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THE PROPOSED FEDERAL RULES OF EVIDENCE: POINTING THE WAY TO NEEDED CHANGES IN ILLINOIS

by HOWARD T. BRINTON*

INTRODUCTION

There is a move afoot to codify the rules of evidence for use in federal district courts and other federal tribunals. The work will be called "Rules of Evidence for the United States District Courts and Magistrates." Copies of the proposed draft have been printed and distributed to lawyers nationwide.¹ The rules could go into effect as early as December, 1972.² Every practitioner, be he "office" or "trial" attorney should be aware of these proposed rules, not only for the purpose of predicting the outcome of litigated matters in federal court for his clients, but also for the effect these rules may have upon state court practice in Illinois.

The proposed rules have eleven basic sections and seventy-six rules with a multitude of sub-sections. The eleven sections are entitled: General Provisions; Judicial Notice; Presumptions; Relevancy and Its Limits; Privileges; Witnesses; Opinions and Expert Testimony; Hearsay; Authentication and Identification; Contents of Writings, Recordings and Photographs; and Miscellaneous Rules. They will govern all matters tried in the federal district courts, both civil and criminal. They will apply to matters before federal judges and magistrates, but will be inapplicable to certain procedures.³

There will be those who will rail at the proposed rules saying they are too liberal, and we are passing into the "ruleless limbo"

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¹ At the time of the publishing of this article the rules have been redrafted and are pending before the Supreme Court of the United States. The pages referred to in this article will apply to the Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, March, 1971, as found in 51 F.R.D. 315-473 [hereinafter called Revised Draft]; however, if there has been a drafting change from that found in the published version that will be cited as the "Unpublished Revised Draft."

² The Revised Draft is to go from the Supreme Court to the Congress, so a definite date is not possible to predict, although the Supreme Court will not reconvene until Fall, 1972.

³ The rules do not apply to Hearings concerning preliminary questions of fact; Grand Jury proceedings; extradition or rendition proceedings; sentencing or granting or revoking probation; and issuance of warrants. Rule 1101, Revised Draft, at 148, 51 F.R.D. 462.

of an administrative hearing. There will be those who will feel that the drafters did not go far enough. In this writer's opinion, there will be a grain of truth in the belief of each group depending upon which section is examined. Under present law, the rule or statute which is most receptive to the *receipt* of the evidence governs, subject to some limitations.⁴ As a practical matter, many district courts allow counsel to pick the most liberal rule from among the sixty odd jurisdictions in the United States in determining the admissibility of evidence. The court then applies a "seat of the pants" feeling of equity in its admission, and a lack of predictability results. Under the proposed rules there will be greater predictability from court to court, although not all the rules are the most liberal to the reception of evidence. For example, in the area of relevancy, no evidence of subsequent remedial measures, offers to compromise or payment of medical expenses will be allowed in evidence against a party.⁵

Besides the beneficial effect which the practitioner will feel in knowing with greater certainty which way the district court judges will rule on a particular evidence question, the Federal Rules of Evidence may aid the proponents of a codified system for Illinois.⁶ Those practicing in the federal district courts of Illinois will at least have a chance to examine a code system first hand before making a choice for themselves.⁷ In deciding whether to support codification, the practitioner should balance the desirability of random rulings upon evidence questions given by many trial judges attempting to interpret a myriad of inconsistent cases, with a well-thought-out, well-drafted set of rules.

This article will be limited to certain of the proposed rules which will be of interest to the Illinois practitioner either because they represent a change from the Illinois or former federal

⁴ FED. R. CIV. P. 43(a):

EVIDENCE

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Proposed changes to this rule at 156 Revised Draft, 51 F.R.D. 470.

⁵ Rules 407, 408 and 409, Revised Draft at '38-40, 51 F.R.D. 352-4. These rules will be discussed in detail *infra*.

⁶ The author admits to being such a proponent.

⁷ The following states have codified their Rules of Evidence: California, Colorado, Maryland, Oregon, Pennsylvania, South Carolina, Texas and Washington.

practice, or because a completely new approach has been taken by the drafters. The Dead Man's Act, Impeachment, Expert Testimony, Privileges, Relevancy and the Hearsay Rule and its exceptions will be discussed.

DEAD MAN'S ACT

The proposed Federal Rules of Evidence would do away with an anachronism of the law — The Dead Man's Act.⁸ Perhaps no fresher breath could be blown through the dusty corridors of our practice.

The gist of the Dead Man's Act is to seal the lips of surviving parties or witnesses, who might lie about a dead or incompetent person or about events or transactions in which that person had participated. The purpose of this rule was to prevent fraud upon the court.⁹ However, the need for the Act has been frequently challenged.¹⁰

The Dead Man's Act is now of only historical importance, as it emerged as a force in the common law long before modern discovery methods. How it has withstood the scholarly impact against it is of some wonder. Perhaps proposed Federal Rule 601 will help inter the Act permanently:

General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules.¹¹

Nowhere in the rules does an exception dealing with the dead or incompetent appear, and the drafters say this in their comment to Rule 601:

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the

⁸ ILL. REV. STAT. ch. 51, §2 (1969). The Act also applies to incompetency of a person, not simply death as the name implies.

⁹ 2 J. WIGMORE, EVIDENCE, §578 (3rd ed. 1940).

¹⁰ 5 J. WIGMORE, EVIDENCE, §1576 (3rd ed. 1940).

¹¹ Revised Draft at 70, 51 F.R.D. 384.

reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501.¹²

However, this will now mean that the surviving physician who is a defendant in a wrongful death action sounding in malpractice will not be able to testify in his own behalf in the state courts of Illinois, but will be allowed to do so in the federal district courts. This same physician will be able to rebut plaintiff's experts with his own in the state court, but the man who knows the most about the occurrence will still be disqualified. Certainly, a similar change is required in Illinois to prevent injustice.¹³

IMPEACHMENT

Of Your Own Witness

What trial attorney has not been stung by the shifting testimony of a witness whom he has put on the stand, and then heard these fateful words when attempting to refresh the witness's memory:

Opposing Counsel: Your Honor, I object — He's trying to impeach his own witness.

Court: Sustained — you put him on the stand, counsel — he's *your* witness.¹⁴

Such words will no longer be heard in the federal district courts if the proposed rules pass. Rule 607 provides:

Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.¹⁵

The drafters' comment following the rule indicates that the prevailing rule is based upon the false premise that a party really has a choice as to the witnesses whom he will call in a case. The comment is certainly correct, as many witnesses have never been under, or have left the control of a particular party; nevertheless, they have specific knowledge of the transaction or occurrence which is material to the matters at issue.¹⁶

¹² *Id.*

¹³ Or why not adopt the Connecticut position, which has abolished the Dead Man's Act, but allows hearsay statements of the decedent or incompetent into evidence. *Joanis v. Engstrom*, 135 Conn. 248, 63 A.2d 151 (1949); CONN. GEN. STAT. ANN. §52-172.

¹⁴ In Illinois courts, if the attorney is surprised by statements inconsistent with what the witness made in pre-trial preparation, he may call his attention to the statements to attempt to refresh the recollection of his own witness. *People v. Wesley*, 18 Ill. 2d 138, 163 N.E.2d 500 (1960). Incidentally, there has never been a rule in Illinois preventing a party from contradicting his own witness by the inconsistent testimony of another witness. *Moore v. Miller*, 2 Ill. App. 2d 523, 119 N.E.2d 545 (1954).

¹⁵ Revised Draft at 74, 51 F.R.D. 388.

