

The California Evidence Code And The Federal Rules: Past- And Present- Are Prologue

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With the California Evidence Code and the Federal Rules of Evidence¹ the law of Evidence has come of age.

Or has it?

If it has, why do so many differences, both superficial and profound, between Code and Rules still persist? For example, both proceed from a consensus among reformers that the historic restriction of prior inconsistent statements to the impeachment function is wrong in theory and unworkable in practice. A witness on the stand at the trial and within the jury's observation is as much subject to cross-examination about what he said on a prior occasion as he is about his prior observations. The old talk that effective cross-examination must "strike while the iron is hot"² is but an outworn figure of speech that modern critical analysis won't tolerate. Besides, how can a jury, however instructed, restrict a known datum to an impeachment function, when it speaks directly to the substantive issue involved? But here the reformers' consensus ends. For under the Code the witness's prior inconsistent statement carries its *carte blanche* for substantive use at the trial,³ whereas under the Rules it is so usable only if its original utterance was "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."⁴

What has happened with presumptions furnishes another example of profound difference between Code and Rules. After so many generations of talk of burden of proof and burden of going forward, of presumptions conclusive and rebuttable, mandatory and permis-

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¹ Hereinafter Code and Rules.

² *State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

³ CAL. EVID. CODE § 1235 (West 1968). The *modus operandi* of qualifying the prior inconsistent statement is set forth in CAL. EVID. CODE § 770 (West 1968).

⁴ 28 U.S.C. FED. R. EVID. 801(d)(1)(A) (1975).

sive, of law and of fact, of those that stay and those that disappear like "bats in the sunlight," of inferences and prima facie cases, was not more of a common front between Code and Rules to be expected in this area? The Code separately sets up detailed, although non-exhaustive, lists of presumptions affecting the burden of producing evidence⁵ (for example, that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail), and presumptions affecting the burden of proof⁶ (for example, that a person not heard from in seven years is presumed to be dead). The former disappear like the notorious bats upon production of countervailing evidence, but the latter linger to impose on the party against whom they operate the burden of proof on the issues involved.⁷ But the Rules are content briefly to provide that "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."⁸ So, certain presumptions either do, or do not, shift the burden of proof, depending on whether the case is in California or federal court.

Of course not all differences between Code and Rules are so basic or significant as the illustrations mentioned. Some differences seem relatively inconsequential or even trivial. For example, the Code insists upon considerable detail concerning the circumstances and conditions of disqualification of the judge when he becomes a witness, concluding with the provision that in the absence of objection by a party, the presiding judge may testify at the trial;⁹ whereas rule 605 is content to provide: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Still other differences are only terminological. Whether the admission of a party opponent is not hearsay at all, or hearsay but within an exception, depends on whether the case is in federal or state court.¹⁰ And other differences, as with those on expert evidence, proceed from a contrasting generosity, or economy, with words.¹¹

⁵ CAL. EVID. CODE §§ 630-645 (West 1968).

⁶ CAL. EVID. CODE §§ 660-668 (West 1968).

⁷ CAL. EVID. CODE §§ 604, 606 (West 1968).

⁸ FED. R. EVID. 301.

⁹ CAL. EVID. CODE § 703 (West 1968).

¹⁰ Compare FED. R. EVID. 801(d)(2) with CAL. EVID. CODE § 1220 *et seq.* (West 1968).

¹¹ Compare FED. R. EVID. 701-706 with CAL. EVID. CODE §§ 720-805 (West 1968).

But the fact that differences are not important does not tend to justify them; in fact, the less consequential the differences, seemingly the less reason to persist in them. A genuine quest for uniformity and certainty might be expected to reconcile at least non-vital differences.

What is one to make of the differences, trivial or serious, superficial or profound, between Code and Rules? Of course they must be exposed and examined, and ultimately, value judgments passed upon them—and we are indebted to this Law Review for carefully undertaking these hard tasks on so comprehensive a scale. Special appreciation is due for approaching the problems not only from the lofty hilltops of theory and speculation, but also on the level ground of pragmatic trial-court orientation. For if evidence problems such as the furthest reaches of the notion of hearsay confront the scholar with almost impossible refinements and intricacies, courtroom hearsay is commonly handled with a certain simplicity and expedition. The authors of this volume have realized that evidentiary analysis is a uniquely pragmatic exercise for trial court practitioners, and for this reason their comments will be all the more appreciated. They know that not every befuddlement of the scholars has its counterpart in adversary wrangling in the courtroom. What could be more difficult from a logical viewpoint than reconciliation of function of judge and jury in determination of foundational and other preliminary facts where relevancy, personal knowledge or authenticity is disputed?¹² The Code¹³ makes a detailed and valiant attempt at a resolution; the Rules,¹⁴ a simpler, but probably equally confusing, one. The formulae are prescriptions for chaos; but it doesn't seem to be working out that way in the courtroom.

