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BAD NEWS AND GOOD NEWS†

by John W. Reed*

I have been asked to visit with you about some of my current interests in the evidence field, in which I teach. When you invite an academic lawyer to speak at your meeting, you obviously expect of him something other than the latest hot tips on trial strategy and tactics, something other than a speech entitled "Reflections on My Last Eleven Victories in Court." Others can do that for you, probably at lunch—or, even better, at cocktails, with the successes more impressive and the defeats more forgivable under the influence of an ounce or two of alcohol.

Instead, you expect of me some analysis of doctrine or some explanation of trend or philosophy. The reason you do not expect more is that you know that as an academician I deal with students and books rather than clients and cases and that, therefore, I know relatively little about the real world of trial practice. And, of course, you are right. The American system of legal education has tended to separate the schools from the bar. Although I believe that on the whole our schools do a good job of preparing men and women for professional careers at the bar, I am persuaded beyond a reasonable doubt that the schools would do a better job if there were more cooperative efforts between the schools and the bar. This is singularly true in the area of evidence and trial practice. If you will indulge me a few more moments of this prologue, let me explain why this is so.

Law schools do one thing superbly well: they teach the intellectual skills of reasoning, of distinction drawing, of deductive and inductive logic, of analysis and synthesis. These are heavily verbal skills, at least in the context in which lawyers employ them, and students are tested for their mastery of these skills by written examinations. If one does well, he or she is placed on the law review, where these particular skills are honed even further.

The top ranking graduates (and, as an aside, four of the first five in Michigan's last graduating class were women) usually go into large firms or clerkships from which, in a few months or at most a few years, they are drawn back to the academy to teach, most of them having never tried a case and many of them having never dealt face to face with a

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client. The faculties feel that the one solid objective criterion they can measure and rely on in assessing potential new teachers is grades in law school—in short, the ability to do well in the written evidence of analytical skills, excellence in which was the criterion by which the existing faculty was chosen. Thus, the faculties repeat—replicate—themselves, again and again.

A good argument can be made that high development of these logical skills is antithetical to the development of creativity and persuasiveness, the hallmarks of the superior barrister. Psychologists and psychiatrists tell us as much. Whatever the theory, the fact remains that faculties hire deucedly few teachers with aptitude for, much less experience in, trial practice.

The schools need more people like Jim Carrigan, who was a pioneer in clinical teaching of trial practice. Many schools, however, are inhospitable to teachers with that kind of interest, mostly because the existing faculty members neither understand nor know how to assess those skills. I have many problems with the Chief Justice's views about the quality of the trial bar and what to do about it, but I agree that the law schools do a better job in almost every other legal field than they do in the field of litigation.

I do have one small suggestion to make, which, by a surprising coincidence, parallels a program I am engaged in. Indeed, it is the point of this extended aside with which I have begun my remarks. It is true that the typical law teacher is not really sophisticated about how litigation is handled, from case intake through satisfaction of judgment or settlement. But it is true also that most trial lawyers do not know how to organize the concepts of a subject matter and lead students through it efficiently and memorably. The obvious answer, it seems to me, is a joining of skills and efforts. This past semester, an able Detroit lawyer, Richard Goodman, and I conducted a seminar at the University of Michigan Law School that we called "Problems in Civil Litigation." The students read a 2500-page transcript of a product liability case, and we worked on that case for the entire semester. Assigning the students various roles, we re-examined most of the strategic and tactical decisions that were made, as, for example, whom to sue, in what court, before what judge, and on what theory. Pleadings were drawn, responded to, and criticized. Discovery approaches were considered, and interrogatories and responses were prepared. Settlement possibilities were discussed. We brought in some of the actual expert witnesses, who were examined and cross-examined by the students and then by Mr. Goodman. Adversary counsel in the case came to one session, and his views on the case were compared with ours.

As you know, this is not an entirely novel approach to training for trial practice, there being extended institutes around the country, notably in Boulder, Chicago, and San Francisco; indeed, some of you are active in these enterprises. But it is not being done in the schools very much, again for the reason that there is scarcely a single full-time law teacher capable of doing it. Team teaching, however, given a thoughtful and able practitioner and a willing and (one hopes) able teacher, is superbly successful. In more than twenty-five years of teaching, I have never had a more responsive, enthusiastic group of students, and I learned more than I like to admit (because of what it tells you about my ignorance before). Moreover, Mr. Goodman, who gave of his time, enjoyed it thoroughly. The experimental seminar was an exciting and resounding success.

