



1985

Symposium Proceedings

Various Editors

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Recommended Citation

Various Editors, *Symposium Proceedings*, 30 Vill. L. Rev. 1557 (1985).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol30/iss6/8>

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SYMPOSIUM PROCEEDINGS

PROF. PACKEL: I would like to take the opportunity to thank all of the panelists. They've all done a splendid job for us today. In addition, I would like to throw the floor open for any questions. Are there any questions?

PROF. IMWINKELRIED: I would like to make one comment. I think that some people, having heard what I said and having heard what Professor Blakey said, might think that I would come down on rule 607 differently because I think that rule 402 will dictate a little interpretation of rule 607. Let me just say, and it may be a surprise to people who have heard us both, that I come down essentially on rule 607 in exactly the same way Professor Blakey does, and I think it is an excellent illustration of both the role the common law still plays and the proper use of rule 402. To begin with, I believe, and *United States v. Able* says, that we still should look to the common law for the purpose of getting guidance as to the meaning of the Federal Rules. Professor Blakey has pointed out that there is no definition of impeachment in rule 607. The text of the Federal Rules, I think, is perfectly consistent with rule 402, to go to the common law and say that's where we go to try to define the parameters of impeachment under rule 607. More importantly, even if you were to assume that you couldn't root out the problem in that fashion, what I think you've really got here is a conflict between the interpretation of two statutory maxims. On the one hand you've got rule 402 building and creating what I think is a very strong constructional bias in favor of the admission of relevant evidence. While it is a strong constructional bias, I don't think it always prevails. What I think we have at work in the situation that Professor Blakey is talking about is the statutory maxim that we want to interpret statutes to move out constitutional attack on them. And, at least in this situation, my inclination would be to say that the general constructional bias built into rule 402 would have to yield to that statutory maxim. Thus, even if you can't root out the problem by construing impeachment more narrowly, this is one of the situations where it is appropriate to say that the bias built into rule 402 has been overridden by guidance on interpreting statutory meaning that's even more important than the bias that's inherent in that statute.

(1557)

PROF. PACKEL: It seems to me that if the policy of rule 801(d)(1)(A) is to permit substantive admission only of those statements which were made under oath, and which have been recorded, then to admit *all* inconsistent statements under rule 607 would appear to be inconsistent.

PROF. BLAKEY: I would certainly accept that as an argument. Obviously, at common law there were a lot of people refusing to understand that impeachment meant impeachment, because they wanted to sneak something in. And you could interpret what the advisory committee came up with as an attempt to legitimize that. Although, as I say, it seems to me that they fail because they think there is a narrow little rule that you can change. They change the narrow little rule but they don't change hearsay or relevancy. But, if rule 801 had not been changed you could say that Congress is going along with their attempt and we should try to make more sense out of the rule, but Congress, insofar as the suggestion came up in a straightforward fashion drastically limited it, and that's a good argument for saying that the second attempt to sneak it in, perhaps, that semi-substantive effort, which is a term our students don't want to hear, also should be rejected.

PROF. SCHMERTZ: Which raises the general question: What about a definition section in the rules? I was looking at the California Evidence Code, which in general I admire because of its greater completeness, and I noticed that the first thirty or forty sections define certain key terms. I suppose they are intended to be used uniformly throughout the entire code.

We use the term "conviction" in rule 609, and a number of courts have said that the term includes "verdicts," and I said, "Gee, a conviction is a judgment." Rule 32 says you've got to have a judgment piece of paper signed by a judge. Of course, we think that means verdicts. Well, if you want it to mean that, fine, you should so define it, but you make a judgment that if you use the word conviction in rule 803(22) and in the impeachment rule, you ought to know what you mean. And similarly with impeachment—if you really wanted to mean impairment of credibility, let's say so in an early section of the code.