But, again, why the differences in the first place? The older practitioner, attuned to Evidence as a case-law proposition, might well respond, why a Code and Rules in the first place? Putting to one side the obvious obsolescences such as a rule on declarations against interest that would not accept penal interest as enough,¹⁵ and which might have been corrected by narrow clean-cut statutes, wasn't the law of Evidence working well enough? Have the changes really been sufficiently innovative to justify an elaborate Code and Rules? Is a litany of categories worth the candle? Those who seek solace in the recollection of things past will garner little satisfaction from this volume. Case-devoted and codification-deprecating practitioners will have to console themselves from the plight of their colleagues

¹² See Kaus, *All Power to the Jury—California's Democratic Evidence Code*, 4 LOYOLA U.L. REV. (L.A.) 233 (1971).

¹³ CAL. EVID. CODE § § 403-405 (West 1968).

¹⁴ FED. R. EVID. 104.

¹⁵ *E.g.*, *Donnelly v. United States*, 228 U.S. 243 (1913); see FED. R. EVID. 804(b) (3); compare CAL. EVID. CODE § 1230 (West 1968).

the teachers, bereft, for example, by the loss (or great diminution) of the fascinating problem of conduct as hearsay. Need a commentator do more than refer to the inadmissible letters to the allegedly incompetent testator of the famous *Wright v. Tatham*?¹⁶

But once again, why do Code and Rules still differ so much? Both had their origins with learned bodies, the California Law Revision Commission and the Advisory Committee on Rules of Evidence. Both were finally enacted by legislative bodies, the Code in regular course, the Rules by happenstance, as it were. For the Rules represent the first time in modern federal rulemaking, revived in 1960, that Congress rebuffed the Advisory Committee and the Supreme Court with counter-propositions of its own.

The story of federal evidence rulemaking and the difficulties shouldered by the Advisory Committee has been told too often to justify more than a brief resketching here.¹⁷ The Advisory Committee on Federal Rules of Civil Procedure, revived in 1960 under the chairmanship of Dean Acheson, refrained from the pursuit of evidence problems as impractical in view of the numerous pressing procedural problems. But the suggestion was conveyed to Chief Justice Earl Warren by the Standing Committee on Rules of Practice and Procedure, via the Judicial Conference of the United States, that there ought to be a separate advisory committee to formulate rules of evidence for the federal courts. The Chief Justice responded by naming a Special Committee under the chairmanship of Professor James William Moore of Federal Practice fame to inquire into the feasibility and advisability of Federal Rules of Evidence. The Special Committee concluded that such rules were both advisable and feasible, and after consideration of its report by bench and bar, the Standing Committee and the Judicial Conference confirmed the recommendation of the Special Committee. In March, 1965, Chief Justice Warren appointed the Advisory Committee on Rules of Evidence under the chairmanship of the highly experienced practitioner Albert Jenner.

¹⁶ 7 Ad. & El. 313 (Exch. 1837); compare *People v. Barnhart*, 66 Cal. App. 2d 714, 153 P.2d 214 (1944); *Corke v. Corke and Cooke*, 1 All E.R. 224 (Ct. App. 1958); *McCrae v. California Unemployment Ins. Appeals Board*, 30 Cal. App. 3d 89, 106 Cal. Rptr. 159 (1973); and Professor Ronan Degnan's delightful hypothetical: May a witness be asked whether the automobile lights of other (non-involved) drivers were on at the scene of the collision at the time thereof? Professor Edward Morgan's 1946 Harvard Evidence Examination objective questions on the nature and definition of hearsay are preserved in LOUISELL, KAPLAN & WALTZ, *CASES AND MATERIALS ON EVIDENCE* 93-96 (2d ed. 1972). Some of these brain-teasers are practically unanswerable, at least in the light of current hearsay analysis. How much of the beauty of "conduct as hearsay" goes with CAL. EVID. CODE § 225 and FED. R. EVID. 801(a)?