¹⁶ *Id.*

Although the Illinois courts still pay lip-service to the old rule, there has been a substantial inroad made upon it in the form of what is called "Section 60" examination.¹⁷ This allows a party to interrogate another party or witness sufficiently identified with that party as if under cross-examination. In addition, the examining party is not bound by the testimony of that witness and may impeach him. But what exists in Illinois is in the nature of "half a loaf." The objection to impeachment of a party's own witness is still good in Illinois as to an "independent" witness, unless the examiner is "surprised" and can refresh the witness's memory.

There is a rough equivalent of the state practice found in the present Federal Rules of Civil Procedure. Rule 43(b) provides:

(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.¹⁸

In practice the rule has been unsatisfactory, as it left too much to the trial judge's discretion in declaring a witness "hostile" or in interpreting what a "managing agent" is. Rule 43(b) will no longer exist if the proposed rules are adopted.¹⁹ The proposed federal rule is the better one as the drafters understand that each witness is presented in order to add further color to the factual picture being painted by the parties, and if the artist wishes to paint over a particular part he should be allowed to do so. This in no way prevents comment upon the witness's demeanor and credibility in opposing counsel's closing argument.²⁰

¹⁷ (Examination of adverse party or agent.) Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements. ILL. REV. STAT. ch. 110, §60 (1971).

¹⁸ FED. R. CIV. P. 43(b).

¹⁹ Revised Draft at 156-57 F.R.D. 470-71.

²⁰ Rule 611(c) also comes into play here and reads as follows:

(c) *Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted

Substantive Evidence

In Illinois, impeachment by prior inconsistent statement does not rise to the level of "substantive" evidence. This means that in considering a directed verdict, judgment n.o.v. or new trial, the court may not use impeaching testimony in the same manner as direct testimony. It is said that such impeachment is not of value except as it affects the credibility of the witness.²¹ This has always seemed nonsensical as facts are facts, regardless of when or where spoken.

In the comment to Rule 801,²² the drafters seem to feel that the proposed rules would eliminate this barrier, and that prior inconsistent statements would be substantive evidence.²³ This seems the better rule as the average juror is hard pressed to understand evidence admitted for a limited purpose.

Rule in the Queen's Case

To a practitioner in any court, one of the most difficult and unreasonable rules has been the requirement that a cross-examiner, before attempting to impeach a witness with a prior inconsistent statement, either oral or in writing, show the state-

on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

Revised Draft at 81, 51 F.R.D. 395.

Another interesting question is whether or not the objection to leading questions should be done away with and all witnesses questioned as if under cross-examination. This would shorten trials and simplify questioning immensely. However, the subject is too narrow to discuss here.

²¹ *People v. Dandridge*, 120 Ill. App. 2d 209, 256 N.E.2d 676 (1970). This assumes, of course, both that the witness is not a party and the impeachment has not risen to the level of an admission.

²² Revised Draft at 99, 51 F.R.D. 413. For a full recitation of the rule see text at notes 63-66 *infra*.

²³ Comment to Rule 801:

(i) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

ment to the witness or call the witness's attention to it. Illinois follows this rule.²⁴

This rule is a definite impediment to effective cross-examination and gives a helping hand to the courthouse prevaricator. The rule comes from England and is found in the *Queen's Case*.²⁵ It has been abolished by statute in the land of its birth. The proposed rules attempt to put the requirement to rest by Rule 613:

Prior Statements of Witnesses

(a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).²⁶

It is this writer's opinion that even the foundation requirement in (b) is unnecessary, as the opposing party's counsel has a right to examine the statement and conduct his own examination concerning it. The rule already goes that far for party-opponents, as admissions are exempted. It would seem wiser, since a prior inconsistent statement will be substantive evidence under the proposed rules, to allow it in and then give the party against whom it cuts a chance to attack its weight. The jury should be allowed to decide the ultimate fact.

EXPERT TESTIMONY

Experts

With the substantial increase in litigated matters which require the use of experts, this area becomes one of prime impor-

Comment, California Evidence Code §1235. See also McCormick §39. The Advisory Committee finds these views more convincing than those expressed in *People v. Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.
Revised Draft at 101-02, 51 F.R.D. 415-16.

²⁴ *Illinois Central R.R. v. Wade*, 206 Ill. 523, 69 N.E. 565 (1903); *Boeker v. Hess*, 34 Ill. App. 332 (1889).

²⁵ 2 Bros. and B. 284, 129 Eng. Rep. 976 (1820).

²⁶ Revised Draft at 85-86, 51 F.R.D. 399-400.

tance in the new rules. The practitioner should take particular note of Rule 702 which defines an "expert":

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.²⁷

The proposed federal rule is quite clear and unequivocal, but in the comment to it, the Committee notes that Rule 702 does not allow all opinions, but only those which are relevant to the issue of fact and do not waste time.²⁸ The comment also interprets the rule so that the expert need not give an opinion, but may testify as to principles and facts and let the trier of fact make the necessary inference.²⁹

To further clarify the procedures in the use of experts, the Committee has formulated Rule 704 which allows an expert to give an opinion on an "ultimate issue":

Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.³⁰

It is rewarding to see that the drafters have put to rest the rather meaningless and nonsensical objection: "I object — that is the ultimate question." What is an expert present to answer, if not one of the ultimate questions? If he is truly an expert and is needed because the area of testimony is outside of the knowledge of the average juror, then he must of necessity tread in the area of the ultimate questions.³¹

The Hypothetical Question

Once last year while trying a case in a northern county of Illinois, the author sat through a hypothetical question addressed to a neurologist which lasted thirty-five minutes. The effect of that ponderous procedure on a lay jury, the court, the attorneys and the witness was literally stupefying. If cross-examination is such a valuable tool, then it should be utilized to discover the

²⁷ Revised Draft at 89, 51 F.R.D. 403.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Revised Draft at 91, 51 F.R.D. 405.

³¹ Illinois has started toward this enlightened position. *Miller v. Pillsbury Co.*, 33 Ill. 2d 514, 211 N.E.2d 733 (1965).

basis for the opinion of an expert called by an adverse party. To that end, proposed Federal Rule 705 provides as follows:

Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.³²

The reader will see that this leaves the use of the hypothetical question within the discretion of the trial judge. It would seem the better rule to do away with the hypothetical question altogether and not leave it within the already vast discretionary powers of a multitude of federal district judges. Hopefully, most judges will use the system which saves the most time and is the least confusing to the jury.³³

The hypothetical question in Illinois has a checkered history, but it is clear that under present case law, the lengthy procedure is still required.³⁴ In this writer's opinion, the continuance of such a laborious and unfair procedure should be halted.³⁵

Privileges

The only way to begin to understand this new set of rules is to begin with a consideration of Rule 501:

Privileges Recognized Only as Provided

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

- (1) Refuse to be a witness; or
- (2) Refuse to disclose any matter; or
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.³⁶

This comment appears after the rule to more fully explain the drafters' reasoning:

³² Revised Draft at 92, 51 F.R.D. 406.

³³ In this counsel's practice, several of the federal district judges in the Northern District of Illinois have adopted this shorter procedure, before the passage of the rule.

³⁴ *Pritchett v. Steinkor Trucking Co.*, 108 Ill. App. 2d 371, 247 N.E.2d 923 (1969).

³⁵ The "unfair" nature of the procedure is that it gives the party employing it numerous opportunities to present its theory of the case between opening statement and closing argument.

³⁶ Revised Draft at 42, 51 F.R.D. 356.

With respect to federal question litigation, the supremacy of federal law may be less clear, yet indications that state privileges are inapplicable preponderate in the circuits . . . [citing cases]. While a number of the cases arise from administrative income tax investigations, they nevertheless support the broad proposition of the inapplicability of state privileges in federal proceedings.

