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## Preliminary Notes on Reading the Rules of Evidence

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By Edward W. Cleary\*

# Preliminary Notes on Reading the Rules of Evidence†

## I. INTRODUCTORY

Following a discussion of the then recently floated Preliminary Draft of Proposed Rules of Evidence for Federal Courts, Chief Judge Bailey Aldrich of the First Circuit Court of Appeals on May 21, 1969 wrote me:

Mr. Babcock reported to me the answer of yourself and Mr. Jenner to my planted question why the rules make no express recognition of there being what Mr. Jenner calls, "some play in the joints." With due respect, it seems to me that there must be play as I look at my ten volumes of Wigmore, and that you don't avoid the problem by not mentioning it.

It is now possible to amplify and illustrate in a meaningful way the answer then given to Judge Aldrich.

The Preliminary Draft contained Rule 102, which remained unchanged throughout the subsequent history of the Rules and was so enacted by the Congress. It provides:

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.<sup>1</sup>

Although captioned "Purpose and Construction," the rule in fact furnishes small guidance in either respect. It does, however, indicate one thing of importance: the answers to all questions that may arise under the Rules may not be found in specific terms in the Rules. This aspect will be considered in more detail at a later point. The judgment that any more particularized approach not be attempted was founded on several considerations. The enormous variety of possible evidentiary situations, foreseeable and unforeseeable, posed obstacles to lesser generalizations. Encouragement of creativity on the part of judges was guaranteed to arouse opposi-

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1. Neither the Model Code nor the Uniform Rules of 1953 contained provisions dealing with purpose or construction.

tion and reduce acceptability. Conflict and uncertainty with regard to the application of the principles of Rule 402 (all relevant evidence admissible except as otherwise provided), Rule 501 (no privileges except as provided), and Rule 601 (witnesses competent except as provided), would be very likely. Therefore, the matter should be left to general principles of statutory construction.

These comments, then, propose to explore the applicable principles of construction and some cases illustrating their application to the Rules of Evidence.<sup>2</sup> Possible syntactical ambiguities<sup>3</sup> will not be treated.

## II. BACKGROUND AND BASIC ASSUMPTIONS

The legal background against which the Rules were drafted and enacted was a vast collection of common law precedents. True, occasional jurisdictions had enacted codes, and some parts of evidence law, e.g., privilege and competency of witnesses, were largely statutory almost everywhere, but in the main the generalization held. This rather formless body of case law attracted much faithful and perhaps uncritical adherence from among the legal profession, partly because it had been evolved by the internal processes of the legal profession itself, and partly because it comprised one of its familiar basic tools. Thus the Rules were working old ground, and ground that was near and dear to much of the profession. By way of comparison, civil rights and antitrust involve new ground, with no great accumulation of judge-made precedent, and regulate the behavior of clients rather than lawyers and judges.

While this background and its accompaniments were much in evidence during the course of the formulation and enactment of

2. The term "Rules of Evidence" will be used herein to refer primarily to the Federal Rules of Evidence. However, the comments will generally be appropriate for States adopting them or their substantial counterpart, the revised Uniform Rules of 1974, with due regard for departures and variations.
3. See, for example, the "more or less probable" provision of Rule 401 in the Preliminary Draft which was replaced by "more probable or less probable" in later drafts. Note also Fed.R.Evid. 612 as amended and enacted by the Congress:

[I]f a witness uses a writing to refresh his memory for the purpose of testifying, either—

- (1) while testifying, or
- (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

the adverse party is entitled to have the writing produced . . . .

Whether the grant of discretion applies only to item (1) or also to item (2) may depend on whether the typesetter follows the above format, as in the bill, or runs all into a solid paragraph in the interest of economy.

the Rules, their impact on interpretation has perhaps been less than might have been expected.

The most basic and fundamental assumption underlying the Rules is that of congressional supremacy. "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."<sup>4</sup> The primacy of the Congress with regard to procedural matters has never been seriously contested.<sup>5</sup>

Scarcely less basic is the constitutional specification as to the manner in which the Congress exercises its powers: bills must pass both houses and receive the approval of the President, or pass over his veto.<sup>6</sup> The Congress may "work its will," to use the quaintly ominous congressional phrase, only as so provided.

A further underlying assumption is that the Rules will operate within the framework of an adversary system, with professional lawyer representation of the parties as the norm.<sup>7</sup>

### III. THE INSTRUMENTS OF INTERPRETATION

#### A. Intent or meaning?

An initial question is whether the interpretive inquiry is properly directed to ascertaining the intent of the legislature or the meaning to its audience. Powerful arguments can be made in favor of meaning to the audience. However, the audience for the Rules of Evidence is a very specialized one of judges and lawyers, much given to downgrading the text of statutes and looking elsewhere for their meaning. Hence the saying in Washington, "You can write the bill, if you let me write the report." As a result, intent and meaning in this instance tend to come together, with meaning being arrived at in terms of materials also relevant to intent. Hence in the present setting, the terms intent and meaning can be used inartfully and more or less interchangeably.