Of course, that raises the problem of "spiking the guns." You put your witness on, as the defense sometimes does, and the Government sometimes does, and say to yourself, "I know you've got six felony convictions. The trial judge has rejected my *in*

limine motion. I know the other side is going to bring it out, so I'm going to bring it out on direct." Now everybody knows you're not impeaching your witness. You don't want the jury to stop believing your witness. You just want to prevent the other side from impeaching him. Professor Blakey had mentioned some point about that before he started. I wonder if you could elaborate on the status of that practice.

PROF. BLAKEY: The North Carolina Court of Appeals, in a decision by the judge who is most likely to do something good with our Rules of Evidence, has just held that rule 607 means you can do that, and I like the result. I think that it is appropriate to let people do some spiking. On the other hand, I don't think we decided that, when we decided you can impeach your own witness. I think that at best it is not covered by the Federal Rules, but in North Carolina it is now covered by rule 607.

PROF. SCHMERTZ: I can see an argument that you might make, that you are impairing the right of cross-examination to some extent when you allow the direct examiner to do this, and you might make a policy decision: "We don't want you to do that. If there are prior convictions, let the cross-examiner make whatever capital they can out of it." On the other hand, you might go the other way. But, there should be some guidance, I think, on one or the other approach.

PROF. BLAKEY: Which brings us, I suppose, to a general point—that the Federal Rules certainly are an incomplete guide to the law of evidence. Essentially the Federal Rules develop only the parameters, and almost all of the state rules stay within those guidelines.

PROF. IMWINKELRIED: Let me add one thing to reinforce what Professor Blakey said earlier in his presentation about the real practical utility of the Federal Rules. A couple of years ago Steven Saltzburg, from the University of Virginia, addressed a section meeting at the American Association of Law Schools convention. Steve makes a lot of presentations at seminars for judges throughout the country, and he told us that at one of the biggest seminars the year they held that A.L.S. section meeting, they divided the judges up into judges from Federal Rules jurisdictions and judges from non-Federal Rules jurisdictions. According to Steve, after they divided the judges, each group got together and

discussed how easy it is for them to figure out what the appropriate starting point is for an evidence issue when it comes up in the course of trials and how quickly the issue can be wrapped up. The almost uniform decision of judges from both Federal Rules jurisdictions and non-Federal Rules jurisdictions was that it probably was easier to find your starting point for evidence research when you've got the Federal Rules. Typically they were able to resolve the evidence issue in their own minds more quickly because of the availability of the rules.

If we start with the assumption that in Los Angeles County it's going to take you six years to get from complaint to trial—that the system is overburdened—that saving of time is the real practical advantage from having a set of rules like those the people on this panel have worked on and brought to fruition in their various states.

AUDIENCE MEMBER: I have a specific question for Professor Imwinkelried pertaining to the application of rule 404. To what extent do you think that rule 404(b) can be used in civil employment discrimination cases, let's say a sexual harassment case? Would the district courts be inclined to use that rule to permit the plaintiff—usually the female who complains of sexual harassment—to bring in evidence of sexual misconduct of the defendant supervisor? And then, the corollary to that question: To what extent can the defendant, again in the sexual harassment case, using rule 404(a)(2), try to bring in character evidence that the woman has had a “loose” background?

PROF. IMWINKELRIED: I happen to know this hypothetical is based on a case. Let me just say a couple of things. First, the threshold problem is whether rule 404(b) applies in civil actions as well as criminal prosecutions. The rule uses the generic expression “crimes, wrongs or acts,” so the language really lends itself to civil actions. There's a recent A.L.R. annotation compiling the cases that are just beginning to perceive the relevance of rule 404(b) in civil actions. That's a really important breakthrough because the state of the common law now is that it is tougher in some jurisdictions to get in evidence of “other tire failures” than it is to get in evidence of “other homicides.” You've got jurisdictions requiring identity of circumstances before other acts can come into evidence, and it's really upside down. The evidence which should be more prejudiced is coming in more readily; the evidence that is more prejudicial faces less rigorous barriers to

admissibility. If you can get over that hurdle, then you can say that the rules that apply in criminal proceedings should apply with full force and effect in civil actions.