In view of these considerations, it is apparent that, to the extent that they accord state privileges standing in federal criminal cases, bankruptcy, and federal question cases, the rules go beyond what previously has been thought necessary or proper.

On the other hand, in diversity cases, or perhaps more accurately cases in which state law furnishes the rule of decision, the rules avoid giving state privileges the effect which substantial authority has thought necessary and proper. Regardless of what might once have been thought to be the command of *Eric R. Co. v. Tompkins*, 304 U.S. 61, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), as to observance of state created privileges in diversity cases, *Hanna v. Plumer*, 380 U. S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), is believed to locate the problem in the area of choice rather than necessity. *Wright, Procedural Reform: Its Limitations and Its Future*, 1 Ga.L.Rev. 563, 572-573 (1967). *Contra, Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555, n. 2 (2d Cir. 1967), and see authorities there cited. Hence all significant policy factors need to be considered in order that the choice may be a wise one.³⁷

Therefore, there are no privileges except as outlined by these Rules, Constitutional Privileges, or ones adopted by Congress.

The major privileges recognized are:

1. Lawyer-Client (Rule 503)³⁸
2. Psychotherapist-Patient (Rule 504)³⁹
3. Husband-Wife (Rule 505)⁴⁰
4. Trade Secrets (Rule 508)⁴¹
5. Identity of Informer (Rule 510)⁴²

³⁷ Revised Draft at 44, 51 F.R.D. 358.

³⁸ Revised Draft at 47-48, 51 F.R.D. 361-62.

³⁹ Revised Draft at 52-53, 51 F.R.D. 366-67.

⁴⁰ Revised Draft at 55, 51 F.R.D. 369.

⁴¹ Revised Draft at 60, 51 F.R.D. 374.

⁴² Revised Draft at 64-65, 51 F.R.D. 378-79. We reprint Rule 503, Revised Draft at 47-48, 51 F.R.D. 361-62, which is representative of the others.

LAWYER-CLIENT PRIVILEGE

(a) *Definitions.* As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the client" is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(4) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be dis-

These privileges may be waived by voluntary disclosure,⁴³ but not if the privileged material was disclosed by erroneous compulsion or without an opportunity to claim the privilege.⁴⁴ In addition, no comment may be made by the court or counsel upon the claim of privilege, and no inference may be drawn therefrom.⁴⁵ The questions to be determined by future cases will mainly concern the interpretation of the privileges as granted and their restrictions.

Illinois has recognized all of the major privileges listed above in varying degrees for a number of years by statute.⁴⁶ However, Illinois also has recognized a modified physician-patient

closed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) *Breach of Duty by Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer.

(4) *Document Attested by Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* As a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

The others recognized are: Required Reports Privileged by Statute, Rule 502, Revised Draft at 46, 51 F.R.D. 360. Communications to Clergymen, Rule 506, Revised Draft at 57-58, 51 F.R.D. 371-72. Political Vote, Rule 507, Revised Draft at 59, 51 F.R.D. 373. Military and State Secrets, Rule 509, Revised Draft at 61-62, 51 F.R.D. 375-76.

⁴³ Rule 511, Revised Draft at 67, 51 F.R.D. 381.

⁴⁴ *Id.*

⁴⁵ Rule 513, Revised Draft at 68, 51 F.R.D. 382.

⁴⁶ See for example, ILL. REV. STAT. ch. 51, §§5, 5.1 and 5.2 (1971).

privilege⁴⁷ and an accountant's privilege.⁴⁸ Apparently, no such privileges will now exist in matters coming under federal jurisdiction.

RELEVANCY

With the exception of the codification of the Hearsay Rule, the most radical changes from a trial lawyer's point of view are found in the area of what is relevant evidence. The outer limits of relevancy are bounded only by the ingenuity of attorneys who try cases. This writer's experience with other attorneys tells him that their ingenuity is infinite in variety and scope.⁴⁹ Therefore, while the courts of most jurisdictions have become involved in convoluted definitions of relevancy and have engrafted exceptions upon exceptions in application, the drafters of the rules have cut cleanly into that knot. Their initial definition is spare, taking the best from the most scholarly definitions⁵⁰:

Definition of "Relevant Evidence"

"Relevant evidence" means 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.⁵¹

Then this broad based idea taken from Professor Thayer follows as Rule 402:

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by these rules, by other rules adopted by the Supreme Court, by Act of Congress, or by the Constitution of the United States. Evidence which is not relevant is not admissible.⁵²

However, the crux is found in Rule 403, which provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

(a) *Exclusion Mandatory.* Although relevant, evidence is not admissible if its probative value is substantially outweighed by

⁴⁷ ILL. REV. STAT. ch. 51, §5.1 (1971).

⁴⁸ ILL. REV. STAT. ch. 110½, §51 (1971).

⁴⁹ In *Reeve v. Dennett*, 145 Mass. 23, 11 N.E. 938 (1887), Mr. Justice Holmes concedes that some restrictions must be placed on relevancy as "a concession to the shortness of life."

⁵⁰ "Relevance . . . is . . . probative worth . . ." C. MCCORMICK, LAW OF EVIDENCE, §151, at 314 (1954). "Legal relevance denotes something more than a minimum of probative value but something less than full proof, sometime to lay before the jury." 1 J. WIGMORE, EVIDENCE, §§28 and 29, (3rd ed. 1940).

⁵¹ Rule 401, Revised Draft at 28, 51 F.R.D. 342.

⁵² Revised Draft at 29, 51 F.R.D. 343, THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898).

the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(b) *Exclusion Discretionary.* Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.⁵³

At page 8 of the unpublished draft now pending before the Supreme Court of the United States, Rule 403 has been revised as follows:

*Exclusion of Relevant Evidence on Grounds of
Prejudice, Confusion, or Waste of Time*

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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.⁵⁴

It is unfortunate that the drafters have seen fit to expand the discretionary functions of federal district courts even in this limited area. With such vast discretionary powers subject to so much abuse already resting with the federal courts in the areas of change of venue, comment on the evidence and unlimited powers to grant a new trial, to grant more is unwise.

No matter in what form the rule is finally adopted, it should be called the "Rule of Expediency," because it is an artificial concept developed by the courts to save time. This rule has now risen to the level of codification and even sub-classification. What was probably formed in some judge's mind on a hot sleepy afternoon when the evidence had dragged on and on, is now a rule of the finest court system in the land. What can it be called but the "Rule of Expediency" when it starts out, "Although relevant . . ." ? Any evidence is relevant if it has a tendency to prove or disprove a fact in issue in the cause.⁵⁵ Then why keep it out? The answer can best be found in some concrete situations found in three Illinois cases.

In *Chicago Union Traffic Co. v. Arnold*,⁵⁶ contradictory evidence of the nature of the plaintiff's injuries was offered through the testimony of two physicians, who were in disagreement over

⁵³ Revised Draft at 31, 51 F.R.D. 345.

⁵⁴ Unpublished Draft at 8.

⁵⁵ The reader should be aware of the difference between relevancy and materiality. To judge whether something offered is material you must see if it is probative on an *issue* in the case. If not, then it is immaterial. You must consider materiality first; then and only then can you consider relevancy.

⁵⁶ 131 Ill. App. 599 (1907).

the nature and extent of the injuries suffered. The appellate court directed that upon remand the trial court should exclude any evidence presented on the issue which, though relevant to plaintiff's injuries, would have the effect of confusing the jury and affecting their verdict.

In *Hulsebus v. Russian*,⁵⁷ a photograph of the plaintiff was refused as evidence. Plaintiff was injured in an auto accident and appealed when one of the two defendants was found not to be liable. The court affirmed the exclusion of the photo, which was one depicting the plaintiff in surgical process and in the court's language was a "gory and hideous sight." The court noted not only the inflammatory and prejudicial nature of the evidence, but also stated that the photo had no bearing on the jury's not finding the defendant liable.