I tell you all of this by way of encouraging you to be alert to opportunities for similar collaborations in the law schools where you live. I know that I must direct the larger part of my message at the schools, because they, not you, tend to be the reluctant ones; but I do want you to know of our seminar at Michigan and of the enthusiastic and affirmative response from all three parties—students, practitioner, and teacher. I urge you to develop the acquaintance of the appropriate teacher and offer your services in a similar enterprise. The trial bar of tomorrow will be the better for it, and (as a not inconsequential by-product) you may have some effect on the style of legal education in this country.

As for my principal topic, it was suggested that I deal with subject matter in the field of evidence. That surely means the Federal Rules of Evidence, the freshest evidence development around. The Conference Committee version of the bill was passed by both houses of Congress on the night of December 18, 1974. The President signed the bill on January 2, and the rules will take effect on July 1, 1975. Copies of the final bill are not yet available, but that is of little matter because I do not intend to report and analyze individual rules. You will be doing that in continuing legal education programs of one kind or another back home in the months ahead. Rather, I want to put the new rules in perspective and to suggest their implications for the future of trial practice and of the adversary system.

First, let me refresh your recollections about the history of evidence codification in the United States. Although some evidence rules are generally statutory, for example, business records as evidence, some privileges (doctor-patient, priest-penitent), and dead man statutes, there has not been throughout our nation's history any significant codification of the law of evidence except California's in the 19th Century. Our evidence principles are essentially common law.

In practice this has led to much diversity. Even in a given state, particular rules may be hard to ascertain. One Michigan judge says, only slightly exaggerating, that he cannot find applicable rules and so he simply keeps a copy of *McCormick* on his bench and rules accordingly. (His practice recalls the instance of the judge who was discovered by some lawyers at his bar to be ruling according to the "card method." At the beginning of a case he would place a well shuffled deck of cards face down on the bench and assign in his mind the color red to one party and black to the other. Whenever an objection was made he would turn up the next card and rule accordingly. A committee of the bar was appointed to call on the judge and remonstrate with him. He was embarrassed to have been found out and apologized, explaining that he had not done very well in the law school evidence course, which was not very good anyway. He agreed that his procedure was unfortunate and promised to buy a copy of *McCormick*, keep it at hand, and rule accordingly. To show his good faith he tore up the deck of cards and threw them in the wastebasket. The Committee members thanked him and left with handshaking and bonhomie all around. A fortnight later, the committee called on him again and presented him with a new deck of cards.)

Other than the California experience with the Field Code of Evidence, there was no important codification attempt until the 1930's, at the time the American Law Institute was engaged in its orgy of restating the law. Because of the heterogeneity of evidence rules and because of belief that revision rather than clarification was called for, the ALI decided that a model code was to be preferred to a restatement, and in 1942 it promulgated the Model Code of Evidence. The product of Professor Edmund Morgan and a committee of distinguished teachers and appellate judges, the Model Code was elegant and forwardlooking. It was, however, adopted nowhere, primarily because it was thought to represent too dramatic a change from precedents. Some of its flaws probably stemmed from the failure to include in the committee membership experienced trial lawyers and trial judges."

Later, the National Conference of Commissioners on Uniform State Laws, concluding that the need for reform in the field of evidence remained, sought to produce rules that had a better chance of acceptance. The resulting Uniform Rules of Evidence were promulgated by the Conference in 1953. These rules, produced by Professor McCormick of Texas and a committee that included trial judges and lawyers, were more modest in their changes. They made some headway, with a degree of acceptance in states such as Kansas (the chairman of the drafting committee had been a Kansas trial judge), Utah, and New Jersey. The rules

also generated considerable interest and discussion even where not adopted, but codification and reform were still glacially slow.

In the 1960's the Judicial Conference of the United States recommended the development of rules of evidence for the federal courts. The Chief Justice appointed an advisory committee, with Professor Edward Cleary, then of Illinois and now of Arizona State, as reporter. The committee prepared and circulated several drafts of proposed rules. The final draft was adopted and "prescribed" by the Supreme Court on November 20, 1972, with Mr. Justice Douglas dissenting on the ground that the Supreme Court does not have rule-making power in evidence matters. Moreover, he said, in effect, "They're not ours," being the product of an advisory committee. The rules were transmitted to Congress as required by the Rules Enabling Act. In early 1973, however, Congress balked and enacted a law that prevented the rules from becoming effective unless and until Congress enacted them.

