EVIDENCE PRINCIPLES, PRACTICES, AND PITFALLS

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201 Things You Were Never Taught, Forgot, or Never Understood

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SUMMARY OF CONTENTS

NOTE TO THE PRACTITIONER

In 40 years of teaching, practicing, and consulting with regard to the common law and the Federal Rules of Evidence, I have seen recurring misunderstandings of certain evidentiary principles. Although these often have been in some of the more complex areas of the subject, many have concerned fundamental issues that every lawyer should understand. Some principles were never learned correctly. Some were not taught correctly. Most simply have been forgotten. All of these principles, however, will eventually be important in most practices.

This book presents and discusses 201 of these principles. Some principles are comparatively unnoticed recent additions to the Federal Rules of Evidence. Some are illogical rules or practices that have become so deeply ingrained in our jurisprudence, they are established doctrine. These practices are being identified because eventually they will be successfully attacked and changed. Finally, some of the issues are so inherently complex and difficult they are quickly forgotten when not regularly reviewed and used.

More than two dozen Diagrams have been used throughout the text to assist readers in understanding some of the more complex concepts, including multiple level hearsay, the application of the state of mind exception to the hearsay rule, and the application of the attorney-client privilege to pre-existing documents and responsive communications of attorneys. In addition, numerous Applications are given to illustrate principles.

Equally important to the practitioner, however, is understanding the relationships between the rules within the evidence code. Therefore, at the end of many topic areas, a Relationship to Other Rules section can be found where these relationships are briefly examined.

Although this book reviews basic concepts relevant to the 201 practices and principles discussed, it is not an Evidence primer. It is designed as a focused refresher for practitioners and a supplement to basic casebooks (including EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE (LEXIS 6th ed. 2009) and manuals. For the convenience of the reader, all evidence rules relevant to each discussion have been reproduced within the text.

BIOGRAPHICAL SKETCH

Paul R. Rice

Paul Rice is a professor of law at the American University Washington College of Law where he has taught litigation related courses for 39 years. His specialty is evidence law, and is an internationally recognized scholar on the attorney-client privilege.

He is the author of two treatises on the attorney-client privilege, Attorney-Client Privilege in the United States (Thomson Reuters 2011) and Attorney-Client Privilege: State Law (Westlaw 2011). On the topic of electronic evidence, he is the author of Electronic Evidence: Law and Practice (2d ed. ABA 2009) that explores issues from discovery through trial. He also has published a popular law school textbook, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE (LEXIS Publishing 6th ed. 2009), from which significant materials in this book were taken. His other law books include: RICE, COMPARATIVE EVIDENCE RULES PAMPHLET (Matthew Bender 1987) and BRAZIL, HAZARD & RICE, MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS (Am. Bar Foundation 1983). He also has published four books of poetry with Finishing Line Press.

Professor Rice is the Director of the WCL Evidence Project that has published comprehensive proposals for the revision of the Federal Rules of Evidence, 171 F.R.D. 330 (1997), *see* www.wcl. american.edu/pub/journals/evidence, and a report on the Project's experience in working with the Federal Rules of Evidence Advisory Committee, 191 F.R.D. 678 (2000). He has published more than 100 articles in law reviews and specialized journals on topics of evidence and procedure and has been a contributor to the *Legal Times* and *National Law Journal.*

Professor Rice has served as a special master or special counsel in a number of large, complex cases: *In re Neurontin Antitrust Litig.* (MDL), *In re Aetna UCR Litigation* (multidistrict litigation, "MDL"), *In re Neurontin* (MDL patent infringement and antitrust case), *In re Vioxx Litigation* (MDL products liability case), *Consolidated Microsoft Cases* (consumer and competitor cases from both federal courts and the state of California), *Southern Communication Corporation v. American Telephone & Telegraph* (private antitrust action); *In re Amoxicillin* (an MDL antitrust and patent infringement action) and *United States v. American Telephone & Telegraph* (government divestiture action). He has lectured to law firms, corporate legal departments, judicial organizations, and bar associations on an array of evidence topics, served as a litigation consultant to the firm of Finnegan, Henderson, Farabow, Garrett & Dunner in Washington, D.C., and is regularly consulted by a number of firms on attorney-client privilege and other evidentiary issues.