The court affirmed the exclusion of evidence in *Woodrick v. Smith Gas*⁵⁸ as well. In that case the defendant contended that certain motion pictures would graphically show that an auto device was correctly installed when the malfunctioning of that device caused the accident injuring the plaintiff. The appellate court decided that the trial judge's discretion in refusing such pictures as evidence of a merely cumulative nature would not be disturbed.

Character

Having considered the above examples, an examination of some specific sub-classifications of Relevancy as found in the rules follows. For law students, learning the rules of evidence in the areas of character, habit and reputation, is second only in difficulty to the Hearsay Rule and its exceptions. However, at least in the area of character, the proposed rules make it easier.

Rule 404 is a not very surprising codification of most existing case law and deals with general character of an accused victim or witness and crimes, wrongs or acts:

Character Evidence Not Admissible To Prove Conduct, Exceptions; Other Crimes

(a) *Character Evidence Generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

⁵⁷ 118 Ill. App. 2d 174, 254 N.E.2d 184 (1969).

⁵⁸ 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967).

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁵⁹

Unfortunately, this rule when used in conjunction with Rule 608 apparently allows the use of the most unreliable character evidence in civil cases. Rule 608 provides:

Evidence of Character and Conduct of Witness

(a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of *reputation or opinion*, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2), except with respect to an accused who testifies in his own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if clearly probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.⁶⁰

⁵⁹ Revised Draft at 32, 51 F.R.D. 346.

⁶⁰ Revised Draft at 74-75, 51 F.R.D. 388 (emphasis added). This writer prefers the comment from the California Law Revision Committee which follows the drafters' comment to Rule 404:

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L.Rev. 574, 581-83 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-58 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California

Thus the drafters have perpetuated and even broadened an area of highly unreliable evidence — the opinion of a witness as to another witness's truthfulness.

Rule 404 must also be read in conjunction with Rule 405 which allows evidence of character or traits of a witness by reputation or opinion:

Methods of Proving Character

(a) *Reputation or Opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific Instances of Conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.⁶¹

Note that cross-examination is permitted into relevant specific instances of conduct in subparagraph (a), and if character is "in issue" proof may always be made by specific instances of the witness's conduct.

It is foreseeable that a great deal of case law will evolve from this rather simple three sentence rule. Also it would seem that all of the elements under Rule 403 (the general Rule of Expediency) would come into play in attempts to prove character. For example, Rule 405 may mean that in a rape case the other transgressions of the victim could be specifically brought out as shedding light on the question of consent.⁶² If specific acts were shown, the party presenting the witness would presumably have a right to rebut each specific act, so that the main trial could run

Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.* 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion. Revised Draft at 33-34, 51 F.R.D. 347-48.

⁶¹ Rule 405, Revised Draft at 34, 51 F.R.D. 348.

⁶² See *People v. Hankins*, 90 Ill. App. 2d 51, 234 N.E.2d 104 (1967), where such evidence is not allowed, but proof limited to general reputation testimony.

parallel with an infinite number of little trials. Nothing within the rule itself seems to prevent this, but the court hopefully would place limitations on proof under the Rule of Expediency.

Similar Occurrences

One of the more confused areas of the law within the "pigeon-hole" of relevancy, which the proposed rules do not even remotely consider, is the similar occurrence. For years, Illinois and its federal district courts have followed the rule that other prior occurrences, if substantially similar in nature, may be shown to prove notice or common causation.⁶³

In *Miller v. Chicago Transit Authority*,⁶⁴ the appellate court held that the plaintiff should have been allowed to show prior assaults upon passengers at a subway platform in order to prove actual or constructive notice of a dangerous condition to the defendant. The court did limit such prior occurrences to those proximately related as to both time and place.

But in two recent decisions the courts have expanded the scope of the rule and virtually eliminated the reason behind it.⁶⁵

*Moore v. Jewel Tea Co.*⁶⁶ was a products liability action against the manufacturer of a household drain product for the explosion of one of its containers. In *Moore*, the happenings of three other explosions of the drain product were admitted into evidence. It was admitted that the accidents were prior to the injury in question, but long after the product had left the manufacturer's control. The incidents were not factually identical, nor related as to the time or place. The proof was not offered for common causation, but for notice to the manufacturer. The appellate court said:

The defendants next contend that improper evidence was received. First, they argue that evidence of claims of prior accidents was improperly admitted over their objection. The record reveals that the trial court limited evidence of prior accidents to explosion claims against defendants where there was no opening of the can or any extraneous matter added or anything done to it. The court not only rejected cases where water or some outside material was

⁶³ *Bloomington v. Legg*, 151 Ill. 9, 37 N.E. 696 (1894); *German v. Huston*, 302 Ill. App. 38, 23 N.E.2d 371 (1939); *Miller v. CTA*, 78 Ill. App. 2d 375, 223 N.E.2d 323 (1966); *Sue v. CTA*, 279 F.2d 416 (7th Cir. 1960) (which cites the general rule, but rules evidence not sufficient).

⁶⁴ 78 Ill. App. 2d 375, 383-84, 233 N.E.2d 323, 326 (1969). The court held the offer of proof made by plaintiff was not sufficient.

⁶⁵ *Moore v. Jewel Tea*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970). *Inman v. The Palmer House, No. 18801* (7th Cir., Oct. 8, 1971).

⁶⁶ 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969).

added to the can, it refused plaintiffs' request to allow evidence of prior spontaneous explosions which occurred after the Drano had been subjected to its normal use. Under these guidelines the plaintiffs introduced evidence of three prior accidents in which a Drano can which had not been opened exploded and after which a claim was made against Drackett.

This evidence affects the question of actual notice or knowledge to the defendants of the possibility of an explosion. *Wolczek v. Public Service Co.*, 342 Ill. 482, 500, 174 NE2d 577, 584. It is competent, not for the purpose of showing independent acts of negligence, but as tending to show that the common cause of the accidents is a dangerous and unsafe thing, *City of Taylorville v. Stafford*, 196 Ill. 288, 291, 63 NE 624, 625; *City of Bloomington v. Legg, Administrator*, 151 Ill. 9, 13, 37 NE 696, 697. It is also competent to show notice of this to the defendants. *City of Chicago v. Jarvis*, 226 Ill. 614, 617, 80 N.E. 1079, 1080. In *Gall v. Union Ice Co.* (Cal App), 239 P2d 48 (1951), it was held that evidence of the explosion of another drum of sulphuric acid was proper to show the propensity of the drums to burst and hence their dangerousness. *While the evidence showed the claims against Drackett were made after the can was manufactured and delivered to Jewel, but before it was sold to the plaintiff, this fact affects the weight of the testimony rather than its admissibility. Whether this evidence was admissible is, of course, initially a matter for the exercise of the sound discretion of the trial judge, and we find no abuse of discretion.*

The defendants also argue that if some evidence of claims of prior accidents was admissible, they should have been allowed to try the merits of such claims. The trial court prevented them from so doing. This was entirely proper because the issue was the notice to the defendants of the prior claims and the dangerous propensities of Drano, but not the legal validity of the claims. Considering the distraction of the jury and the undue consumption of time which would have resulted from allowing the defendants to present evidence on the merits of the prior claims, we find that the trial judge did not abuse his discretion by so limiting the evidence.⁶⁷

Unless there is an absolute duty of recall upon manufacturers extending into the retail outlet and the consumer's home, the question could be asked — notice of what? The can had been put into the stream of commerce some eleven months before the occurrence and was on the shelf of the retail store when these other incidents happened. The appellate court held that these facts only effect the weight of the evidence and not its admissibility, but again the question — notice of what?