Now let's take the two things you said. First, the evidence of other instances of misconduct by the defendant. I think there's one very clear theory of admissibility for getting it in your hypothetical. I may be wrong on the substantive law because I've never been involved in one of those cases, but it seems to me that if it's a sexual harassment case, punitive damages might be recoverable. Whenever punitive damages are recoverable, the intentional or wilful character of the misconduct is logically relevant, and you've got a huge body of caselaw saying that under the doctrine of chances, other instances of similar, recent misconduct that is evidently intentional are admissible on a noncharacter theory in order to show that the conduct in question was intentional and wilful. Now, on the other hand, if you're talking about evidence of the plaintiff's other misdeeds, simply to show character—she did it once, therefore she did it again—whether you are talking about a criminal case or a civil case, you run into the first sentence of rule 404(b), precluding the use of specific instances of conduct in order to support a general character influence and in turn use that as circumstantial proof of conduct on a specific occasion. So it seems to me that the plaintiff can use other instances of sexual misconduct in order to show intent in order to prove entitlement to punitives. On the other hand, if the defendant's only tenable theory is that if the plaintiff did it once, she did it again, you're running smack-dab into the character prohibition in the first sentence of the rule.

PROF. SCHMERTZ: It seems to me that one of the mistakes the framers made in drafting rule 404(a), was to eliminate entirely all character evidence in civil cases. The reasons given are totally unconvincing. There are many cases in which the issue, in a civil case against an insurance company or something, actually concerns whether a party committed a crime: "Were you breaking into a house at the time you got yourself killed? If yes, we will pay, if no, we won't." It's a civil case, and under rule 404(a), you can't use character evidence to exonerate the person, to exculpate him, or to protect his reputation. The Advisory Committee failed to take into account that type of case in its note, so it may well be that it is something revisers should think about, opening up that

area somewhat under certain conditions, or greater use of character evidence as well as evidence of other acts in civil cases.

PROF. BLAKEY: Could I issue a caution? The reason that rules 404(a) and 404(b) say very different things about the use of evidence—one forbids it except in limited circumstances, and the other permits it—is that rule 404(b), in theory, is not dealing with character evidence, although many law students and many lawyers have great difficulty in distinguishing. In theory, rule 404(b) is talking about a narrower kind of propensity to do things in a particular way, which is something narrower than character. For example, I certainly agree that the hypothetical female sexual harassment plaintiff from the earlier question has nothing to worry about under rule 404(a), about having her past conduct gone into. She may, however, have something to worry about under rule 404(b) with respect to a claim of a propensity to behave in a particular way or, under rule 406, habit of behaving in a particular way.

PROF. PACKEL: I had thought that evidence of the plaintiff's other conduct would be admissible under rule 404(b) on behalf of an employer who is defending on the ground that "I didn't fire this woman because she's a woman. I fired her because she stole from me." He ought to be able to offer instances of theft and instances of not showing up for work if that's the ground for firing, or instances of not completing work, or whatever. It seems to me that if he can't do that, then he doesn't have the capacity to show that there is a legitimate defense and a legitimate ground for firing. So it would seem that they ought to be admissible in both instances.

PROF. IMWINKELRIED: I agree, but my understanding of the facts in the hypothetical was that the employer sought to introduce evidence of misconduct of a sexual nature that (1) is not job related and (2) perhaps that employer did not know about. If that's what the defendant is trying to do, he's going to have real problems.

PROF. PACKEL: Right, I agree that that's correct.

I want to thank our panelists again, and I want to rectify something that I said at the beginning of this symposium. I have told students here, and everyone for years, that Pennsylvania does not have a code of evidence. Indeed, Pennsylvania does have a code of evidence. It was adopted on May 13, 1887. The

drafters, or whoever put together Purdon's, proceeded to take that code apart and to put various evidence sections all over kingdom-come so nobody ever recognized that they were part of a code. The courts never paid much attention to them anyway, which leads me to the conclusion that since it is only two years away from 1987, perhaps it is time we got back to putting a code together again, something like the Federal Rules.

Again, thanks to our panelists.