¹⁷ E.g., Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962); REDDEN & SALTZBURG, *FEDERAL RULES OF EVIDENCE MANUAL* pp. 1-5 (1975).

After publication of a preliminary draft of proposed federal evidence rules in 1969,¹⁸ and a revised draft in 1971,¹⁹ the Supreme Court promulgated the rules to be effective in 1973. But Congress, with its reserved power to veto or alter such judicial promulgation,²⁰ promptly deferred the effectiveness of evidence rules until expressly approved by the Congress.²¹ The Rules we now have are therefore the product not only of Advisory Committee and Standing Committee work and Supreme Court promulgation, but of supersesory Congressional action—omission of some provisions, amendments of others.

What was there about the Evidence Rules which aroused Congressional dander and stiffened the Congressional backbone, when except for the Evidence Rules it has left the modern rulemaking process strictly alone? Even the much-debated rule on class suits, FRCP 23 revised in 1966, was left undisturbed by Congress as proposed by Advisory Committee and promulgated by Court. The psychology of Watergate, resistant to executive encroachment, likely also played its part in connection with the Evidence Rules. Committee and Court, no less than the President, must be kept from usurping legislative power. And not without reason; for the acknowledged expertise of rulemakers within the ambit of their technical competence, hardly bespeaks authority to preempt the value judgments that in a society purportedly democratic belong at least in the first instance to the people and their legislative bodies.

Not only did the Advisory Committee commit the political *faux pas* of underestimating the continuing reach of *Erie* teaching,²² but worse, it proposed the wholesale abandonment of physician-patient privilege (except for a narrow psychotherapist-patient privilege),²³ and even worse, would have effected the complete abandonment of the spousal confidential communication privilege.²⁴ This expression of professional *hubris*, against which this author with a student colleague tried to caution many years earlier²⁵ was too much for

¹⁸ 46 F.R.D. 161.

¹⁹ 51 F.R.D. 315.

²⁰ RULES ENABLING ACT, 28 U.S.C. § 2072 (1970).

²¹ Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

²² *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); see Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); Note, 44 CALIF. L. REV. 949 (1956); see Degnan, Note 17 *supra*.

²³ Compare Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 746 (1957).

²⁴ Proposed (not adopted) FED. R. EVID. 505, Husband-Wife Privilege, ADVISORY COMMITTEE'S NOTE, in FEDERAL RULES OF EVIDENCE ANN. 205, 206 (Federal Judicial Center, 1975).

²⁵ Louisell & Crippin, *Evidentiary Privileges*, 40 MINN. L. REV. 413, 415-424 (1956).

Congress. The California Code,²⁶ of course, had carefully guaranteed the continuation of this historic and vital privilege, and it is hard to understand why the expertise of rulemaking should have engendered a reaching out to supersede the historic common law and settled legislative judgment of Anglo-American, and indeed at least Western, society. Whether the final solution of Congress on privileges²⁷ is the best possible one, is debatable; but the brakes had to be applied, and Congress to its credit applied them. The Supreme Court, which had recently examined the general area of spousal privilege,²⁸ had little excuse except the pressure of its regular business for joining in the Advisory Committee's miscalculation.

But the law of privileged communications, however important, is only a part of the new evidence law, Code or Rules. Perhaps most practitioners when confronted with the new regime think primarily of the hearsay changes. And the evidence teacher who has watched generations of students grapple with the concept of hearsay and its almost unbearably refined distinctions, must have hoped at least subconsciously for a breakthrough of understanding as much as he perhaps secretly dreaded loss of his prideful mastery. For how much of the new hearsay dispensation, whether of Code or Rules, is really *breakthrough*? How much is *true reform*, as distinguished from systemization and codification? Did the failure of the radical Model Code of Evidence,²⁹ and the substantially similar fate of the less innovative Uniform Rules of Evidence,³⁰ render the California codifiers and federal rule makers too timid, thus producing essentially restatements rather than true reforms?