The House Judiciary Committee, in that pre-Watergate time, held extensive hearings and produced a bill that made many changes from the Supreme Court's version, almost all of them in the direction of conforming the new rules to existing practice. The House passed its version on February 6, 1974, and the Senate then went to work. In October the Senate Judiciary Committee reported out its version of the bill, which was passed by the Senate in November. The differences from the House bill were relatively few, but those differences tended to move back toward the Supreme Court version—which is to say, restored some of the modest reforms that would have been denied by the House version. The Conference Committee reached agreement on a statute close to the Senate version and on December 18, 1974, the law was passed, with President Ford signing it on January 2.

It seems safe to predict that many states will follow suit in order to have consistent practice between state and federal courts, even as they have followed the lead of the Federal Rules of Civil Procedure. Indeed, some have jumped the gun, e.g., Wisconsin, which has already enacted the Supreme Court version of the rules. My own state of Michigan is launching a study of the desirability of adopting evidence rules identical with or closely similar to the new Federal Rules of Evidence.

Now, during the years of this codification process, another development was taking place—a development with which you are all familiar. I refer to the gradual but perceptible modification of the adversary system. I do not mean to over-dramatize the situation, but I think that a legal historian some decades hence will perceive the post war years (and I refer, of course, to World War II, *our* war) as a time of significant erosion of the adversary system. There has been an assimilation of some of

the features of the Continental system of litigation, technically known as inquisitorial in distinction to adversary. In that other system, as you know, the judge plays a larger role than he does in traditional British and American practice, and a much larger role than in American practice from the Jacksonian era to about 1940.

During the last thirty-five years or so, we have seen a diminution of adversariness in our courts. You know the changes as well as I:

(1) For example, the discovery and pretrial procedures typified by the Federal Rules of Civil Procedure—the system of laying almost all of one's cards on the table;

(2) For example, the widespread abolition of party voir dire of jurors and the substitution of voir dire from the bench (and—a related development, I think—reduction in jury size);

(3) For example, judicial management of complex litigation;

(4) For example, the apparently widespread tendency of judges to increase the employment of their historic but little used power to question, and even to call, witnesses.

Each of you can add illustrations of this trend better than I, because you live with it week in and week out.

Of course, I do not laud everything about the adversary system, and I certainly deplore its excesses where lawyer self-discipline is weak or lacking. But I sincerely believe that in a world of imperfect men, a world of non-angels, the application of contending forces is productive of "truer" and more just determinations of controversies than is any system dependent on magisterial wisdom and probity.

I recently conferred with a group of parole board members, their hearing officers, and supporting staffs. They were trying to determine what procedures to use in parole matters in order to comply with the Supreme Court's landmark decision in *Morrissey v. Brewer*. They have been performing their tasks under guidelines that seek to balance the welfare of the individual prisoner and the security of the general public. They have been doing so, however, with limited or no input from the parolee or his counsel (if any), whereas the new standards will require a considerable degree of adversariness, particularly in revocation hearings. These good men and women have been doing their work honestly and diligently; but when they explained to me how they arrive at their decisions as to whether the parolee has violated the terms of parole, I was appalled by the extent to which in this nonadversary setting unchallenged biases, illegitimate inferences, and paternalism apparently abound.

The training and experience of most judges, of course, are a good cut above the training and experience of parole board members and hearing officers. But none of us—judge or no—is without prejudices and misconceptions, and all of us err. I submit that the surest way to confound the error and to expose the prejudice is to subject all assumptions and assertions to the scrutiny of someone with a contrary interest—in short, an adversary.

Adversariness pits contending points of view against each other, and point of view does make enormous difference. Perhaps you recall the familiar illustration of the diary entries made by the young woman on a Caribbean cruise. Her first day's entry said, "I met the Captain and I believe he is interested in me." The next day's entry read: "The Captain has asked me to have dinner with him in his cabin tomorrow night." The third day's entry said: "I went to the Captain's cabin for dinner, and after dinner he made advances to me and said that if I did not yield myself to him, he would sink the ship. I saved all of the passengers and the crew." Things do look different, depending on point of view.