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4. U.S. Const. art. 1, § 1.

5. For the history of congressional delegation of rulemaking power to, and its acceptance and exercise by, the Supreme Court, see *Proposed Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Federal Crim. Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 73 (1973) (Statement of Judge Albert B. Maris. See also *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 8 (1973) (Statement of Chief Justice Burger). In the States, the pattern may, of course, vary, with the power vested either in the legislature or in the supreme court.

6. U.S. Const. art. 1, § 7.

7. See, e.g. Rule 103 (admission and exclusion), obviously drawn in contemplation of a measure of professional expertness on the part of those engaged with its operations.

## B. The plain meaning rule.

The well known and perhaps equally well criticized case of *Caminetti v. United States* gave voice to one oft quoted version of the so-called "plain meaning" rule:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.<sup>8</sup>

If what is meant is that meaning is to be ascertained by reading the statute with the aid only of a dictionary and such aphorisms of construction as *noscitur a sociis* and *ejusdem generis* as may be suitable, then it must be discarded as unrealistic. The slipperiness of meaning combines with the ingenuity and resourcefulness of the legal profession to render the evolution of a plain meaning by this approach unlikely in any disputed situation, and if one should appear the chance is greatly against its being acceptable.<sup>9</sup>

If, however, the plain meaning rule is read as mandating the text of the statute as the prime source of meaning, to be read in such context as may be relevant, then plain meaning becomes a useful tool.<sup>10</sup>

## C. Purpose as context.

For most of the writers, it is said, legislative purpose is "the touchstone of statutory interpretation."<sup>11</sup> Broadly, it overlaps legislative intent, since legislative intent may be conceived of as immediate purpose in contrast to legislative purpose viewed as a more generalized long-term objective.<sup>12</sup> In the present discussion the distinction, though discernible, is not of substantial importance.

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8. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The Court ignored the manifest purpose of the statute, namely to curb commercialized vice, and sustained convictions under the Mann Act (transporting a woman in interstate commerce for purposes of prostitution or debauchery "or for any other immoral purpose"), although no commercialized aspect was proved in any of the combined cases, but only that the woman would be the concubine or mistress of the particular defendant. Professor Kernochan raises the question as to the result if a defendant had transported his girlfriend for purposes of staging a bank holdup. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 Dalhousie L.J. 333 (1976).

9. Sands, *Sutherland's Statutes and Statutory Construction* § 46.02 (4th ed. 1973), hereafter cited as *Sutherland*.

10. Dickerson, *The Interpretation and Application of Statutes* 229-233 (1975), hereafter cited as *Dickerson*.

11. *Id.* at 87.

12. *Id.* at 87-88.

The broad purposes sought to be achieved by the Rules of Evidence are enumerated in the preparatory study, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, which appeared in 1962.<sup>13</sup> These purposes included uniformity, improvement, and simplification. Save perhaps for uniformity, they offer slight interpretive assistance. A statement of purpose also appears in Rule 102, but, as previously observed, contributes little to the solution of particular problems of interpretation beyond the important indication that all answers are not to be found in specific terms in the Rules.<sup>14</sup> Indicia of purpose do, however, appear throughout the Rules as adjuncts to particular rules. These latter indicia of purpose are sufficiently concrete and numerous to furnish important assistance in approaching problems of interpretation.

#### D. Legislative history as context.

If the Congress can speak only as specified in the Constitution, that is, by passing bills and obtaining the President's approval or overriding his veto, then a plausible argument can be made that as a matter of constitutional theory nothing said by the Congress in any other way has any force as law and ought to be disregarded. On policy grounds, the use of legislative history is criticized as inviting easy answers and drawing attention away from conveyed meaning, purpose, and general scheme.<sup>15</sup> The British practice has been against referring to legislative history at all. But in the United States legislative history has proved irresistibly tempting, and it must be admitted that, in exploring nuances of meaning, the reasoning and thought processes of those involved may be helpful as a source of explication and illumination, without necessarily attributing to them the authority of law.

The principal considerations in the use of legislative history are its authoritativeness and its availability. Authoritativeness concerns the extent to which given materials reflect the thinking that actually went into the legislation. Availability is important for very practical reasons. In the public interest, how far should the profession and its menial diggers be expected, or even permitted, to excavate and sift for minute shards of legislative history? These two aspects will surface from time to time in the discussion which follows, with the components of legislative history listed in a

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13. 30 F.R.D. 73 (1962).

14. Text at n.1, *supra*.

15. Dickerson, ch. 10.

roughly descending order of importance as measured in terms of authoritativeness and availability.

