensities that, because they involve moral connotations and are very general or diffuse, can properly be called "character," and other propensities that, while still being propensities, do not meet these character criteria. The former propensities should be prohibited because they are morally charged and not very probative.

The terminology of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" used in the current Federal Rule to describe the permissible purposes is abandoned. The current string of permissible purposes is frequently chanted in its entirety, unbroken, by attorneys and courts as a magic talisman to justify receipt of evidence without analysis, and without particular catchwords in the phrase being tied to any of the evidence in any meaningful way.

The new rule should produce results more in accord with the intention of the present rule and the common law: If a broad-based attack on the type of person is the aim, the evidence should be excluded; but if some pattern truly more probative or less morally charged than that is involved, the evidence should be viewed more favorably. The result will be felt principally by those judges who have admitted uncharged-crimes evidence with extreme liberality.

Crimes, wrongs, or culpable acts offered pursuant to the revised permissible purposes must be preceded by reasonable advance notice to the other side, and must be shown to have probative value out-

weighing negative factors such as prejudice, confusion, misleadingness, and time consumption. When the evidence is to be used against a criminal defendant, the probative value must *substantially* outweigh. The proposal reverses *U.S. v. Huddleston*, ___ U.S. ___ (1988), by prescribing that the prosecution must demonstrate by clear and convincing evidence (not merely evidence sufficient to support a finding, as in *Huddleston*) that the accused committed the act. The proposal for reasonable notice was adopted on May 18, 1989, by the U.S. Judicial Conference's Advisory Committee on Criminal Rules, for inclusion in amendments to the Federal Rules of Evidence. The proposal concerning *Huddleston*, requiring clear and convincing evidence, became ABA policy by act of the House of Delegates in February 1989.

Another character rule, Rule 404(a), governs the accused's right to show his own good character. Currently, the word "pertinent" limits the kind of good character trait that the accused may introduce in his own behalf. This word has proved to be ambiguous. The committee eliminates it, since its intended function—to indicate, for example, that ordinarily a trait for nonviolence may be shown in an assault but not an embezzlement case—is performed anyway, to the extent appropriate, by the generally applicable concepts of relevance, prejudice, misleadingness, time, and the like.

The committee expressly requires a good faith basis for cross-examination questions about specific instances designed to discredit a character witness.

The prosecution may offer evidence of the character of a non-sex-crime victim in any kind of criminal case only if the defense does so first. This eliminates a special, broader prosecution license in homicide cases accorded by the current rule. Character evidence is expressly prohibited in civil cases.

The committee proposal also deals with expert testimony about

character, and mental or personality traits, features, or illnesses which, under current law, seem to be in an uncertain limbo, to be classed as character or not according to the whim of the particular judge and the perspicacity of the lawyers, if the issue is recognized at all.

The committee also addresses other problems in the character area. In this section of the Rules (Rules 404 and 405, among others), the drafting is singularly murky, glossing over poorly conceived and poorly delineated concepts. This is not in keeping with the careful work of the drafters in many other areas. This murkiness has deprived lawyers and judges of needed signposts, has promoted widespread misunderstanding of the rules, has resulted in tremendous disparity among rulings, and has joined with the propensity difficulty already noted to make this one of the most litigated areas in caselaw annals.

Drafting snafus include mixing apples and oranges in the same rule; occasionally unpredictably segregating them; and, in some rules, doing both in different portions. Rules that form exceptions to other rules are not noted or cross-referenced. The proposals address these problems.

Rape shield

Federal Rule of Evidence 412 provides in rape cases that "past sexual behavior of [the] victim . . . is not admissible [except that] evidence other than reputation or opinion [may be admitted if] constitutionally required or . . . offered [to show alternative source of] semen or injury [or] concern." The rule has a laudible objective: shielding victims of rape and attempted rape from unwarranted character assassination. The committee found, however, that almost everyone acquainted with the rule agreed that it is a blunt instrument and a drafting disaster. It was prepared hastily in Congress as an expedient, well after and
(Continued on page 44)

Federal Rules of Evidence

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without the careful work that went into the other Rules.