In *Inman v. Palmer House*,⁶⁸ a man fell in a bath tub in a

⁶⁷ 116 Ill. App. 2d 109, 129-30, 253 N.E.2d 636, 645-46 (1969) (Emphasis added).

⁶⁸ No. 18801 (7th Cir., Oct. 8, 1971).

hotel. Evidence of eleven other falls was allowed in to show notice of a dangerous or hazardous condition without regard to similarity of circumstances or proximate relation in time or place. Nor was the defendant allowed to put in evidence showing the cause of the other falls, as this would have created a collateral issue. The Seventh Circuit Court of Appeals cited *Moore* in support of its position.

The drafters of the rules should give aid to the various federal jurisdictions and include a rule dealing with similar occurrences, as there appears to be a trend in the case law which has a potential for much confusion and injustice. It is suggested the following be added as Rule 412:

Prior Occurrences: (a) Evidence of prior accidents or occurrences, if substantially identical to the facts in issue and proximately related as to time and place, may be admitted if relevant on the issues of notice of a dangerous agency or causation. (b) The Court may in its discretion under Rule 403 allow the party opponent of such evidence to rebut the same to show lack of notice of a dangerous agency or causation. (c) Evidence of a lack of prior occurrences or accidents may be admitted.⁶⁹

Habit

Habit is to be distinguished from character as reputation is to be distinguished from character. Character is what a man is and reputation is what his community thinks he is. Habit is defined as his routine practice.⁷⁰ What a man does the same way over a period of time becomes routine. Rule 406 allows evidence of the habit of a person or routine practice of an organization to be proved by *opinion* or by specific instances being testified to so as to warrant a finding that the habit existed or that the practice was routine.⁷¹ There is no requirement of corroboration. This is certainly one of the most far-reaching rules found in the re-

⁶⁹ Sub-paragraph (b) of this rule has been added to prevent injustice. What if, in fact, the claims relied upon by the proponent of the evidence were contrived, untrue or explained by some cause other than negligence or defect on the part of its opponent. Should not the jury hear an explanation of the "claim" similar to the rehabilitation of an impeached witness.

Sub-paragraph (c) is based on the Illinois case law allowing proof of the "negative." *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N.E. 577 (1931); *Hardiman v. Helene Curtis Industries, Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

⁷⁰ C. McCORMICK, EVIDENCE, §162 at 340 (1958).

⁷¹ Rule 406:

HABIT; ROUTINE PRACTICE

(a) *Admissibility.* Evidence of the habit of a person or of 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.

(b) *Method of Proof.* Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct

vised draft; in fact, so much so that one must ask how opinion testimony can provide the basis for a habit. What opinion does the witness give? Is the opinion to be received from a "lay" witness or so-called expert? The comment fails to help answer those questions, except to refer to Rule 701 which deals with opinion Testimony by Lay Witnesses.⁷² That is not much help as subparagraph (a) merely completes the circle — an opinion of habit *must be based* on personal observation and firsthand knowledge.

Proof of Habits of Decedent

A line of cases in Illinois has imposed an artificial rule upon parties, usually in wrongful death actions. It is the rule which prohibits surviving witnesses from testifying as to the habits of due care of the deceased before the occurrence which caused death if that occurrence was witnessed by others.⁷³ The proposed rules do away with this requirement providing as follows in Rule 406(a) :

Habit; Routine Practice

(a) *Admissibility.* Evidence of the habit of a person or of 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.⁷⁴

This rule should be adopted in Illinois to avoid injustice. As it is, Illinois is one of the few states that requires that the due care of the plaintiff or decedent be pleaded and proved before recovery.⁷⁵ Therefore, in an Illinois court at the present time, a lone driver colliding with a vehicle driven by another decedent, but with a damaging eyewitness present would leave the plaintiff unable to prove the due care of the decedent. This rule is unjust and should be modified.

sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Revised Draft at 35-36, 51 F.R.D. 349-50.

⁷² Rule 701:

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Revised Draft at 88, 51 F.R.D. 402.

⁷³ *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39, 243 N.E.2d 657 (1968). *Plank v. Holman*, 46 Ill. 2d 465, 264 N.E.2d 12 (1970). Also notice the interesting case of *McElroy v. Force*, 38 Ill. 2d 528, 232 N.E.2d 708 (1968), where evidence of a living plaintiff's due care was allowed because he was prohibited from testifying under the Dead Man's Act.

⁷⁴ Revised Draft at 35, 51 F.R.D. 349 (emphasis added).

⁷⁵ In most states it is an affirmative burden of defendant.

Events Occurring After Injury

Three events may occur after an injury which may be highly probative and perfectly relevant, but not allowed by a corollary, the "Rule of Expediency," translated into public policy arguments. They are evidence of an offer to pay medical expenses, offers of compromise and the taking of subsequent remedial matters. The first two were relatively easy for the drafters to handle. Rule 408 provides:

Compromise and Offers To Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.⁷⁶

Rule 409 provides:

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 the injury.⁷⁷

These are basically classic renditions of the case law and should pose no problem in interpretation.

However, Rule 407 is a totally different matter. Evidence of subsequent remedial measures or repairs has been excluded in most jurisdictions on the basis of public policy. It was felt that if evidence of repairs or corrective measures could be introduced to prove liability, then the party in a position to make the repairs would not do so.⁷⁸ A look at proposed Rule 407 in its entirety is required to see if it affects that long standing rule of law:

Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or

⁷⁶ Revised Draft at 39, 51 F.R.D. 353.

⁷⁷ Revised Draft at 40, 51 F.R.D. 354.

⁷⁸ C. McCORMICK, EVIDENCE, §77 at 159 (1958).

*feasibility of precautionary measures, if controverted, or impeachment.*⁷⁹

It is suggested that with the inclusion of the italicized words the drafters have written in a dangerous exception, which virtually engulfs the rule. As a wag one said, "Hindsight is always 20/20." The term "feasibility of precautionary measures" lends itself to misuse by ingenious counsel, because every precautionary device, available or not, becomes feasible after an injury. Take as an example a products liability case involving a press. The press had been installed five years before with all safety devices known to the industry at the time. An injury occurs after five years and a claim made against the manufacturer of the machine. The manufacturer investigates and in learning how the accident occurred wishes to add another safety device unknown before within the industry. Enterprising counsel for the party-proponent would attempt to present this change to the trier of fact, saying that it shows the feasibility of the additional safety measure at date of sale. What should be the advice of the manufacturer's counsel — make the change and become subject to liability or defer any change until after the litigation is concluded?

To consider the other side of the coin, what about the absence of additional precautionary measures being taken after the occurrence as evidence of the feasibility of the existing precautions or as bearing on plaintiff's fault? Would that not run afoul of the public policy considerations behind the rule?⁸⁰ The hope is that if this language is allowed to remain in the rule, it is honed by interpretation, so the rule is not absorbed by the exception.

HEARSAY

To attempt to explain what hearsay is, is not, and its exceptions, and then pursue a discussion of the way hearsay is handled in the proposed rules, is literally impossible in a few pages. Therefore, a basic knowledge of the Hearsay Rule and its exceptions is assumed and this article will attempt to give the reader a broad picture of what the drafters are attempting to accomplish in codifying the Hearsay Rule.⁸¹

The drafters' approach to Hearsay is a novel one and quite exciting in concept. For over a year both in the classroom and the courtroom this writer has attempted to apply their way of

⁷⁹ Revised Draft at 38, 51 F.R.D. 352 (emphasis added).

⁸⁰ See *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N.E. 577 (1931).