It was quite possible that a modern code of evidence would carry forward this diminution in the vigor of the adversary system. Indeed, the ALI Model Code moved in that direction. But the new Federal Rules are much more moderate in this regard, and it is here that we come to the "bad news/good news" point of my topic. The *bad* news is that there is a new statutory code of evidence whose dozens of rules—fifty pages in the Senate draft—you and I are going to have to become familiar with. Some of these rules represent no change whatever in existing law, but others will significantly change the way you will try some lawsuits. That means some retraining or rereading, which is hard work. That's the bad news.

Now for the *good* news: the Federal Rules of Evidence are well within the spirit of the adversary system. Because they codify the law and are succinctly stated and readily available, they may indeed reverse any existing trend toward giving the judge a free hand and letting the processes of proof slip further toward the inquisitorial method. In this regard, they are "conservative" rules, and, in the true sense of that much abused adjective, they conserve the process we now have. That's the good news.

Incidentally, to characterize the new rules as "conservative" is not to praise them unreservedly. In some areas they "conserve" long-established rules that probably were not very wise to begin with and have grown no better with age. One is reminded of the analogous situation of the man who was in his doctor's office for a physical examination. As the patient stood against the wall stripped of his clothes, the doctor examined him

carefully and began measuring his abdomen with a yardstick. In a puzzled tone the doctor said:

"As near as I can tell, your navel is about five inches below where it belongs. Have you had an operation?"

"No," said the patient.

"Well, maybe it's hereditary."

"No, I don't think so."

"Well, then, what do you attribute it to?"

"I don't know, unless it's that for twenty-three years I have been flag-bearer in my lodge."

Indeed, to applaud the new rules as conservative is not to say that all our existing rules are fine and dandy. Many are not, and the Federal Rules change some of these, most for the better. Nor is it to say that I am pleased with every single provision in the new Federal Rules. I think certain ones are bad, and I am "underwhelmed" by the wisdom of some others. But I applaud the project; I recognize the processes of political and professional compromise that were necessary to get a set of rules at all; and most of all, I am delighted that, in the field of evidence, the adversary assumptions have been strengthened on the whole, rather than weakened. To me, and I suspect to you, that *is* good news.

I do not have time to speak of many of the specific rules, but let me illustrate my thesis with mention of a few.

First, the rules that recognize in the judge considerable power to affect the development of the case and the finding of facts are, on the whole, merely continuations of practices well established, in federal courts at least, and sometimes generally. I refer, for example, to Rule 403, which authorizes the judge to exclude relevant evidence:

"if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 611 recognizes the authority of the court to:

"exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harrassment or undue embarrassment."

And Rule 102 states that:

“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

These limit counsel's freedom to proceed as he might wish; but they are certainly orthodox, and they are undoubtedly necessary limitations on free enterprise in the courtroom.

Another illustration of continuing rules that limit what might be called freedom of competition in the courtroom is the pair of rules dealing with the court's power to call and interrogate witnesses, both lay and expert. Surely no one doubts a judge's power either to call or to question a witness; Rule 614 recognizes that power, but the committee report significantly notes that appellate courts may still reverse when a judge abandons his proper role as judge and assumes the role of advocate. Even here there is a handy escape hatch for counsel: Rule 614 also makes it explicit that counsel need not object to the judge's actions (in calling or interrogating) until the jury “is not present.” And Rule 706, calling for court-appointed experts, merely continues the practice under Rule 28 of the Federal Rules of Criminal Procedure and extends it to civil cases—a power that exists, I take it, even without statute. Here too there is an adversary protection: Rule 706 expressly says that nothing in the rule limits the parties in calling expert witnesses of their own selection.

In short, when the Federal Rules have provisions inhibiting full play of the adversary system, they are merely codifications of well recognized judicial prerogatives, not new encroachments. Even here, minor relief has been granted as I have noted.

The other rules that have any policy bias on this issue come down pretty much on the side of encouraging adversariness. Some seem tame in the abstract, but a comparison of them with the Supreme Court's draft discloses that Congress moved firmly in this direction. Let me offer five illustrations:

Illustration 1: Rule 611 retains the classic federal rule limiting cross-examination to the subject matter of the direct, plus matters affecting credibility, with the judge having discretion to permit coverage of additional matters as on direct. This is the advocate's rule, protecting his order of presentation of proof. The Supreme Court draft, on the other hand, had adopted the wide open rule—the judges' and law professors' rule. Congress, by insisting on the present rule, opted for adversariness.

