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THE NEW FEDERAL RULES OF EVIDENCE:
AN OVERVIEW

JON R. WALTZ*

On January 2, 1975, President Gerald Ford signed into law the final version of House Bill 5463, which then became Public Law 93-595 and which in accordance with rule 1103 contained in the new statute will henceforward be known as the Federal Rules of Evidence.1 Officially, these rules went into effect on July 1, 1975; unofficially the federal courts, including the Court of Appeals for the Seventh Circuit, were giving persuasive effect to the rules well before their effective date.2 There can be little question that adoption of the Rules of Evidence is the most significant development in federal practice since the approval in 1938 of the Federal Rules of Civil Procedure. And adoption of the Federal Rules of Evidence by the states, with some necessary modifications, is already underway.3

HISTORY

The Federal Rules of Evidence rode a rougher path to approval than did the Rules of Civil Procedure, which went into effect without significant congressional demurrer. In a negative sense, the history of the new federal code of evidence goes back to April, 1937, when the United States Supreme Court's original Advisory Committee on Civil Rules stated in a note appended to what became Federal Rule of Civil Procedure 43, dealing with the taking of testimony during trials, that "[t]he first impression of the Committee was

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Portions of this article are drawn from Professor Waltz's book, THE FEDERAL RULES OF EVIDENCE: AN ANALYSIS (2d ed. 1975).


2. E.g., United States v. Banks, 520 F.2d 627 (7th Cir. 1975) (rule 601, witness competency); United States v. Farris, 517 F.2d 226 (7th Cir. 1975) (rules 803(6), (7), (8), (9) and (10), 902 and 1005, self-authentication of officially certified computer data compilations); Levitt v. H.J. Jeffries, Inc., 517 F.2d 523 (7th Cir. 1975) (rule 401, definition of "relevant" evidence); Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974) (rule 103(a)(2), offers of proof).

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against touching the field of evidence." And in large measure the Committee governed itself by this initial impression: it touched upon evidentiary matters in only two of the procedural rules that it drafted.

A year later the Advisory Committee's chairman, former Attorney General William D. Mitchell, suggested that "some day, some other advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court." During the next twenty years the American Bar Association and other lawyers' groups pressed for the formulation of uniform rules of evidence applicable to actions tried in the United States District Courts. In 1961 the Judicial Conference of the United States gave its approval to a proposal that it proceed with a project for a federal code of evidence. A special committee, headed by Professor James William Moore of the Yale Law School, reported during the following year that such a project was both advisable and feasible.

Within three years an Advisory Committee on Rules of Evidence had been assembled. The Committee was heavily weighted with practitioners either actively engaged in the trial of cases or closely associated with that activity. Albert E. Jenner, Jr., the noted Chicago trial lawyer, was the fifteen-member Committee's chairman; eight other members were practitioners; three were federal judges; three were law teachers.

On January 30, 1969, Mr. Jenner formally transmitted a Preliminary Draft of Rules of Evidence to Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. The Preliminary Draft was then circulated to the entire bench and bar with the Conference's request for comments and suggestions. Discussions of the 1969 Preliminary Draft were held at each of the 1969 Circuit Judicial Conferences and five two-day, multi-state regional seminars were conducted with members of the Advisory Committee in attendance. Numerous individual judges and practitioners presented constructive criticism of the Preliminary

6. PROCEEDINGS, INSTITUTE ON FEDERAL RULES (CLEVELAND) 186 (1938).
9. The other fourteen members of the Advisory Committee were David Berger, Esq.; Hicks Epten, Esq.; Robert Erdahl, Esq.; Judge Joe Ewing Estes; Prof. Thomas F. Green, Jr.; Egbert L. Hayward, Esq.; Dean Charles W. Joiner; Frank G. Raichle, Esq.; Herman F. Selvin, Esq.; Judge Simon E. Sobeloff; Craig Spangenberg, Esq.; Judge Robert Van Pelt; Prof. Jack B. Weinstein; and Edward Bennett Williams, Esq. Both Dean Joiner and Prof. Weinstein were appointed to the federal bench subsequent to the Advisory Committee's formation.
Draft and suggestions for amendment. Many of these suggestions were later adopted, in whole or in part, by the Advisory Committee before the 1971 Revised Draft of the Rules was formally submitted by the Judicial Conference to the Supreme Court in its 1971 Term.  

On November 20, 1972, the Supreme Court promulgated the Federal Rules of Evidence pursuant to the various pertinent Enabling Acts. According to the order of promulgation, the new rules were to take effect on July 1, 1973, unless disapproved by Congress. On February 5, 1973, Chief Justice Warren E. Burger, acting under the Court's November 20, 1972, promulgation order, formally transmitted the Proposed Rules of Evidence to Congress. At this juncture, comparison of the transmitted draft with the 1971 Revised Draft revealed some redrafting that had not previously been made public. Most of the redrafting was of rules bearing upon criminal matters. Nine of the seventy-seven Proposed Rules had been changed by the Judicial Conference at the request of the Kleindienst Justice Department after the deadline for public examination of and comment on revisions had expired.

Influential members of Congress were displeased with the Supreme Court's inclusion of a date on which the rules would automatically become effective in the absence of congressional disapproval. Hitting back at what it considered to be the Court's highhandedness, Congress passed Public Law 93-12, which deferred the effectiveness of the rules until such time as they might be expressly approved by Congress.

Thereafter the Proposed Rules were assigned to a subcommittee of the House Judiciary Committee, which held six days of public hearings. In June, 1973, the subcommittee published and circulated a print of its product, House Bill 5463. This bill was approved by the full judiciary committee and on February 6, 1974, it passed in the House. The bill contained numerous amendments of the Rules as transmitted by the Supreme Court.