In trials for sex offenses, indiscriminate introduction of the sexual character and conduct of the victim can be a serious problem. This evidence, often of marginal relevance, can effectively rape the victim a second time in court, discourage other genuine rape complaints, dampen future victims' willingness to cooperate with authorities or testify, and infringe privacy.

There is, however, a dilemma here. To the extent that the defendant is protected by a broad view of the relevance of such evidence, the interests of the victim and society suffer. But the reverse is also true: Serving these interests can and often does impinge upon the defendant's defense, something in which society may also share an interest.

Setting policy regarding evidence of this kind requires careful study, thought, and drafting. The task should not be left to the vagaries of constitutional adjudication. Policy should be ascertained within the constitutional limits, and the rule should provide concrete guidance to participants in the system. How the rule interplays with other rules affecting the evidence should also be specified. Terminology should be clear.

Current Rule 412 falls short in most of these respects; the report proposes entirely new language. This new language extends coverage to victims of all sex crimes; provides a broad, clear-cut, comprehensive ban; and then states clearly expressed exceptions (based on a study of cases around the country) that attempt to balance competing considerations and to treat similar situations alike. The exceptions include, in appropriate circumstances, sexual conduct with the accused to prove consent, certain patterns of conduct, conduct that is part of the alleged offense, conduct to show an alternative source

for enumerated telltale signs of the offense, impeachment, specific motive to lie, and certain material offered in connection with expert testimony.

Presumptions in criminal cases

This subject has forever mystified lawyers and judges. The drafters of the Federal Rules of Evidence gave up in despair and left this area with no codified rule. The excuse was that the problem was too knotty and should await codification in the then pending congressional criminal code revision. However, no provision ever emerged from that criminal code effort.

The committee believes that the reasons that make general codification of Rules of Evidence desirable apply in force to the important but obscure area of criminal presumptions. The source of the problem with both civil and criminal presumptions has been the law's failure to recognize and treat separately the many entirely disparate questions in a trial that an enacted or judicially created "presumption" answers. For example, questions may arise as to whether, when there is evidence of "x," and "y" must be proved by a party, there should be a directed verdict because "x" does not sufficiently suggest "y." Is judicial comment to the jury appropriate, to the effect that "y" may be found from "x"? When "x" is introduced, may the jury be instructed that the burden of persuasion on "y" has now shifted to the opponent of "y"? Does establishing "x" remove "y" from the case as a subject for proof? A presumption seems to provide an answer to all of these questions, but they should not be lumped together.

The committee leaves to statutory and case law the matter of what particular presumptions exist. The proposal provides, however, that unless a contrary intention specifi-

cally emerges, statutory language creating a presumption of "y" from "x" (or employing equivalent language) has the effect of determining only one question: whether "x" is sufficient evidence of "y" to compel the judge to present the issue of "y" to the jury.

For example, if there is a statutory presumption that a person who is found present at an unlicensed distillery has something to do with the distillery's operation (operation being the crime), assuming such presumption is constitutional, there is only one effect: The judge would know that if the prosecution has evidence of presence but no evidence of operation, the case must still be submitted to the jury. The jury, however, would be told nothing other than what they would normally be told in the absence of any such presumption. Similarly, a presumption concerning a defense would let the judge know that the jury must expressly be given the option to embrace the defense even if the judge felt the fact proved could not make out the defense.

Another proposal codifies current federal law on the judge's qualified power to make an advisory, accurate, impartial evidence summary, or comment on the weight of the evidence, at the close of all the evidence and argument. Banned, however, is the use of any presumption terminology with the jury, even when a presumption's intended effect is to produce judicial comment to the jury. The committee found that presumption language is bewildering to juries and produces irrational results out of keeping with both the intent of the jury and the intent of the presumption. The proposal mandates that in this situation, the basis of the inference be explained instead.

Believing that much of the problem with presumptions stems from misunderstanding of the meaning of key terms in the law of proof—terms such as "burden of persuasion," "burden of production,"

"element of offense," "defense," and the like—the proposal provides a clear general definition of these terms not intended to change the law.