Illustration 2: Rule 613 eliminates the requirement of a foundation for proof of a prior inconsistent statement. You will recall that typically it is necessary that counsel on cross-examination bring to the attention of the witness with some specificity the time, place, and nature of the allegedly inconsistent statement, as a condition of independent proof of that inconsistent statement by counsel's own witness later. This tips counsel's hand and makes difficult the exposure of the lying or wishy-washy witness. The new rule merely requires that, in fairness, the witness be afforded an opportunity at some point to explain or deny the allegedly inconsistent statement. Obviously, that opportunity may be delayed until after the inconsistency has been revealed. This is a pro-adversary rule.

Illustration 3: Rule 607 permits impeachment of one's own witness, a procedure not allowed in many courts, including some federal. Perhaps one might argue that *prohibiting* impeachment of one's own witness is the "pro-adversary position," and that new Rule 607 moves away from that. But I read it otherwise—as a freeing of counsel to protect his client even against those whom he calls and who then disappoint.

Illustration 4: Surprisingly, the Congressional version eliminated a rule proposed in the Supreme Court draft that sought to codify the practice followed by many federal judges of summing up and commenting on the evidence. The House Judiciary Committee report noted that the authority to comment on the weight of evidence and the credibility of witnesses (an authority not granted to judges in most state courts) is "highly controversial." After much debate, the Committee deleted the rule and said that it intended "that its action be understood as reflecting no conclusion as to the merits . . . and that the subject should be left for separate consideration at another time." Until that "other time" arrives, this lack of a provision on the point in an otherwise comprehensive evidence code seems to me to be strongly pro-adversary.

Illustration 5: The treatment of the hearsay rule is the most important illustration of all. The various proposals for reform of the law of evidence almost always have involved significant alterations to the hearsay rule. In extreme form, these proposals suggested that hearsay should be received for what it is worth, relying on the ability of jurors to assess secondhand, uncross-examined narratives. Even the more moderate reforms proposed that the hearsay exceptions be replaced with a generic principle of admitting hearsay that seemed reliable—"the kind of information on which reasonable people rely in the conduct of important matters." It is fair to say that a major reason for the chill reception given

some earlier reform efforts was the bar's distaste for these departures. The Federal Rules, on the other hand, have retained the familiar pattern of rejecting hearsay (rather traditionally defined) but admitting it if it falls under one or more of numerous (about 30) exceptions. Some of these exceptions are stated traditionally and others are modernized and liberalized, but all have some foundation in case law. I do not have the time here to speak of the rule and the exceptions individually except to note that there are provisions authorizing the court to admit hearsay not fitting precisely within the stated pigeonholes but having "equivalent circumstantial guarantees of trustworthiness" if certain general conditions are met. In context this amorphous exception is not a major inroad on the hearsay rule.

This treatment of hearsay in the Federal Rules is consistent with the adversary philosophy and represents another anchor against a drift away. That is so because the hearsay rule is a fundamental element of adversary procedure. Although it is sometimes said that hearsay is objectionable because it is typically second- or third-hand, with a danger of error in reporting, and because it is not under oath (and there is some merit to both of these contentions), the essential failing of hearsay evidence is that the declarant's story is being placed before the jury in order to prove the truth of that story *without cross-examination of the declarant by the adversary*. I think it no exaggeration to say that the hearsay rule is the "enforcer" of the right of cross-examination. The hearsay rule and the right of cross-examination are opposite sides of the same coin. Thus, a diminution of the hearsay rule is *pro tanto* a diminution of the right of cross-examination. In a litigation system that relies heavily on party initiative and gives a party great latitude in deciding what material to place before the court, the right of cross-examination is indispensable to the search for truth. Hearsay evidence is excluded precisely because the statement being offered to the jury for its belief or disbelief is uncross-examined. The retaining of the essence of the hearsay rule is the clearest indication of the pro-adversary character of the Federal Rules.

In short, I view the new Federal Rules of Evidence as marking, at the very least, a pause in the process of weakening the adversary aspects of our system of civil litigation. With their undoubted influence on state practice, the rules suggest that, during our years at the bar in any event, we shall continue to seek determinations of fact based on competing presentations by adversaries, not upon magisterial inquests. To each of you (and, I believe, to the public we are sworn to serve) that is indeed good news.