⁸¹ The reader should be reminded that the historical reasons for the prohibition against hearsay have been (a) lack of an oath, (b) inability of trier of fact to judge the demeanor of an absent witness and (c) lack of the right of cross-examination. C. McCORMICK, EVIDENCE §224 at 457-58 (1954).

approaching hearsay problems, and predicts that theirs will be a practical success as well as a conceptual one.

The Committee's revised draft begins where all scholars have begun, with a definition, but that is where the similarity ends. The drafters not only tell you what Hearsay is, but tell you specifically what it is not. To begin with, a look at the definitions is suggested:

Definitions

The following definitions apply under this Article:

(a) *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant*. A "declarant" is a person who makes a statement.

(c) *Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.⁸²

The hearsay "rule" itself is quite simple.

Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by Act of Congress.⁸³

The first thing which must be asked is, "Is the statement hearsay?" There is nothing novel in that approach, and there is no problem in a non-hearsay statement fitting in under the phrase "offered in evidence to prove the truth of the matter asserted." For example, if the issue is whether a person had the ability to speak after an occurrence, testimony as to what that person said is admissible, not for the truth of what was said, but for the fact that he could speak. That is non-hearsay.⁸⁴

In Rule 801(d), the drafters tell you what further statements are not hearsay:

(d) *Statements Which Are Not Hearsay*. A statement is not hearsay if

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him; or

(2) *Admission by Party-Opponent*. The statement is offered against a party and is (i) his own statement, in either

⁸² Rule 801, Revised Draft at 99, 51 F.R.D. 413.

⁸³ Rule 802, Revised Draft at 104, 51 F.R.D. 418-19.

⁸⁴ Don't be confused by sub-section (2) of 801, concerning non-verbal conduct, as the drafters are probably referring to a line of cases concerning identification in a police line-up.

his individual or a representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, or (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.⁸⁵

The logic of subparagraph (d) (1) above, which deals with impeachment, rehabilitation and line-ups, seems inescapable, as the only thing missing is the declarant's oath at the time of making the statement. He is present for the trier of fact to judge his credibility and may be cross-examined at the trial or hearing.

As to subparagraph (2), the reliability of admissions made in the five categories set out by the drafters would seem to mitigate against classifying them as hearsay. The rule does not even change the law of Illinois.⁸⁶

From this point on the concept changes and we find the proposed federal rules dividing hearsay into those situations where the availability of the declarant is immaterial and where the declarant is unavailable. The rules recognize twenty-nine basic exceptions, and the drafters divide them as follows:

Availability of Declarant⁸⁷ Immaterial⁸⁸

1. Present Sense Impression.
2. Excited Utterance.
3. Then Existing Mental, Emotional or Physical Condition.
4. Statements for Purposes of Medical Diagnosis or Treatment.
5. Recorded Recollection.
6. Records of Regularly Conducted Activity.
7. Absence of Entry in Records of Regularly Conducted Activity.
8. Public Records and Reports.
9. Records of Vital Statistics.
10. Absence of Public Record or Entry.
11. Records of Religious Organizations.
12. Marriage, Baptismal and Similar Certificates.
13. Family Records.
14. Records of Documents Affecting an Interest in Property.
15. Statements in Documents Affecting an Interest in Property.
16. Statements in Ancient Documents.

⁸⁵ Revised Draft at 99, 51 F.R.D. 413.

⁸⁶ *Buttitta v. Lawrence*, 346 Ill. 164, 178 N.E. 390 (1931); *People v. Miller*, 278 Ill. 490, 116 N.E. 131 (1917); *Mix v. Osby*, 62 Ill. 193 (1871).

⁸⁷ "Declarant" is the person who makes the statement as defined by Rule 801(b), Revised Draft at 99, 51 F.R.D. 413.

⁸⁸ Rule 803, Revised Draft at 105-08, 51 F.R.D. 419-22.

17. Market Reports, Commercial Publications.
18. Learned Treatises.
19. Reputation Concerning Personal or Family History.
20. Reputation Concerning Boundaries or General History.
21. Reputation as to Character.
22. Judgment of Previous Conviction.
23. Judgment as to Personal, Family or General History, or Boundaries.

Exception 24 is the "catch-all" exception which covers all statements not specifically covered by any of the foregoing exceptions, if there are comparable guarantees of trustworthiness.⁸⁹

Declarant Unavailable

1. Former Testimony.
2. Statement of Recent Perception.
3. Statement Under Belief of Impending Death.
4. Statement Against Interest.
5. Statement of Personal or Family History.
6. Other Exceptions.⁹⁰

Declarant Unavailable

In this area there are two basic changes which deserve attention before delving into the more complicated area of the immateriality of the availability of the declarant. The first is found in the definition of Unavailability.

Hearsay Exceptions: Declarant Unavailable

(a) *Definition of Unavailability.* "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
- (3) Testifies to a lack of memory of the subject matter of his 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; or

⁸⁹ Rule 803, Revised Draft at 108, 51 F.R.D. 422:

(24) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

⁹⁰ Revised Draft at 124-25, F.R.D. 438-39. The sixth sub-paragraph of the rule is similar to exception 24 of Rule 803 cited above. The reader should remember that if the evidence does not fit under a particular exception, it may fit under another, and he may use the rules as a type of "check list" for admission of evidence.

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.⁹¹

Sub-section (3) of the rule is troublesome because one can foresee a situation in which a retrial has been granted to a party and suddenly the most damaging witness develops a startling loss of memory concerning his testimony, thereby allowing his testimony from the first trial to be read under the former testimony exception. The fact that additional information which would aid greatly in the cross-examination of the witness has been found between the first trial and the second is thought to be the reason for the convenient loss of memory.⁹² Are there any protections within the rule to prevent this? If the claim of lack of memory can be shown to be because of the wrongdoing of the proponent the witness is determined to be available. But how effective a sanction is this? What trial judge without overwhelming evidence could apply such a rule?

Sub-section (5) of Rule 804(a) leaves out the necessity for the party-proponent to attempt the witness's deposition before he can be declared unavailable. This should be a minimum requirement. This section deserves a reworking for protection of all litigants in situations of this type.⁹³

The second change in this area has been much needed for years. In most jurisdictions, including Illinois, for a declaration against interest to be admissible it must be against a witness's pecuniary, not penal interest.⁹⁴ The general rule has been felt by many to be an absurd one, since it appears to be a reverse reading of what human beings usually or normally do. Rule 804(b)(4) allows into evidence declarations against interest which would tend to subject the declarant to criminal liability.⁹⁵ This includes confessions made by others to crimes of which the accused is charged. There is a serious question of whether or

⁹¹ Rule 804(a), Revised Draft at 124, 51 F.R.D. 438.

⁹² Such a case may truly exist, *see* *Rio Grande Southern Ry. v. Campbell*, 55 Colo. 493, 136, at 68 (1913).

⁹³ Illinois has maintained the stricter rule in *People v. Cox*, 87 Ill. App. 2d 243, 230 N.E.2d 900 (1967), where even though a key witness was declared legally incompetent a defendant could not be denied the right of confrontation in a criminal case.

⁹⁴ A declaration against interest is made only by a non-party and should not be confused with an admission or confession. An illustrative Illinois case explaining the exception is *Frazier v. Dan Burks*, 95 Ill. App. 2d 51, 238 N.E.2d 78 (1968).