Child witnesses

Many jurisdictions are codifying (or adopting by decision) relaxations of traditional party-protecting safeguards when child witnesses are involved, principally where the child is the alleged victim of the sex abuse or violence charged in the case. This approach takes two forms: (1) hearsay exceptions (either new ones or judicial stretching of old ones) to allow into evidence the child's statements to police, parents, relatives, or babysitters; and/or (2) courtroom procedures for sheltered testimony (the screen between defendant and the thirteen-year-old victim witnesses in *Coy v. Iowa*, ___ U.S. ___ (1988)). These provisions and rulings use varying degrees of care to accommodate the competing interests of, on the one hand, the defendant in defending and, on the other, the victim in avoiding psychological trauma and the state in preventing false retractions.

The movement toward protection of the victim and the state's case seemed to the committee to express a perceived need that, if unaddressed or left to quick political "fixes," might result in some very poor solutions in which the cure was worse than the disease. Against this background, the committee tackled the problem with the Commissioners on Uniform State Laws.

The proposal creates a special hearsay exception allowing into evidence a videotaped statement of the child, provided certain rigorous safeguards are observed in making and in offering the videotape, but only if it is determined that live testimony would produce severe emotional or psychological disturbance in the particular child. In a criminal case, the court must, if requested, call the child for further trial questioning by the oppo-

nent; the court may do so in civil cases. In any case where the child is to be called as a witness (whether the hearsay exception has been utilized or not), if the judge finds that traditional testimony would produce severe emotional or psychological disturbance in the particular child, the testimony may be given in a somewhat "sheltered" fashion, perhaps through a two-way video hook-up with the child in another room than the courtroom. Because of the necessity of a particularized finding of severe emotional or psychological disturbance, the option to the judge to allow two-way video, and the non-incriminating nature of and better visibility of video as compared with a shielding screen, the proposal should withstand attack under *Coy*. (*Coy* invalidated, pursuant to the U.S. constitutional confrontation clause, a one-way screen shielding the defendant from the view of the children, but allowing him and the jury to dimly see the children.) This conclusion is bolstered by several post-*Coy* decisions.

Miscellaneous revisions: pleas, jury improprieties, judicial notice

The report extends the inadmissibility currently accorded to plea bargain discussions with prosecuting attorneys, to include such discussions with other law enforcement officers if they have authority to enter into such discussions or if they affirmatively lead defendant to believe they have it.

In order to overturn a jury verdict, current law will not receive, with a few exceptions, the testimony or affidavit of a member of that jury attesting to improprieties in or affecting the jury. The committee proposes that violence among jurors directed at producing a certain verdict be listed among the exceptions. The committee is considering whether juror drug and alcohol intoxication, at least if pervasive, ought also to be excepted, contrary to *Tanner v. United States*, 103 S. Ct. 2739 (1987).

Currently, judicial notice of any relatively indisputable fact in a civil or criminal case may be taken at any stage, including trial and appeal. However, judicial notice on appeal in a criminal case conflicts with another part of the judicial notice rule, which provides that in a criminal case the jury must be given a chance to find for or against the fact judicially noticed. If a fact is judicially noticed for the first time on appeal, the jury will not have been given a chance to reject it.

Courts have been giving precedence to the provision that says judicial notice may be taken on appeal, and "winking" at the notion that this deprives the jury of the chance to reject the fact. This is done particularly (but not exclusively) in cases where the fact is essential to convict, was inadvertently omitted by the prosecution below, and is a technical matter of federal jurisdiction (for example, that Fort Leavenworth is within U.S. territorial jurisdiction, or that South Central Bell Telephone Co. is a facility for transmission of interstate communications). Courts fear that any other view would "let a criminal go on a technicality," since he normally cannot be retried because of double jeopardy.

The courts use a variety of ruses to get around the rule provision. The underlying excuse seems to be that because the fact is judicially noticeable, it is *ex hypothesi* beyond rational dispute, and therefore the jury would find it to exist anyway. The jury should not be given freedom to act irrationally by finding that it does *not* exist.