One thinks of proposals for substantial abandonment of the exclusionary hearsay rule, especially in non-jury cases.³¹ On the other hand, one also thinks of a creeping constitutionalization of phases of the hearsay rule.³²

The student who struggles with the intricacies and refinements of hearsay's definitional delineations, must often sense a threatened intellectual collapse of the very concept of hearsay. *People v. Alcalde*,³³ holding that a homicide victim's statement "I am going out tonight with Frank" was admissible under *Mutual Life Insurance Co., v. Hillmon*³⁴ to help prove that in fact Frank, the alleged

²⁶ CAL. EVID. CODE § 980 (West 1968).

²⁷ FED. R. EVID. 501.

²⁸ *Wyatt v. United States*, 362 U.S. 525 (1960).

²⁹ MODEL CODE OF EVIDENCE (1942).

³⁰ UNIFORM RULES OF EVIDENCE (1953 version, superceded 1974).

³¹ *E.g.*, *Davis, Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362 (1970).

³² *Douglas v. Alabama*, 380 U.S. 415 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

³³ *People v. Alcalde*, 24 Cal. 2d 177, 148 P.2d 627 (1944).

³⁴ 145 U.S. 285 (1892).

murderer, went out that night with her, tellingly makes the point. In the words of dissenting Justice Traynor: "The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her 'It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed' The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declaration cannot be admitted for that purpose without setting aside the rule against hearsay."³⁵

Granted, I think. But *should* it be set aside?

As with so many problems of law and life, the core of one problem is the very heart of a larger one. So here the ultimate problem of course is that democratic America hasn't yet found the way to make sure that it gets judges who can assuredly be *trusted* with the power implicit in the discretion that would ensue upon abandonment of the hearsay rule. Neither popular elections, plebiscites, nor senatorial courtesy, seems adequate to the task.

In the meantime the Bar — and who can blame it? — abides the ancient wisdom that discretion is but a softer word for arbitrary. And so the hearsay rule remains to the bewilderment of students, and something like a schizophrenic ecstasy of their teachers.³⁶

³⁵ 24 Cal. 2d at 189-190. Compare *Shepard v. United States*, 290 U.S. 96 (1933).

³⁶ There is the wisdom of the historian and the courage of the prophet in the conclusions of REDDEN AND SALTZBURG, *FEDERAL RULES OF EVIDENCE MANUAL* 5 (1975):

Once there has been some opportunity for studying the way the Rules operate in practice and for some careful thought about the philosophy of "black-letter" Federal Rules and interstate uniformity, it may turn out that those who labored long and hard to give birth to Federal Rules of Evidence were overly enthusiastic. It may be that the supposed benefits of Federal Rules, e.g., increased certainty of the practicing bar as to what the Rules are, greater freedom for Judges to transfer from district to district and from Appellate Court to Appellate Court without worrying about applying different rules of evidence, and insurance that there is a uniform standard of justice in all Federal Courts, were largely mythical. Or, quite to the contrary, it may appear that the anticipated dangers of codification e.g., ossification which could prevent the flexibility that is needed to do justice in particular cases, a breakdown in intrastate uniformity which could make it very difficult for lawyers to practice effectively in either state or Federal Courts, and poorly drafted and problematic black-letter rules which could result from an inability of drafters to anticipate all of the problems that might arise in the course of litigation, were greatly overstated.

However history tells this tale, one thing seems certain; the adoption of Federal Rules of Evidence is viewed by many judges, lawyers,

But ultimately all things die, or are transformed. And so it will be with the hearsay rule.

The Code and Rules of the present, like the past itself, are only prologue—as today's students make evident.

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and law teachers as a great step forward in the improvement of judicial machinery, an improvement equal to, and in the eyes of some, perhaps more important than the adoption of Federal Rules of Civil and Criminal Procedure.

It is interesting to note in passing that one of the main criticisms leveled at the Rules is that they are "substantive" rather than "procedural." The fact that many of the evidentiary rules are much closer to substance than procedure is precisely one reason why the Federal Rules are viewed as being so important, and why their effect will be closely scrutinized.

Thus it seems that this is an important moment in history, since we are about to undertake what may in retrospect be viewed as either a major step forward or an error of great magnitude. And even if time should tell us that neither the critics nor the supporters of the Rules were entirely correct, and that little changed after the Rules were adopted, this too would be of great importance. There is no reason to suspect that in the immediate future legislatures and courts will not share the lawmaking function. Our experience with the Federal Rules of Evidence may help us understand how best to allocate future responsibility.