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The Federal Rules of Evidence: Six Years After


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The Federal Rules of Evidence: Six Years After

by Paul F. Rothstein

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The Federal Rules of Evidence have been in effect since 1975. Six years of experience is not much time in which to assess such a complex and important body of law. Nevertheless, there is now some "evidence" of the impact of the Federal Rules on the various states and circuits.

The Rules do seem to have proved successful enough to stimulate widespread imitation. Approximately half the states in the United States have or will very shortly have evidence codes patterned substantially on the Rules, even down to their numbers. Many of the remaining states (*e.g.*, Iowa, Illinois, and Pennsylvania) have already adopted individual Federal Rules by decision, and have indicated a willingness to adopt more in the future. At a series of evidence codification meetings in both New York and Canada, it became apparent that the Federal Rules will also exert considerable influence on new codes even in those important and usually very independent jurisdictions. In addition, the Uniform Law Commissioners have amended their Uniform Rules of Evidence to conform almost precisely to the Federal Rules, and administrative agencies are relying on the Federal Rules more and more.

The meaning of "success" for a body of rules such as these is somewhat problematical. The new Rules were expected to reduce appeals on evidence questions, but they have not yet fulfilled this expectation. On the contrary, since promulgation of the Federal Rules there have been nearly 500 appellate decisions each year in Federal courts involving evidence questions most observers would

probably consider important. In contrast, there were approximately half that many appeals in the years immediately prior to the Federal Rules. Appeals may begin to decrease as more questions are settled. For example, although at this point there is no real uniformity among the circuits and states, the new Rules do seem to have contributed to a growing consistency among the various circuits, and among states under similar rules, on significant questions such as what derelictions can be used to impeach.

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Another apparent effect of the Federal Rules is a tremendous increase in admissibility, with a consequent increased emphasis on lawyer skills to show defects in evidence as a matter of weight to the fact-finder, particularly in the area of expert testimony.

Some lawyers feared that the new Rules' emphasis on judicial discretion would increase the difficulty of planning and predicting the course, outcome, and expense of litigation. These results do not seem to have occurred to nearly the extent that was feared. In many areas in the past, the common law and the multiple sources of evidence law that could be drawn on by the judge gave him more options than the Federal Rules do. However, expert testimony and the "catch all" exception to the hearsay rule, which allows the judge to create new exceptions to the hearsay

rule on essentially discretionary standards, have both proved to be greater problems in this regard than some may have anticipated.

The Rules have had perhaps the greatest unforeseen effect on pretrial preparation and discovery. For example, the extent to which the expert testimony rules are predicated on full discovery was only dimly appreciated. Full discovery is indispensable under the Rules because experts are allowed to testify based on hearsay and other inadmissible evidence; they need not mention in the direct examination the basis for their testimony (*i.e.*, their assumed hypothetical facts; whether they have examined the patient or thing in controversy; what they have used, looked at, studied, read, or considered, if anything, etc.). Even if the Federal Rules of Civil Procedure provided for adequate discovery of experts (which they do not), requiring extensive discovery in every case does not seem to make economic sense. The new hearsay, authentication, and best evidence rules also place a high premium on discovery, since their former coverage is considerably cut back under the Federal Rules. Thus, an attorney may no longer be presented with the maker of a statement to be used against him, or an authenticating witness to cross examine, or an original document to study. Instead, the attorney must obtain the maker, authenticating witness, or original document through discovery if that is necessary to "debunk" the evidence.

Perhaps the biggest shock to trial lawyers has been a brace of recent cases interpreting an ostensibly harmless rule (612) in a way that threatens a time-honored method of preparing lay or expert witnesses: giving the witness some of the case file before a trial or deposition so that he may prepare himself. Rule 612 provides that the judge may order any documents so used to be

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turned over to the other side for inspection, and recent cases seem to apply this Rule even to privileged documents. Rule 612 may even be logically extended to require disclosure of *anything* a witness has looked at during any indefinite period prior to testifying in a deposition or trial, if there is any possibility that it might have influenced his testimony. Thus, lawyers should be very careful if they represent a government agency or company that has employees or investigators who, as part of their jobs, have wide-ranging access to agency or company files, and who also can be expected to be witnesses in litigation. Under the new Rules, confidentiality of the files may be waived.

There is not space in this article to examine fully the questions which have been briefly noted. Indeed, an in-depth empirical study would be required. But at least some of the more apparent directions are now beginning to be discernible, and some of the questions that should be asked are beginning to present themselves. **O**

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