⁹⁵ Revised Draft at 124-25, 51 F.R.D. 438-39.

not this is the law in Illinois, which supposedly excludes such evidence on the grounds that it is untrustworthy as a matter of law.⁹⁶

Availability of Declarant Immaterial

Of the twenty-three enumerated exceptions under this sub-classification, probably the majority merit attention. However, time and space limit the comments to only a few. These can be divided into five basic areas of interest.⁹⁷

The Outmoded Res Gestae Exception

This res gestae exception is found in the first two exceptions, which are:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present Sense Impression*. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited Utterance*. 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.⁹⁸

Res gestae has been defined as those statements or declarations which are made spontaneously or contemporaneously with and as a part of a transaction, event or condition to which they relate.⁹⁹ The Committee feels that sub-sections (1) and (2) are more workable rules, although the drafters admit that they overlap. The Committee comment on exception (1) indicates that it is the better rule because the chances for fabrication are less due to the immediacy of the statement, and there is either a chance to cross-examine the declarant or the person who allegedly heard it.¹⁰⁰ Unfortunately, the Committee either cannot or does not choose to explain what the words "or immediately thereafter" mean. It is foreseeable that those words will be extended by the courts to mean as long as 30 seconds, three minutes, three hours or three days.¹⁰¹

⁹⁶ *People v. Lettrick*, 413 Ill. 172, 108 N.E.2d 488 (1952). This case states the general rule, but allowed the other confession in the interest of justice. A later case held that a confession by another defendant has high probative value but is not conclusive and must be weighed in the same manner as other evidence.

⁹⁷ (1) The outmoded res gestae exceptions; (2) Improving upon State of Mind exceptions; (3) Treatises and Textbooks; (4) Judgment of Previous Conviction; and (5) Business Records Exceptions.

⁹⁸ Rule 803(1)-(2), Revised Draft at 105, 51 F.R.D. 419.

⁹⁹ GARD, ILLINOIS EVIDENCE MANUAL, 191, Rule 165 (1963).

¹⁰⁰ Comment, Revised Draft at 109, 51 F.R.D. 423.

¹⁰¹ *Braden v. Rosenstone*, 83 N.J.L. 251, 83 A. 906 (1912), where "immediately thereafter" was interpreted to mean "directly" or "at once" and not within a reasonable time. Yet in *Whitehead v. Moch*, 85 N.J.L. 574, 89 A. 981 (1914), the court found the space of an evening to be reasonable under the circumstances.

Whether it is called "spontaneous declaration" or "excited utterance," the thrust of exception (2) remains the same. It is a variation of exception (1), but, as the Committee comment recites, it is placed here to avoid "needless niggling."¹⁰²

The grounds for the reliability of exception (2) are the same as that of the present sense impression, that is that the situation produces utterances free of conscious fabrication.¹⁰³ The drafters' comment suggests that this rule has been criticized because of unconscious fabrication due to the same excitement. In addition, note that the utterance need not be made by one *participating* in the event or occurrence.¹⁰⁴

This set of facts may be assumed to test the rather brief language of exception (2). The defendant, in a case involving an automobile collision at a controlled intersection, produces a non-party witness who testifies that an unidentified declarant excitedly told him right after the impact that "the red (plaintiff's) car went through the red light." All tests for an excited utterance have been met: declarant — under stress from a startling event which has occurred — availability immaterial. But what of the right of cross-examination — the reliability of the declarant's conclusion. Is it not just as likely that someone told the declarant what happened, that he saw it wrong under stress, or that the witness at trial erroneously repeated what the declarant told him.

Applying these same facts to exception (1), Present Sense Impression, would appear to make exception (2) seem superfluous. Perhaps the drafters should combine (1) and (2) and come up with an exception which would either make this type of evidence more reliable or do away with it all together. As an alternative, they should place these exceptions into the "declarant unavailable" category with all its restrictions.

Improving Upon the State of Mind Exception

Historically, an exception has been recognized to the hearsay rule called "State of Mind or Statement of Intent."¹⁰⁵ The drafters handle it in this manner:

(3) *Then Existing Mental, Emotional, or Physical Condition.*

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including

¹⁰² Comment, Revised Draft at 109, 51 F.R.D. 423.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Illinois has recognized it for years. *Wilkinson v. Service*, 249 Ill. 146, 94 N.E. 50 (1911).

a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.¹⁰⁶

The drafters call this a "specialized application of exception (1) presented separately to enhance its usefulness and acceptability."¹⁰⁷ They say that the phrase "but not including a statement of memory or belief to prove the fact remembered" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable from a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.¹⁰⁸ There is "an exception to the exception" in that it does not apply to the execution, revocation, identification or terms of a declarant's will.¹⁰⁹

The comment on exception (3) cites *Mutual Life Ins. Co. v. Hillman*,¹¹⁰ and says that the case law is untouched. In *Hillman*, Mrs. Hillman brought actions against insurance companies on life insurance policies insuring her husband's life. The defense was that the plaintiff's husband was not in fact dead, and this was an attempt to defraud the insurance companies. The alleged decedent went west to travel and was purportedly killed, but the identity of his corpse was at issue, the defense contending that the body was one Walters. Among the evidence introduced to prove that the corpse was Walters were letters which were written by Walters. These letters were introduced to show the intention of the writer to travel at a certain locale at certain dates, thus putting him at the site of the death. The defendant said this tended to establish his identity as the deceased. The court decided that the letters were properly admissible and held that,

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what might be impossible to show by other testimony. . . . Such declarations are regarded as verbal acts, and are competent as any other testimony when relevant to the issues. Their truth or falsity is an inquiry for the Jury.¹¹¹

This is an exception limited to words which show an intent to do an act in the future, but if these same words recite an act

¹⁰⁶ Rule 803 (3), Revised Draft at 105, 51 F.R.D. 419.

¹⁰⁷ Comment, Revised Draft at 110, 51 F.R.D. 424.

¹⁰⁸ *Id.*

¹⁰⁹ When dealing with the Hearsay Rule, the words quoted above are not flippancy on the part of the author.

¹¹⁰ 145 U.S. 285 (1892).

¹¹¹ 145 U.S. at 296, citing *Insurance Co. v. Mosley*, 8 Wall. 397, 404, 405 (1869).

already accomplished they are excluded unless excepted by the last phrase of the rule. Where is the logic in such a restriction when the sub-exception has no logic behind it at all?¹¹²

Treatises & Textbooks

At this time only three jurisdictions allow the use of learned treatises as substantive evidence after varying requirements of authenticity are met.¹¹³ In Massachusetts, so many procedural safeguards have been written into the rule, that it is virtually unworkable.¹¹⁴ In Illinois, as in a majority of the states, texts may be used for cross-examination of expert witnesses, again after varying requirements of authenticity are met.¹¹⁵

Proposed Rule 803(18) provides:

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by him 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.¹¹⁶

This language appears to follow the best and fairest rule, permitting the use of treatises on cross-examination, but not as substantive evidence unless adopted by the witness. This rule will surely enlarge an already burgeoning practice of using treatises to cross-examine expert witnesses, but leaves to the discretion of the trial judge how the cross-examination is handled. It will be that judge who will decide contextual disputes and how much of the treatise may be read in rebuttal.

Judgment of Previous Conviction

From the common law many ancient practices still remain. Once a felon was declared incompetent to testify. Now in most jurisdictions, including Illinois, a rule allowing a conviction of a felony or infamous crime to be introduced as impeachment is in force.¹¹⁷ The proposed federal rule is as follows:

(22) *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

¹¹² Comment, Revised Draft at 110, 51 F.R.D. 424.

¹¹³ Alabama, Massachusetts, Nevada. For an illuminating discussion of this area see D. LOUISELL, *CASES AND MATERIALS ON EVIDENCE*, 326 (1968).

¹¹⁴ MASS. GEN. LAWS ANN. ch. 233, §79(c) (1959).

¹¹⁵ *Darling v. Charleston Memorial Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

¹¹⁶ Revised Draft at 107, 51 F.R.D. 421.