House Bill 5463 was next referred to the Senate Committee on the Judiciary. This committee focused on the House bill rather than on the Court's

transmitted version of the Rules. It made a substantial number of additional amendments before publishing its report on October 18, 1974.\textsuperscript{18} On December 14, 1974, the Senate-House Committee of Conference reported its resolution of the variations between the Senate and House versions of the rules.\textsuperscript{19} The Conference report, incorporating a number of new amendments, was agreed to by the Senate on December 16, 1974,\textsuperscript{20} and in the House on December 18.\textsuperscript{21} In the chaotic last days of the 93rd Congress, the final version of House Bill 5463 was not printed. It was, however, signed by President Ford early in the following month.\textsuperscript{22}

It is accurate to say that the rules ultimately approved by Congress and signed into law by the President are essentially the rules promulgated by the Supreme Court, with some important exceptions dictated in the main by Congress' disagreement with the Advisory Committee's assessment of the significance of \textit{Erie Railroad Co. v. Tompkins},\textsuperscript{23} and, regrettably, with a few vexing drafting errors.

The work of the Court's Advisory Committee and of the two congressional subcommittees had fallen into three categories: (1) the codification and occasional clarification of relatively settled evidentiary principles and practices; (2) the resolution of conflicting evidentiary approaches where such differences should be discerned; and (3) the making of some innovations, either moving beyond or backing away from established principles.

As the Advisory Committee itself freely conceded, no sharply defined pattern emerges from its extended labors and the amendments of Congress superimposed no pattern on the Advisory Committee's product. This much can be said: although both the Advisory Committee and Congress refused to voice a generalized preference for the admission of evidence, whenever there was a close choice between exclusion and admissibility, the drafters of the new Federal Rules of Evidence chose the latter.\textsuperscript{24} The philosophy that emerges is that, in general, cases should be decided on the basis of received

\textsuperscript{18} S. REP. No. 1277, 93d Cong., 2d Sess. (1974).
\textsuperscript{20} 120 CONG. REC. S21,644-45 (daily ed. Dec. 16, 1974).
\textsuperscript{21} 120 CONG. REC. H12,253-60 (daily ed. Dec. 18, 1974).
\textsuperscript{22} WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 1 at 12 (Jan. 6, 1975).
\textsuperscript{23} 304 U.S. 64 (1938). The decision in the most important of \textit{Erie}'s progeny, \textit{Hanna v. Plumer}, 380 U.S. 460 (1965), was handed down after the Advisory Committee's formation but prior to its first meeting. It was the Committee's view, obviously shared by the Court which appointed it, that \textit{Hanna} left the Committee free, within the bounds of the Enabling Acts, to recommend for promulgation uniform rules of evidence. At first the Advisory Committee thought that only burdens of proof would be subject to \textit{Erie}'s command concerning the applicability of state law in diversity of citizenship cases; later the Committee developed an identical attitude toward presumptions. Still later the Congress concluded that \textit{Erie}'s dictates were applicable to privileges and to witness competency.
\textsuperscript{24} See generally statement of Frank Raichle, Esq., a member of the Advisory Committee, 48 F.R.D. 52 (1969).
rather than excluded evidence. The process of evidentiary innovation and the philosophy just mentioned are both observable in a number of the rules singled out for special mention in this article.

OVERVIEW

What follows is a catalog of the most significant aspects of the new Federal Rules of Evidence, now applicable in all federal courts. The Rules are set up in eleven articles, some of which, like Article V (Privileges) are very brief and some of which, like Article VIII (Hearsay) are lengthy, complicated, and full of innovations.

Article I: General Provisions

The initial article embraces, among other subjects: rulings on evidence; offers of proof; the "plain error" rule; the handling of evidence admissible for a limited purpose only; and the "completeness rule" relating to writings. Rule 104 attempts to clarify the respective functions of judge and jury, and the applicability of evidentiary rules, in the disposition of preliminary questions of admissibility. Nothing in this general article constitutes a notable departure from past practice in the Seventh Circuit.

As submitted to Congress by the Supreme Court, rule 105 of the Federal Rules of Evidence permitted trial judges to "fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of witnesses." The quoted language stated the current rule, although not the invariable practice, in the federal courts. It was close, at least in theory, to the English approach, which gives the trial judge wide latitude in commenting on the evidence.

The House Judiciary Committee recognized that the rule as submitted was consistent with current federal practice. Even so, the aspect of the rule dealing with the authority of a trial judge to comment on the weight of the evidence and the credibility of witnesses, as distinguished from that aspect of the rule that dealt with summing up or marshalling evidence, was

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25. Because Rule 103(a) has to do with the preservation for appeal of claimed error in trial level rulings on evidence, subdivision (a)(2) in no way relates to the sort of offer of proof that is sometimes made by counsel prior to any in-court testimony and thus obviously prior to any objection and ruling. This latter sort of offer, which is not precluded by Rule 103(a)(2), may be made because offering counsel has a number of witnesses, who are available but not present in court, to establish a line of facts but the trial judge's rulings or comments have strongly suggested that he would exclude their testimony. Such an offer may also be made, even as early as a pretrial conference, to induce a ruling on a line of facts. For a detailed discussion of offers of proof in the federal practice, see Waltz, Making the Record, in D. Louisell, J. Kaplan & J. Waltz, Cases and Materials on Evidence 1316-1326 (2d ed. 1972).


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controversial. After inconclusive debate, the judiciary committee deleted the entire rule. In doing so, however, it announced that it intended that "its action be understood as reflecting no conclusion as to the merits of the proposed Rule." The committee stated that it was leaving the subject for separate consideration at some future time. Neither the full House of Representatives nor the Senate resurrected the subject and so the Federal Rules of Evidence as approved by Congress contain no rule relating to summing up and commenting on evidence and credibility. Thus the local practice of the district courts will continue undisturbed, at least until such time as Congress reconsiders the issue.

Article II: Judicial Notice

Rule 201(a) specifically states that article II, delineating the formal procedures and limitations applicable to judicial notice, governs only judicial notice of adjudicative facts, that is, the facts of the particular case, and thus does not control judicial notice of so-called legislative facts, that is, general facts which help a court to determine the content of the law and of policy and aid it in exercising judgment or discretion (for example, citing the works of economists and sociologists in school desegregation cases), and article II does not deal with judicial notice of foreign law, a subject left to Federal Rule of Civil Procedure 44.1 and rule 26.1 of the Federal Rules of Criminal Procedure. In its treatment of judicial notice of adjudicative facts, article II conforms to past practice in the federal courts.