The committee believes that as a general matter in a criminal case where there is a jury trial, the jury should have a chance to accept or reject even facts judicially noticed, and should be so instructed. The committee proposal prohibits judicial notice at any stage after the commencement of jury deliberation. There are two exceptions: One concerns the type of jurisdictional situation mentioned above; the other is intended to embrace situations where judicial notice is taken of a scientific truism about the

chemical or structural nature of a substance, e.g., that cocaine hydrochloride is a derivative of coca leaves. Judicial notice should be allowed to be taken at any stage of the proceedings in these two situations, to avoid the kind of hyper-technical results that bring the law into disrepute.

* * *

Since 1975, when the Federal

Rules of Evidence became effective, an overwhelming majority of states have adopted rules patterned on them, and the remaining states have frequently cited them as being highly influential in evidence decisions. The Criminal Justice Section's Rules of Criminal Procedure and Evidence Committee studied the accumulated federal and state experience under the rules in anticipation of the interest

which is now being shown on the state and federal levels in seeing whether the rules are working or need changing or modified interpretations in the light of 10 years of experience. The Committee's report is a valuable resource for any such re-examination and also for courts and lawyers who must be concerned with the soundness of evidentiary rulings and interpretations on the front lines. **CJ**

Assigned Counsel

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portant that the program be autonomous and effectively independent of management or ministerial control of the judiciary—or any other governmental branch with conflicting objectives or interests, either real or perceived.

Typical confrontations between the courts and assigned counsel programs involve the authority to assign or remove attorneys and to approve or disapprove payment of attorneys' bills. However it is structured, a program should retain the ultimate authority to assign attorneys, in order to prevent judges from hand-picking attorneys who may meet the needs of the court rather than the needs of their clients. It also is important that the payment of attorneys' fees be determined and approved by the program, independent of the courts' control. A perhaps apocryphal exchange illustrates the advantages of an independently administered program. Following her aggressive and vigorous representation of a client, an assigned attorney was told at sidebar by the judge that he not only would not appoint her again, he would not pay her for the case at hand. Because of the structure of the system, the attorney was able to say, "It doesn't work that way any more, Your Honor."

If courts have a financial interest and administrative authority over the program, this may conflict with and undermine the effectiveness of representation. Similarly, direct in-

volvement of judges in assignment and payment of counsel may potentially interfere with attorneys' exercise of independent professional judgment in handling their cases.

While many courts jealously guard what they believe to be their prerogatives in this area, mounting funding problems and administrative headaches have caused some courts to yield these responsibilities, perhaps on a piecemeal basis, to other agencies. If properly presented, legislation that clearly establishes authority outside the courts to select, train, pay, evaluate, remove, and support attorneys could provide welcome relief from overwhelming judicial responsibility. (See, e.g., Massachusetts General Laws c.211D.) It is also less likely to meet resistance as other problems faced by the judiciary escalate.

Standards and evaluation

Because criminal law is a complex specialty that requires keen trial advocacy skills and up-to-date expertise on constantly changing case law, bar membership should not automatically entitle an attorney to be a member of the panel of attorneys eligible to accept assignments and compensation. This must be a basic tenet of any assigned counsel program. If an assigned counsel program is to

provide quality representation, it must have the authority to:

- Set threshold qualifications for members of the panel of participating attorneys and establish performance standards for continuing eligibility on the panel;
- Monitor and evaluate the performance of panel members; and
- Remove panel members.

Qualification standards. Qualification standards are criteria by which prospective participants in the assigned counsel program can be evaluated prior to acceptance on a panel. The standards are used to ensure that only qualified, trained attorneys with criminal law experience and trial advocacy skills will represent indigent defendants. The program should establish and maintain a number of different panels, each with a set of qualification standards tailored to the severity of the charges. A policy of general eligibility for any and all types of assignments, based on passing the bar examination or taking a training course, fails to recognize the danger of permitting inexperienced counsel to hone their advocacy skills at the risk of jeopardizing their clients' rights. Ad hoc assignments by judges may reflect a sensitivity to the experience and competence of counsel and the type of case. This should not, however, be a substitute for clearly written objective standards estab-