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As with all of my scholarship, this project was made possible by the financial support of the Washington College of Law and its Dean, Claudio Grossman.

Most importantly, without the consistent support, encouragement, tolerance and sound advice from my partner and best friend, Jane Bird Rice, I would have attempted little and accomplished far less.

INTRODUCTION

This book attempts to resolve for practitioners, in manual form, many common problems and misunderstandings that have existed since evidence rules evolved under the common law. Unfortunately, many of those problems were perpetuated when the common law rules were codified in 1973 in the Federal Rules of Evidence. The evidence code provided some solutions to several existing problems and created consistency among the federal courts. Before the rules, federal district courts followed the evidence rules of the states in which they sat. The evidence code also created new problems, many of which subsequently have not been addressed by the Judicial Conference of the United States through its Advisory Committee on the Federal Rules of Evidence.

Codification has radically changed the dynamic of the evolution of evidence rules. Unlike common law rules, which judges were expected to modify, based on principles of equity and fairness in light of the facts in cases before them, codified rules are intended to minimize judges' discretion in interpreting and applying the rules. Regardless, judges occasionally have had to ignore inadequate language of codified rules or resort to strained interpretations in order to achieve an acceptable level of fairness.

Rule changes are now quasi-legislative. They must be adopted by the Federal Rules of Evidence Advisory Committee after public hearings, and the amendments become law only after being accepted by: (1) the Committee on the Rules of Practice and Procedure, (2) the full Judicial Conference, (3) the Supreme Court, and (4) Congress. If Congress does not act to reject proposed changes, they automatically become law the following December 1. Because this process is detached from individual cases, the evolution of codified rules is now influenced by special interest groups as much as the equities of situations in which they must be applied. This, coupled with the lethargic committee process, has left many problems unaddressed. During the past two years all of the rules in the evidence code were reorganized and reworded without addressing a single existing problem. This book identifies some of these problems and traces their development through the common law, codification in the Federal Rules of Evidence, and evolution through judicial decisions.

The 201 principles identified in this book are organized under a specific sequence of topical areas as they are addressed in my basic evidence textbook, P. Rice and R. Katriel, Evidence: Common Law and Federal Rules of Evidence (LEXIS 6th ed. 2009). The diagrams illustrating the logic of hearsay and the sections titled Relationship To Other Rules have been taken, in substantial part, from that textbook.* As topic discussions overlap, cross-references are provided to PRACTICE NUMBERS within the 201 PRACTICES explored in this book.

Chapter One debunks the "beyond the scope" cross-examination objection too often raised, discusses principles relating to the making of the record and explores the most fundamental of all issues: logical relevance, the universal hurdle all evidence must clear. This chapter explores the basic rules that control the presentation of testimony and discusses the flawed new provision in the Federal Rules of Evidence that dispenses with the requirement of

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contemporaneous objections at trial when *in limine* rulings have been declared "dispositive."

Chapter Two deals with issues of authentication, a fundamental aspect of logical relevance. Identifying witnesses and authenticating tangible items about which testimony is being offered are essential to logical relevance. Evidence is not relevant and therefore should not be heard by the jury unless it has been authenticated and connected to the cause of action. This chapter explores various doctrines of authentication, the concept of self-authentication, and the application of these common law doctrines in the new world of electronic evidence.

Chapter Three examines specific exclusionary rules: similar occurrence evidence, remedial measures, offers of compromise, and the least understood of these, character evidence — rules that evolved under the common law after repetitive judicial balancing of relevance and probative value against potential unfair prejudice.