Article III: Presumptions

This article is limited to civil actions and proceedings; it does not deal with the effect of presumptions in criminal cases. The effect of rule 301 is to make it clear that while evidence of underlying facts giving rise to a presumption shifts to the opposing side the burden of going forward with evidence, the purpose of which is to meet or rebut the presumption, it does not alter the burden of persuasion as to the existence of the presumed fact. The burden of persuasion remains with the litigant to which it was allocated in the first instance.

Article IV: Relevancy and Its Limits

Rule 401 defines the standard of relevancy as being evidence's tendency to make the existence of a fact more probable, or less probable, than it would

29. Id.
30. The distinction between adjudicative and legislative facts is drawn clearly in a classic article, Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404-07 (1942).
31. The matter of presumptions in criminal cases is being considered in connection with pending bills to revise the federal criminal code.
be without that evidence.\textsuperscript{32} Rule 402 explicitly declines to codify statutory and constitutional limitations on admissibility. With some exceptions, rule 404 rejects character evidence as circumstantial evidence. Rule 405 recognizes the admissibility of opinion evidence, along with reports of reputation, to establish character where character evidence is permissible. Rule 406, in a departure from Illinois practice,\textsuperscript{33} permits the receipt of evidence of habit and routine, whether or not corroborated and regardless of the presence of eyewitnesses. Rule 407 states the usual rule relating to post-accident remedial measures: inadmissible to prove negligence or culpable conduct but admissible for impeachment or on contested issues of ownership, control, or feasibility of safety measures. Rule 408 extends the rule against receipt of offers of compromise to include statements made during preliminary compromise negotiations.

\textit{Article V: Privileges}

Rule 501, the only rule contained in the fifth article, provides that in federal criminal cases and in federal question civil cases, federally evolved rules of privilege are to be applied since it is federal policies that are being enforced in these two areas of litigation.\textsuperscript{34} Conversely, where state substantive law supplies the rule of decision, state rules of privilege are to be applied in all but the most exceptional situations.

\textit{Article VI: Witnesses}

Rule 601 was amended in the House of Representatives and in the Senate to conform with rule 501. In cases in which state substantive law supplies the rule of decision, state rules concerning competency of witnesses to testify are to be applied. The effect of the amendatory language is to make Dead Man’s Acts applicable in diversity cases, much to the regret of many lawyers who regard these statutes as an abomination.\textsuperscript{35}

Article VI does not specify any mental or moral qualifications of witnesses. The fundamental requirement, laid down in rule 602, is that wit-

\textsuperscript{32} The Seventh Circuit tacitly approved this definition, citing Proposed Rule 401, in Levitt v. H.J. Jeffries, Inc., 517 F.2d 523 (7th Cir. 1975).


\textsuperscript{34} The federal courts in federal question civil cases and in federal criminal prosecutions—in which privilege law is to “be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience”—are quite likely to follow, with little modification, the privilege formulations set forth in the Supreme Court’s proposed but congressionally rejected article V. REVISED DRAFT, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315, 356-83 (1971). For detailed discussion of the nine privilege rules contained in the Proposed Rules, see J. Waltz, The Federal Rules of Evidence: An Analysis 39-80 (2d ed. 1975).

\textsuperscript{35} For a powerful criticism of the Dead Man’s Acts, see Ladd, Witnesses, 10 Rutgers L. Rev. 523, 525-26 (1956).
nesses must have personal knowledge of matters about which they offer to
give testimony. And interest, perceptual and memory defects, convictions
of serious crimes, and other matters bearing on credibility may be used to
impeach a witness' credibility in the eyes of judge or jury.

Under Rule 606, a juror cannot testify about mental processes or
emotions affecting his or her or any other juror's verdict and cannot testify
about irregularities occurring inside the jury's deliberation room. A juror
can, however, testify to the fact of improper outside influences.

Rule 607 jettisons whatever remains of the traditional rule against
impeaching one's own witness. Methods of impeachment are clarified in
rules 608 through 613. After some wavering back and forth, rule 609 con-
tinues the principle that, generally speaking, an accused and an ordinary
witness can be impeached by evidence of prior conviction of any sort of
felony, not just those involving dishonesty or false statement.

Rule 611(b) retains but brings some flexibility to the rule that cross-
examination should be restricted to the scope of the preceding direct
examination.

In the form in which it was submitted to Congress, rule 612, detailing
procedures to be employed in using writings to refresh or revive present recol-
clection, was in basic accord with settled doctrine but did contain one innovation. Past case law had failed, in the main, to recognize any right of access by the opponent when a memory-refreshing writing was used prior to the time the witness got on the stand. This distinction has more recently been under-
going partial repudiation. Rule 612, as submitted to Congress, did away with the distinction completely by referring to use "either before or while test-
ifying." The House Judiciary Committee amended the Court's proposed rule 612 and the Senate concurred. The resulting rule still requires the produc-
tion of writings used by a witness while he is on the stand testifying but makes the required production of memory-refreshing writings used prior to taking the stand a matter of judicial discretion rather than an absolute right. This dis-
cretionary approach will permit judges to block fishing expeditions among the numerous papers which a witness may have consulted before going on the stand.

36. Note that a witness can have personal knowledge of a hearsay statement and
thus can testify to the fact that such a statement was made. However, article VIII gov-
erning hearsay will then determine whether the statement is admissible in evidence.

37. Rule 606 is likely to undergo reconsideration when some court, citing the rule, rejects evidence that a gun-wielding juror threatened to kill any fellow juror who failed to acquiesce in his or her views. Under rule 606, this would be a "matter . . . occurring during the course of the jury's deliberations" and would be inadmissible to impeach the jury's verdict.

38. Under this rule, the trial judge, in the exercise of discretion, can permit inquiry into additional matters but examining counsel must proceed "as if on direct examina-
tion." This abrupt shifting from one mode of examination to another is likely to be
difficult to carry off and potentially puzzling to jurors.