¹¹⁷ ILL. REV. STAT. ch. 51, §1 (1971). See also *Mulroy v. Prudential Ins. Co.*, 299 Ill. App. 598, 20 N.E.2d 613 (1939).

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.¹¹⁸

The reader should note there is no limitation upon the age of the conviction, an infamous crime is not necessary, as required in Illinois, and the pendency of an appeal affects only the weight of the evidence. All these points make the rule more liberal in favor of admission than Illinois, with the exception of the appeal point.¹¹⁹

Business Records Exceptions

An initial reading of all the exceptions leaves one wondering: Where is the business record exception — the old shopbook rule? You can find nothing labelled as such, but instead, the drafters present these proposed exceptions:

(6) *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

(7) *Absence of Entry in Records of Regularly Conducted Activity.* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.¹²⁰

Notice that the word "business" does not appear in either of these exceptions.¹²¹

¹¹⁸ Rule 803(22), Revised Draft at 108, 51 F.R.D. 422.

¹¹⁹ *People v. Henneman*, 323 Ill. App. 124, 54 N.E.2d 745 (1944), twenty-one year old conviction too remote; *People v. Trent*, 85 Ill. App. 2d 157, 228 N.E.2d 535 (1967), crime must be infamous; *People v. Gardiner*, 303 Ill. 204, 135 N.E. 422 (1922), must be a conviction, not misconduct; *People v. Barney*, 89 Ill. App. 2d 180, 232 N.E.2d 481 (1967). the fact that an appeal is pending makes no difference.

¹²⁰ Rule 803(6) and (7), Revised Draft at 106, 51 F.R.D. 420.

¹²¹ Business or professional records can also be admitted through Exception (5) Recorded Recollections. Other excepted records by exception number, within Rule 803 are (8) Public Records & Reports, (10) Absence of Records & Reports, (9) Records of Vital Status, (11) Records of Religious Organizations, (12) Marriage, Baptismal & Similar Certificates, (13) Family Records, (14) Records of Documents Affecting an Interest in Property, (15) Statements in Documents Affecting an Interest in Property, (16) Statements in Ancient Documents, and (17) Market Reports, Commercial Publications. Revised Draft at 105-08, 51 F.R.D. 419-22.

Exception (7) is a codified exception for a negative search for records, which warrants an inference of the nonoccurrence or nonexistence of the matter. This reminds one of one of McCormick's more interesting cases posed in his casebook on evidence. A supplier of corn had his bulk shipment cut into three parts and delivered to three separate customers, but only one customer complained about the quality. The supplier attempted to admit evidence of the lack of complaints from the other two, but his offer was denied.¹²² Would this now be admitted? Would a manufacturer's bare complaint file concerning a product which is the subject of a products liability action be admitted? The answer to both questions is "yes," if relevant.¹²³

The drafters comment to exception (6) would seem to indicate the following items of evidence are admissible under this exception:

1. All business and professional records;
2. All hospital records;
3. All doctors records and *evaluation reports*;
4. Accident reports.¹²⁴

Their admissibility is subject to the last phrase, "unless the sources of information or other circumstances indicate lack of trustworthiness." Allowing in all business records should pose no problem as the federal courts have allowed such evidence for many years.¹²⁵ The same is true for Illinois.¹²⁶

Hospital records have been admissible in the federal courts,¹²⁷ but prohibited in most courts of Illinois unless the entries are separately admissible as admissions, declarations against interest, spontaneous utterances, refreshing of recollection or past recollection recorded.¹²⁸ Physicians' records of care, including in certain instances the history, have been admissible in both jurisdictions,¹²⁹ but medical reports and evaluations have not been allowed.¹³⁰

¹²² *McMillen Feeds, Inc. v. Harlow*, 405 S.W.2d 123 (1966).

¹²³ See Rule 403, Revised Draft at 31, 51 F.R.D. 345.

¹²⁴ Revised Draft at 113-15, 51 F.R.D. 427-29.

¹²⁵ 28 U.S.C. §1732(a); *Chesapeake & Ohio Ry. v. Stojanowski*, 191 F. 720 (1911); *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820).

¹²⁶ ILL. REV. STAT. ch. 51, §3 (1971); ILL. REV. STAT. ch. 110A, §236 (1971).

¹²⁷ *Missouri Pacific R.R. v. Soileau*, 265 F.2d 90 (1959); *Brown v. Maryland Casualty Co.*, 55 F.2d 159 (1932); *Wojciechowski v. States Marine Corp. of Del.*, 155 F. Supp. 874 (1957).

¹²⁸ *Branch v. Wolfe*, 300 Ill. App. 472, 21 N.E.2d 148 (1939); cf. *Banks v. Bauman Dairy Co.*, 65 Ill. App. 2d 113, 212 N.E.2d 4 (1965).

¹²⁹ *Shell Oil Co. v. Indus. Comm.*, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); *New York Life Ins. Co. v. Bullock*, 59 F.2d 747 (1932).

¹³⁰ *Oard v. Dolan*, 320 Ill. 371, 151 N.E. 244 (1926). However, in *Melford v. Gaus and Brown Const. Co.*, 17 Ill. App. 2d 497, 151 N.E.2d 128 (1958), an electroencephalograph test was admitted. In the federal courts

Is there anything untrustworthy per se about a medical report and evaluation upon a personal injury claimant? Under the eyes of the law, one would assume not.¹³¹ Then how does an attorney practicing in the federal district court go about keeping out a medical report and evaluation about a personal injury claimant, written by a doctor who does not appear at trial and who he has never had a chance to cross-examine? It would be a better idea to re-write the rule excluding such evidence.

Finally, will a police accident report now be admissible as an exhibit which the jurors may examine? It never has been before in Illinois¹³² or in this federal district.

CONCLUSION

To fully explain such a voluminous and complicated set of evidentiary rules within a few pages is impossible. However, it is hoped that this brief exploration has made the reader more aware of what will probably stem from this ambitious attempt into codification.

First, it seems fairly clear that either this set of proposed rules or a very similar set will be adopted by the Supreme Court of the United States and its Congress. This means that all Federal Court practitioners who try cases, or in fact, participate in almost any area of federal litigation, will be faced with the Federal Rules of Evidence to the exclusion of all other evidentiary rules.

Second, it is obvious that the proposed Federal Rules have been prepared with painstaking labor and scholarship. However, like any pronouncement of a governmental body under our system, the drafting and the enactment are only the beginnings. Each rule will have to be interpreted and reinterpreted not only at the level of the district courts, but throughout the federal appellate system, including the Supreme Court of the United States. It would be desirable for the district courts to study the rules and consider the guidelines laid down in the Comments before rendering evidentiary rulings. It would be of further help if on novel issues these rulings would be in the form of memorandum opinions, so that all could have the benefit of the court's thinking.

such evidence is allowed. *United States v. Timmons*, 68 F.2d 654 (1934); *Long v. United States*, 59 F.2d 602 (1932).

¹³¹ Although a federal narcotics agent's records of purchases have been excluded as not sufficiently routine. *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

¹³² *People v. Turner*, 29 Ill. 2d 379, 194 N.E.2d 349 (1963); *Paliokaitis v. Checker Taxi Co.*, 324 Ill. App. 21, 57 N.E.2d 216 (1944).

Finally, it seems clear that the Illinois practitioner will have a laboratory close at hand in which he may study the operation and effects of an evidence code. It may be that it is unworkable, because we have too long adhered to now meaningless evidentiary rules laid down in times past and followed only by rote. It is also possible that the courts themselves may so cloud the rules with totally diverse interpretations, that they fall of their own weight. But it is more likely that with proper judicial handling, and modest change, the rules will be a force which will endure for years and stand as an example for most state legislatures to adopt to improve their own system of justice.