Chapter Four, which constitutes the largest portion of these materials, analyzes hearsay, the most frequently raised evidentiary objection. It is a concept that has been complicated and made more difficult by numerous exceptions. Under the Federal Rules of Evidence, this complexity has been compounded by: (1) the assertive/non-assertive distinction in the definition of hearsay, (2) the exclusion of a class of statements from the definition of hearsay that is equivalent to the creation of an unrecognized third category of hearsay exceptions, (3) the inconsistent incorporation of constitutional principles in the language of the rules in a way that has misinterpreted and misapplied those provisions, and (4) the inadequate and occasionally inconsistent ways comparable policies and exceptions are codified.

Chapter Five reviews writings, specifically the topics of authentication and best evidence. Authentication is a difficult and growing problem with the advent of electronic communications and the Internet. The old wine of the common law can easily be poured into these new bottles if basic principles and the context in which they are being employed are understood. Changes to the common law best evidence rule, incorporated into the Federal Rules of Evidence, are one of the most striking successes within the evidence code. Article X has virtually eliminated the often frivolous best evidence objection through its recognition of "duplicates" (unless genuine questions of authenticity and accuracy are raised by the parties). The most serious problem in Article X has been created by judges who minimize the importance of summaries, permitted under Rule 1006, by treating them like they are only pedagogical devices rather than an exception to the best evidence rule or original writing requirement. Another problem identified in this chapter has existed since the common law — the effect of self-authentication. It continues to be unresolved under the Federal Rules of Evidence, primarily because of the continuing debate over the appropriate effect of presumptions, which lies at the foundation of self-authentication.

Chapter Six discusses the significant problems that continue to plague lay and expert opinion rules. Practices codified in Rules 702 and 703 are illogical, inadequate, and inappropriate. While mimicking a practice under the common law with medical doctors, Rule 703 stretches the practice beyond its breaking point, and in doing so, changes the nature of our adjudicatory system and the role of the players within it.

The common law problems with opinion testimony from lay witnesses were resolved by the elimination of the common law rule of exclusion in Rule 701. While only minor problems continue, one of the revisions in Rule 701 — preventing lay witnesses from offering opinions "based on scientific, technological, or other specialized knowledge"— was totally

unnecessary and has the potential of creating more problems than it solves.

The poor work of the Advisory Committee in drafting and maintaining Rules 702 and 703 is trumped only by the Supreme Court's unhelpful, perhaps even naive, interpretation of those rules. Judges have been assigned a role previously relegated to scientific and technological experts under the *Frye* "general acceptance" test, and judges are now forced to do indirectly what they previously did directly.

Chapter Seven addresses problems within the various methods of impeachment — prior inconsistent statements, bias, prior convictions, character evidence and psychiatric conditions. These rules have perpetuated many of the problems that existed under the common law, created new problems through codified language, and expanded the scope of admissibility where severe restrictions were previously imposed. The most significant problems under this topic of impeachment exist with regard to proving bias. The Federal Rules of Evidence ignore the topic, compelling courts to fashion rules from conflicting common law principles.

Chapter Eight examines the attorney-client privilege — the most complicated and litigated of all privileges. Although it is premised on a requirement of confidentiality/secrecy, most judges have indicated, through their decisions on a variety of issues, that they do not believe secrecy is a necessary condition for the privilege. As fundamental elements of the privilege, like confidentiality, are being abandoned or forgotten, basic principles are also evolving through misinterpretation and misapplication. In addition, the application of the privilege to the corporate entity has been the most vexing problem for judges, who have *never*, in the history of our jurisprudence, critically evaluated and justified the privilege's application to these fictitious legal entities. Case law has developed on little more than *ipse dixit.*

Chapter Nine deals with presumptions. In general, the profession is probably least familiar with this evidentiary principle. When this unfamiliarity is coupled with judicial interpretations and uses that are inconsistent with the theory of presumptions adopted in Article III of the Federal Rules of Evidence, it is little wonder there is such widespread confusion. This is unfortunate because presumptions will prove to be particularly important to the authentication of electronic communications in this digital age.

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