The purpose of rule 612 is identical to that of the Jencks statute.\textsuperscript{40} It permits the defense to test credibility and memory. The procedures outlined in the statute have now been incorporated in rule 612.

Rule 613 outlines the foundation which must be laid in impeaching a witness on the basis of a prior inconsistent statement. Subdivision (a) of this rule rejects the requirement set forth in the antiquated Queen's Case\textsuperscript{41} that the witness must be shown the statement before he can be cross-examined on it. Under subdivision (a) the statement need not be displayed to the witness and counsel is not required to divulge its contents to him. On request, however, the impeaching statement must be shown to opposing counsel. Presumably this is to block the use of falsely insinuating questions by examining counsel. And under subdivision (b) of rule 613 an impeaching writing must be shown to the witness before examining counsel can prove the contents of the writing by extrinsic evidence. Contrary to past practice, subdivision (b) does not require that this foundation be laid on cross-examination in advance of use of the writing. The only requirement is the generalized one that the witness be given a chance to explain or deny the impeaching statement; the subdivision mentions no particular time sequence. This would permit several collusive witnesses to be cross-examined prior to disclosure of their joint inconsistent statement.

Rule 615 gives any litigant an absolute right to the exclusion from the courtroom of most sorts of witnesses prior to their testimony.

\textit{Article VII: Opinions and Expert Testimony}

The two-pronged test of opinion evidence by a nonexpert is (1) whether it is rationally based on the witness' perception and (2) whether it is likely to be helpful to the factfinder; so says rule 701. Rule 702 contains an orthodox statement of the bases upon which expert testimony will be permitted. The rule is broad and flexible: the fields of expertise are not limited to the scientific but include every brand of specialized knowledge. A physicist is an expert but so is a banker, a carpenter, an electrician, a sheet metal worker, and so on down the long list of special skills.\textsuperscript{42} The test again, as in rule 701, is basically usefulness to the factfinder.

Under rule 703 the bases of an expert's opinion need not themselves be independently admissible if they are of a sort reasonably relied on by experts in the particular field (for example, a physician's reliance on X-rays taken by a technician). Nothing in rule 703 suggests, however, that the plainly inadmissible—such as a discredited testing method—is rendered admissible simply because a supposed expert relied on it. Indeed, revelation of his reliance on a discredited testing method would detract significantly

\textsuperscript{40} 18 U.S.C. § 3500 (1970).
from the weight of his testimony or, in an extreme case, lead to the striking of it.

Rule 704 rejects the "ultimate issue" rule in connection with expert witnesses. This does not mean that witnesses will now be allowed to give testimony that amounts to nothing more than choosing up sides. "Did Clyde Bushmat possess the capacity to make a will?" is not a good question; "The defendant, in my opinion, was guilty of culpable conduct" is not a good response. The safeguards are to be found in rules 701 and 702, both of which insist that opinion testimony must be helpful to the factfinder, and in rule 403, which empowers a trial judge to exclude evidence that constitutes a waste of time.

Under rule 705 the bases of an expert's opinion need not be adduced by examining counsel unless it is required by the trial judge. The major change accomplished by rule 705 is elimination of the necessity of using a hypothetical question in eliciting expert testimony. This is not to say that rule 705 does away with the hypothetical question completely. It simply does away with an absolute requirement that a hypothetical be put to the expert. The use of the hypothetical question occasionally has its advantages and it remains to be seen whether trial lawyers will accept with any frequency this rule's invitation to forego its use. In any event, rule 705 probably forecloses successful assignments of error based on a claim that opposing counsel's hypothetical question was incomplete, that is, failed to include all of the underlying facts or data. In effect, rule 705 lodges with the cross-examiner the burden of drawing out any missing data. And so the new rule should make examining counsel less apprehensive about the use of hypothetical questions since it is no longer essential to include every scrap of arguably pertinent data on pain of a successful objection or of reversal.

Under rule 706 the trial court can appoint expert witnesses and can reveal to the jury the fact of their appointment by him, thereby implying the witness' neutrality and objectivity.

Article VIII: Hearsay

This is the lengthiest and far and away the most significant article of the Federal Rules of Evidence. It is significant not simply because the rule against hearsay evidence and all its pendant exceptions have long been either the bane or the joy of litigators but because this article contains more innovations (and, it can be suggested, more faulty drafting) than any other in the new code. This article will not undertake an exhaustive analysis of article VIII; however, the discussion will alert readers to some of the more significant innovations to be found in the hearsay article.

Rule 801: Definitions

The first rule contained in article VIII is definitional. Rule 801(a)'s definition of "statement" is important because of that word's use in subdivi-
sion (c)'s definition of "hearsay" as being "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."\(^43\)

Subdivision (a) recognizes three types of statements which are subject to the hearsay rule as that rule is enunciated in subdivision (c): (1) a direct oral assertion; (2) a direct written assertion; and (3) nonverbal conduct, such as wordlessly pointing at a man in a police lineup with one's index finger, which was intended as a direct assertion.

Statements of types (1) and (2) have been subject to the hearsay rule ever since that rule emerged in English common law. It is subdivision (a)'s description of type (3) that warrants discussion here. The effect of subdivision (a) is the exclusion of non-assertive conduct from the operation of the hearsay rule; non-assertive conduct, which can be translated into a relevant assertion, is not hearsay under the new Federal Rules of Evidence. This is counter to the common law in a number of state jurisdictions.\(^44\)

As used in rule 801(b), a "declarant" is a "person" who makes a "statement" as that word is defined in subdivision (a). In other words, a "declarant" is one who makes (1) an oral assertion; (2) a written assertion; or (3) an assertion by means of nonverbal conduct, such as pointing or nodding one's head.

Although the Advisory Committee said nothing on this score in its notes, the word "person" was undoubtedly used advisedly, in order to avoid any questions regarding so-called "non-human hearsay"—the parking meter "said" his time had expired; the bloodhound who tracked him "said" this is the killer; the radar equipment "said" the defendant was driving his automobile at eighty miles an hour. While evidence of this sort may have its problems, the hearsay rule is not one of them. A bloodhound is not a "person"—at least an unincorporated bloodhound isn't.

Rule 801(c)'s definition of "hearsay," taken alone—that is, without incorporating the innovations embodied in subdivisions (a) and (d)—is entirely orthodox. Testimony given during court proceedings is excluded from the rule's reach since there is compliance with the ideal conditions for testimony—oath, confrontation, right of cross-examination, ability of fact-finder to observe demeanor, and so on.

43. FED. R. EVID. 801(c) (emphasis added).
44. At common law, nonassertive conduct has often been branded as hearsay. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 214, 217 (1948). It has been treated as hearsay even though it frequently is "great" evidence. It is often "great" evidence because, unlike many conscious assertions, it does not seem to suffer significantly from the most important of the risks of unreliability usually associated with hearsay evidence. Those risks have to do with the out-of-court declarant's (or actor's) (1) perception; (2) memory; (3) veracity or sincerity; and (4) ability to communicate what he/she means accurately and comprehensibly. See J. WALTZ, CRIMINAL EVIDENCE 62-67 (1975).
The crucial test is whether the statement is offered to prove the truth of the matter asserted. If the statement is significant simply because it was made (verbal act) or because the making of it has legal significance in and of itself (legally operative fact), the statement is not being offered to prove the truth of anything asserted. It is therefore not hearsay.

Subdivision (d)(1)(A) of rule 801 alters the common law. In times past it had been thought that a witness' prior inconsistent statement was admissible solely to impeach his credibility as a witness. It was not admissible as substantive evidence; it could not, in other words, be used affirmatively to support some issue in the case. Since, under subdivision (d)(1)(A), a prior inconsistent statement given under oath is not hearsay, it is admissible to prove the truth of assertions contained in it and thus qualifies as substantive evidence.

Rule 801's subdivision (d)(1)(B) conforms to the approach taken in the preceding subdivision. Prior consistent statements have customarily been receivable to rebut claims that the witness' testimony was a recent fabrication or invention. Now such statements are admissible not only to rehabilitate the witness but also as substantive evidence. (It may have been a drafting error, but there seems quite clearly to be no requirement that the prior consistent statement have been made under oath.)

Rule 801's subdivision (d)(2) provides that admissions made by a party to the action are not subject to the operation of the hearsay rule, although admissions of this sort have traditionally been considered hearsay and then allowed in evidence under an important exception to the hearsay rule. It should not be thought, however, that the difference between the common law approach and that of this subdivision is merely semantical.

Rule 801(d)(2) sets out a number of categories of party admissions. Most of them are reiterations of existing law. However, two of the categories—(C) and (D)—effect changes in existing law.

Subdivision (d)(2)(C) goes beyond the common law as it exists in some jurisdictions. If a principal authorizes his agent to make statements to third persons, these statements can take on the characteristics of admissions and are binding upon the principal. This subdivision is broader, however, and would make admissions made between two agents or between the agent and the principle admissible evidence. The expansion discernible in subdivision (d)(2)(C) is consistent with the fact that a party's books and records are admissible against him regardless of whether disclosure to third persons was ever intended.

Subdivision (d)(2)(D) goes beyond the usual agency test for determining whether the principal is bound by admissions made by an agent. In the past the key question had been, "Was the agent acting within the scope of his agency in making the admission?" Not many principals engage agents for the purpose of making damaging admissions and so the usual result was
exclusion of the agent's statements. Lately, the trend has been toward admissibility. Subdivision (d)(2)(D) follows this trend: the statement need only concern a matter within the scope of the declarant's employment. It is thought that this relaxation of the traditional rule will facilitate the admission of much reliable and illuminating evidence. The limitation that the statement must have been made prior to the termination of the principal-agent, master-servant relationship will protect the principal or employer from statements made by unhappy former employees who later seek retribution for having been discharged.

Subdivision (d)(2)(E), providing for the admission of a co-conspirator's statement, is consistent with current federal practice. It adopts the Supreme Court's position in denying admissibility to statements made after the conspiracy's objectives have either failed or been accomplished.  

Rule 802: The Hearsay Rule

Rule 802 excludes all evidence that qualifies as hearsay under rule 801 unless it falls within an exception listed in rules 803 and 804, or is made admissible by some other rule adopted by the Supreme Court or by federal statute.

Rules 803 and 804: The Hearsay Exceptions

Instead of following the usual pattern of describing all of the traditional hearsay exceptions in no particular order, article VIII presents two separate catalogs of exceptions. Whether an exception falls into one list or the other depends on whether the availability or unavailability of the out-of-court declarant as a witness is deemed significant.

Rule 803 lists those exceptions, twenty-four in all, under which the availability of the declarant to testify is immaterial. The hearsay statement can be proved through another witness even though the declarant himself is available to take the witness stand and testify.

Rule 804 lists five exceptions that come into play only when the out-of-court declarant is unavailable to testify. Rule 804 defines the term "unavailable" with some specificity.

Subdivision (1) of rule 803 sets out the first of twenty-four exceptions under which the availability of the out-of-court declarant as a witness is of no legal consequence. Exception (1), for present sense impressions, involves a type of spontaneous but not necessarily excited utterance. The idea is that the substantial contemporaneity of observed event and statement preclude deliberate falsification. Furthermore, declarations of present sense

46. Rule 803(2) is an orthodox statement of the excited utterance exception to the hearsay rule.
impression are usually made in the presence of at least one other person, who presumably would often be in a position to check any misstatement. Indeed, this will probably be considered essential to any application of this exception. If, for example, a witness on the stand at trial offers to testify, "My husband told me, 'Clyde Bushmat, whose voice I recognized, called me just seconds ago on the telephone and offered me a bribe,'" the present sense impression exception should not be considered applicable, if only because the witness on the stand did not hear the alleged telephone conversation and thus was not in a position to assess the accuracy of her husband's declaration that the caller was in fact Bushmat and that Bushmat's words added up to the offer of a bribe. This situation is quite different from the one encountered in the case most often relied on in support of this exception, Houston Oxygen Co. v. Davis, where an automobile driver commented, in the hearing of two passengers, that the persons in a passing car "must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." The passengers were in as good a position to observe the passing car as was the declarant; they acted, as a consequence, as a check on any misstatement by the declarant.

Rule 803(3), covering then existing mental, emotional, or physical condition, actually embraces particularized applications of subdivision (1) (present sense impression). It bundles together several specific types of spontaneous declarations that in the past have usually been given separate treatment in codes, treatises, and law school casebooks. Aside from this merging process, however, subdivision (3) is in line with established precedent.

Rule 803(4), to the extent that it excepts from the hearsay rule statements of past and present symptomology to a treating physician, is consistent with the rule applied even in those few states that refuse to recognize a generalized exception of the sort found in subdivision (3). Here it is thought that the out-of-court declarant, who seeks accurate diagnosis and helpful treatment, has a powerful motive for speaking truthfully.

Subdivision (4) contains one departure from conventional doctrine. The usual rule has been that statements to a physician who has been consulted solely for the purpose of enabling him to testify as an expert witness are excluded from this type of hearsay exception. The witness could describe what had been told him if it tended to support and explain his diagnosis but the out-of-court declarations were said not to be substantive evidence in the case. Calling on lay jurors to make this sort of distinction is unrealistic. Accordingly, the distinction is deliberately abandoned in subdivision (4), which is as applicable to statements to non-treating doctors as it is to those made to treating doctors.

47. 139 Tex. 1, 161 S.W.2d 474 (1942).
48. Id. at 5, 161 S.W.2d at 476.
A hearsay exception for past recollection recorded (which is to be distinguished from the process of reviving or refreshing present recollection)\textsuperscript{49} has long been recognized and can now be found in rule 803(5).

Rule 803(6), covering business records, was unorthodox in one respect as it was first transmitted to Congress. Its pivotal phraseology was significantly broader than that encountered in existing business records statutes in that it referred not to a "business" but to any "regularly conducted activity." This phraseology departed from that of the Federal Business Records Act.\textsuperscript{50} Presumably the draftsmen were seeking a phrase broad enough to encompass occupations and callings that are not ordinarily thought of as businesses—the work of a church, for example, and also the professions.

The House Judiciary Committee believed that there were insufficient guarantees of reliability surrounding records that did not fall within traditional definitions of "business" records. By amendment the committee inserted a definition of "business" that specifically included professions and occupations and "callings of every kind."\textsuperscript{51} The House committee also added language making it explicit that "it must have been the regular practice of a business to make the record."\textsuperscript{52}

The Senate preferred the Court's version of subdivision (6) and amended the House version to restore the phrase "regularly conducted activity."\textsuperscript{53} However, the Senate-House conference committee restored the word "business" and reinserted an expansive definition of "business."

Just as do most existing statutes, subdivision (6) eliminates the common law requirement of calling or accounting for all participants in the making of business records. The subdivision adopts the approach of the Uniform Business Records as Evidence Act § 2 in providing that the requisite foundation testimony can be supplied by "the custodian or other qualified witness."

In describing the various forms that a record may assume the drafters included the expression "data compilation." This phraseology, drawn from revised Federal Rule of Civil Procedure 34(a), is flexible enough to include electronic computer information storage.

Subdivision (7), having to do with the absence of an entry in business records, will occasionally assist the trial lawyer who confronts the sometimes difficult task of proving a negative.

Subdivision (8) covers public records and reports. It is in most respects orthodox; public records, generally speaking, have long been subject to a

\textsuperscript{49} See rule 612 \textit{supra}.


\textsuperscript{52} \textit{Id}.

hearsay exception. Of the three subsections of subdivision (8), only (C) is likely to be controversial. It embraces so-called evaluative reports, such as a report of the United States Bureau of Mines containing a conclusion as to the cause of an explosion. The truth is that a significant range of evaluative reports are already admissible in evidence pursuant to various federal statutes. Subdivision (9), involving records of vital statistics, is typical of such provisions.

Subdivision (10), pertaining to the absence of a public record or entry, slightly overlaps subdivision (7). Just as rule 803(7) permits proof of the nonoccurrence of an event by evidence of the nonexistence of a record that would ordinarily be made of its occurrence during a regularly conducted business activity, rule 803(10) permits this mode of proof in connection with public records of the sort referred to in subdivisions (8) and (9).

Subdivisions (11) through (17) (records of religious organizations; marriage and baptismal certificates; family records; records of documents affecting interest in property; statements in documents affecting an interest in property; ancient documents; market reports and commercial publications) are, in the main, codifications of existing common law. Under rule 803(16) a document is now "ancient" if it has been in existence for more than twenty years. This may startle some practitioners and judges who, like the author of this article, have been in existence for somewhat more than twenty years.

Rule 803(18), providing for the admission of "learned treatises" as substantive evidence, and not simply for impeachment purposes, constitutes a significant departure from the law in all but a handful of jurisdictions. Some legal scholars have favored the admissibility of learned treatises as substantive evidence. Not all of them have. Almost none of the decided cases have allowed this approach, holding the hearsay rule applicable and often predicting, additionally, a likelihood that a treatise, or portions of one taken out of context, would be misunderstood and misapplied by lay factfinders. The minority of courts and writers favoring substantive admission have

55. E.g., 7 U.S.C. § 79(d) (1970) (Secretary of Agriculture's findings prima facie evidence of true grade of grain); 18 U.S.C. § 4245 (1970) (Director of Prisons' certificate that convict has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency).
56. The old rule was that any document over thirty years of age was "ancient," a circumstance duly noted by the sort of law student, rampant in the late sixties and early seventies, who insisted that anyone over thirty was not to be believed. It gives one a certain satisfaction to be able to point out that, under the new Federal Rules of Evidence at least, anything over twenty is "ancient."
thought that powerful guarantees of reliability surrounded learned treatises\textsuperscript{59} since, as the Advisory Committee put it, they are “written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake.”\textsuperscript{60}

The drafters of subdivision (18) expressed a belief that “The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired.”\textsuperscript{61} There are those who will suggest an element of naiveté in the Committee’s expectation than an expert witness’ testimony will invariably render learned treatises crystal clear to laymen. But the drafters are clearly correct in their added suggestion that some potential for confusion may be avoided by the subdivision’s proscription against receiving the learned publication physically in evidence and sending it to the jurors’ deliberation room.

The requirement that there be an expert witness on the stand may reduce the value of subdivision (18) to plaintiffs in those sorts of cases—medical malpractice cases, for example—in which claimants have experienced difficulty securing favorable expert testimony. As drafted, subdivision (18) does not mean that a medical malpractice plaintiff can now rely exclusively on medical literature to make out a prima facie case for liability; the asserted “conspiracy of silence” on the part of medical experts is not so easily surmounted. Introduction of medical literature by the malpractice plaintiff may be blocked if the plaintiff cannot secure an expert medical witness to place on the stand at trial to “sponsor” the proffered items of literature. Of course, it may prove easier for plaintiffs to obtain expert witnesses where the only testimony expected of them is to the effect that particular items of literature constitute “reliable authority.” It may also be that a malpractice plaintiff can occasionally solve this problem by calling the defendant physician to the stand “as on cross-examination.”\textsuperscript{62}

Subdivision (18) does not require that the opposing party’s expert witness rely on or even recognize the publication as being authoritative. In this way the subdivision avoids the possibility that the expert might block cross-examination by refusing to admit either reliance or authoritativeness. (Of course, the authoritative nature of the publication must be established by some means—for example, testimony by another expert or, occasionally perhaps, judicial notice.)

\textsuperscript{60} Advisory Comm. Note, 56 F.R.D. 194, 316 (1972). The source of the Committee’s intelligence that all treatises are written “impartially” goes undisclosed.
\textsuperscript{61} Id.
\textsuperscript{62} But it should be observed that nowhere do the Federal Rules of Evidence provide, in so many terms, for calling an adverse witness “as on cross-examination.” And Federal Rule of Civil Procedure 43(b), which did so provide, is abrogated by the Federal Rules of Evidence.
Since the treatise or other form of publication is made admissible as substantive evidence, and is no longer usable only as an impeachment tool, trial judges need no longer devise instructions aimed at getting the jury to draw this distinction.

Subdivisions (19), (20) and (21) (reputations concerning personal or family history, boundaries, or general history, and reputation as to character) are relatively unimportant and reflect no radical shifts from prior practice.

Rule 803(22) deals with judgments of previous felony convictions. American courts have taken three different approaches to the admissibility in a later civil action of a prior criminal conviction as evidence of facts essential to the conviction. The majority rule has been that a criminal conviction cannot be introduced in a later civil action. This rigid rule has been undergoing some erosion, however. Thus some jurisdictions will receive previous convictions for whatever they may be worth, that is, as prima facie evidence of the existence of the facts involved in the criminal case. And some courts will admit prior criminal convictions as conclusive of the facts underlying them. Rule 803(22) adopts the second approach. Convictions of minor offenses and judgments based on pleas of nolo contendere are excluded from the subdivision's operation.

Subdivision (23) sets up a hearsay exception for previous judgments concerning facts which would also be provable by reputation evidence. There have been only four reported cases dealing with this exception.

Rule 803(24) is a residual or catchall for what might be termed "great" hearsay that just misses treatment under one of the traditional hearsay exceptions. Under the final version of subdivision (24) a hearsay statement not falling within one of the specific exceptions will nonetheless be admissible if (1) the out-of-court declaration appears to have "equivalent circumstantial guarantees of trustworthiness," (2) is offered as evidence of a material fact, (3) "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," and (4) the trial court has determined that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." And there is a notice provision which it can be safely predicted will from time to time be unworkable.

66. Grant Bros. Construction Co. v. United States, 232 U.S. 647 (1914) (pedigree); Patterson v. Gaines, 47 U.S. (6 How.) 550 (1848) (prior judgment of legitimacy admissible as prima facie evidence in later civil suit); Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936) (citizenship); United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933) (pedigree).
While controversial, this residual exception is not likely to be dramatically significant. The preconditions are onerous but beyond that, it is quite difficult to think of many trustworthy types of hearsay that are not already adequately covered by the traditional exceptions to the rule against hearsay.

Rule 804 collects five hearsay exceptions under which the unavailability of the out-of-court declarant is made a condition of the admissibility of the hearsay declaration. Rule 804(a) catalogs five grounds of unavailability, ranging from the ultimate unavailability, death, to the successful invocation of a testimonial privilege.

Rule 804(b)(1) sets up an exception covering previously recorded testimony. It is a fairly typical statement of this longstanding exception.

Subdivision (b)(2) perpetuates the dying declaration exception, once restricted to homicide cases, and extends it to civil actions, although not to lesser criminal cases. The expansion of this exception to include civil actions is a significant one, especially in wrongful death cases, and may from time to time inspire forum-shopping.

Rule 804(b)(3) is the declaration against interest exception. It reflects a departure from the traditional form of this exception in that declarations tending to subject the speaker to civil or criminal liability, or to negate a claim by him against another, are included.

Rule 804(b)(4) deals in orthodox fashion with the familiar hearsay exception for out-of-court declarations concerning family history: birth, death, divorce, and so on. Some restrictive foundation requirements have been dropped. 67

Rule 804(b)(5)'s wording is identical to that of rule 803(24), the residual exception. It serves no useful purpose.

Rule 805: Hearsay-Within-Hearsay

Rule 805 declares that the rule against hearsay does not require the rejection of a hearsay statement which includes a further hearsay statement (hearsay-within-hearsay or "totem pole hearsay") when both statements conform to the requirements of some hearsay exception. 68

67. E.g., under (B) the subdivision deals with out-of-court declarations relating to the history of another person. The declarant is qualified under this subdivision if he was related to the other person by blood or marriage. Contrary to the common law, the declarant also qualifies as a consequence of intimate association with the other person's family. The subdivision contains no requirement, contrary to some of the cases, that the declarant must qualify as to both persons where the subject of the out-of-court declaration is the relationship between two persons other than the declarant.

Rule 806: Impeaching the Out-of-Court Declarant

Rule 806 liberalizes existing law relating to the impeachment of out-of-court declarants. When a hearsay statement or an 801(d)(2)(C), (D) or (E) nonhearsay statement is received in evidence to prove the truth of its assertions it is as though the out-of-court declarant were a witness—a witness who is "testifying" from beyond the courtroom through a witness on the stand who acts as a conduit. It is the credibility of the out-of-court declarant that matters. Consequently, it is only fair to permit the party against whom the out-of-court declaration is offered to attack the absent declarant's credibility (and then the proponent can seek to rehabilitate the declarant) in the ways permitted under such rules as 608 (Evidence of Character and Conduct of Witness), 609 (Impeachment by Evidence of Conviction of Crime), and 613 (Prior Statements of Witness).

There are, however, some peculiar problems attending the use of an out-of-court declarant's inconsistent statements for impeachment purposes. These problems stem from the almost inevitable differences between the use of an in-court witness and the use of out-of-court declarations.

In the case of an in-court witness the inconsistent statement will undoubtedly be a prior statement; it is therefore entirely feasible to call the statement to the witness' attention and let him explain it if he can. On the other hand, in the case of an out-of-court declaration the declarant's inconsistent statement may very well be a subsequent one, and this precludes calling the declarant's attention to it. If this impossible foundation requirement were enforced, the opponent of the out-of-court declaration, already deprived of any opportunity for cross-examination, would be denied another important impeachment technique. The drafters of rule 806 followed the current trend and gave the factfinder the widest opportunity for assessing the trustworthiness of an out-of-court declaration by accepting any inconsistent statement, regardless of when made, and dispensing with any foundation requirement.

Article IX: Authentication and Identification

The requirement that tangible evidence be authenticated or identified is satisfied, under rule 901, by the production of evidence sufficient to support a finding that the evidence is what its proponent asserts it is. Rule 901 supplies some examples of authenticating evidence: (1) the testimony of a witness with direct knowledge, such as a person who observed the signing of a document; (2) nonexpert handwriting opinion; (3) handwriting comparison by the factfinder; (4) evidence of distinctive characteristics, such as content suggesting that a letter was in reply to an authenticated letter; (5) voice identification by one familiar with it; (6) telephone calls placed in reliance on an assigned number; (7) evidence that a writing is an official record or report; (8) ancient documents; (9) evidence describing a process or system which tends to show that it produces an accurate result; and (10) methods of authentication provided by statute or rule.
Rule 902 recognizes various presumptions of authenticity for, among other items, certified copies of public records, official publications, newspapers and periodicals, trade inscriptions, and commercial paper.

Article X: Contents of Writings, Recordings, and Photographs

Rule 1002 sets forth all that remains of the so-called "best evidence" rule relating to writings, recordings, and photographs. Under the preceding rule, 1001, computer printouts and photographic prints are deemed "originals" within the meaning of the "best evidence" rule, which simply expresses a preference for originals. The most significant forward movement to be found in article X is in rule 1003, under which duplicates are admissible as originals unless a genuine question of the original's authenticity arises or for some reason fairness requires production of the original. The term "duplicate" is defined in rule 1001(4) in such a way as to virtually eliminate the possibility of error in the making of duplicates.

Rule 1005 exempts public records from rule 1002's version of the "best evidence" rule, since their removal from proper custody for extended periods of time is not feasible.

Rule 1006 deals in customary fashion with the use of summary witnesses, who reduce the contents of voluminous writings to a chart, calculation, or summary. Rule 1007 provides that the contents of writings and the like can be authenticated by the testimonial or written admission of the party against whom it is being offered, in which event there need be no accounting for failure to produce the original.

Article XI: Miscellaneous Rules

Rule 1101 describes in detail the courts, proceedings, questions, and stages of proceedings to which the Federal Rules of Evidence apply in whole or in part. Rule 1102 sets forth the way in which future amendments to the Rules are to be accomplished.

Conclusion

In dissenting from the Supreme Court's November 20, 1972, order promulgating the Federal Rules of Evidence, former Justice William O. Douglas remarked on the fact that the Advisory Committee, and not the Court, had written the Rules. He declared that the Court was "merely the conduit to Congress." And Mr. Justice Douglas thought that the Court probably lacked the expertise to be much more than a conduit. "We are so far removed from the trial arena," he said, "that we have no special insight, no meaningful oversight to contribute." He thought that the Proposed Rules

70. Id.
should be channeled through the federal Judicial Conference, "whose mem-
bers are much more qualified than we to appraise their merits when applied
in actual practice."\footnote{71}

Instead of being circulated to the Judicial Conference, the Rules were
sent across to a Congress that was soon to be embroiled in the agonizing issues
raised by the scandals of the Nixon Administration, including the possible
impeachment of the President. Despite these distractions, committees of
both Houses set about the amendatory process with gusto. Not surprisingly,
their efforts were hasty and sometimes haphazard.

The products of congressional ineptitude in attempting to redraft rule
formulations that had been some eight years in the making can be cured by
amendment\footnote{72} and judicial gloss. Meanwhile, the new Rules provide a basic,
and basically sound, evidentiary framework for the federal practice.

\footnote{71. \textit{Id.} at 185-86.}
\footnote{72. One such amendment, embodied in S. 1549, 94th Cong., 1st Sess. (1975), is
already in the legislative hopper. It is aimed at restoring to rule 801 a subdivision (d)
(1)(C) which would exempt from the hearsay rule statements "of identification of a
person made after perceiving him." This provision, which has strong Justice Depart-
ment backing and is likely to pass both Houses of Congress and receive presidential ap-
proval, is tailored to fit police lineup identifications.}