1. *The Rules prescribed by the Supreme Court.* The Rules prescribed by the Court constituted the official document transmitted to the Congress. They carried the prestige of the Court, both in its own right and as delegate of the congressional rulemaking power under the various enabling acts. Moreover, they were the basis of the bills introduced in the Congress. They are readily available.<sup>16</sup>

2. *The Advisory Committee's Notes.* The notes of the Advisory Committee served the purposes of both supporting and explaining the Rules. They accompanied the Rules through the successive stages of consideration by the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and the Supreme Court. The Chief Justice transmitted them to the Congress with the Rules.<sup>17</sup> They were carefully scrutinized by the involved congressional committees and subcommittees, and, except in those instances where superseding changes were made in the Rules by the Congress, must be taken to represent the thinking of that body as the equivalent of a committee report effectively serving as the basis of legislation. If the Congress had not undertaken to review and in some instances to revise the Rules, their significant legislative history would have included no more than the 1962 Preliminary Report,<sup>18</sup> the various drafts produced and circulated by the Advisory Committee, and the Advisory Committee's Notes.<sup>19</sup> All were widely reproduced and

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16. See, e.g., 56 F.R.D. 187 (1973); 34 L. Ed. 2d lxvii (1973).

17. RULES OF EVIDENCE: COMMUNICATION FROM CHIEF JUSTICE OF THE UNITED STATES, H. DOC. NO. 46, 93d Cong., 1st Sess. (1973).

18. *Supra*, n. 12.

19. The original Advisory Committee on Rules of Civil Procedure included this cautionary statement in its Notes:

Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source material. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases.

H.R. DOC. NO. 588, 75th Cong., 3d Sess. vii (1938); 2 FED. R. SERV. 632 (1940). Nevertheless, the profession and the judiciary eagerly sought the assistance of the Notes; they were widely cited and quoted; and the statement proved to be far too modest.

publicized.<sup>20</sup>

3. *Congressional materials.* The materials emanating from the Congress are of varying degrees of authority. Committee reports include those of the Subcommittee on Criminal Justice of the House Judiciary Committee,<sup>21</sup> the House Committee on the Judiciary,<sup>22</sup> the Senate Committee on the Judiciary,<sup>23</sup> and the Conference Report.<sup>24</sup> All are helpful and highly authoritative.

Some materials in the Congressional Record are of authority equivalent to a committee report, e.g., statements by the committee chairman, sponsor of the bill, or sponsor of an amendment. Others are of lesser standing and may deserve little or no consideration. While the credibility of the Congressional Record may in some respects be dubious, no reason appears to doubt the accuracy of its account of the debates on the Rules.

At the instance of the Federal Judicial Center, relevant congressional materials were assembled in conjunction with the Rules and Advisory Committee's Notes, and the integrated product was made available to all law book publishers.<sup>25</sup>

4. *Remote materials.* A large volume of materials falls below the Plimsoil line both as to authoritativeness and availability. Among them may be included:

- Testimony, statements, and exhibits presented at congressional committee hearings;
- Proceedings at congressional committee "mark up" sessions;
- Advisory Committee proceedings, tape recorded but not transcribed;
- Suggestions and comments received from organized bar groups and other organizations and from individuals.

5. *State resort to federal materials.* The draftsmen of the revised Uniform Rules and the various committees charged with examining the Federal Rules with a view to State adoption of course

20. See, e.g., 46 F.R.D. 163 (1969); 51 F.R.D. 315 (1971); 56 F.R.D. 183 (1973).

21. SUBCOMM. ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, H.R. 5463, 93d Cong., 1st Sess. (Comm. Print Oct. 10, 1973).

22. H.R. REP. NO. 650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075.

23. S. REP. NO. 1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051.

24. FEDERAL RULES OF EVIDENCE, H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098.

25. E.g., Federal Rules of Evidence for United States Courts and Magistrates with Notes by the Federal Judicial Center, Pertinent Advisory Committee Notes and Relevant Legislative History (West 1975). These materials also appear in the treatises.



had access to the relevant federal legislative historical materials. Hence it seems reasonable to assume that in the interpretation process at the local level, subject to due regard for local notes, resort to the federal materials is to be expected.<sup>26</sup> The federal materials are, however, one step further removed from the local rules, and their impact may accordingly be somewhat diminished in force, particularly where the text of the Rule itself may be thought to be at variance with meaning as suggested by history.

#### IV. THE DEVELOPING PATTERN OF INTERPRETATION

In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided . . ." <sup>27</sup> In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.

In some instances the Rules contain explicit authorizations to courts to occupy specified areas with judicial creations. One illustration is the provision that privileges "shall 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."<sup>28</sup> Another will be found in the open end hearsay exceptions admitting hearsay statements not specifically enumerated but "having equivalent circumstantial guarantees of trustworthiness, . . ." <sup>29</sup> subject to compliance with specified restrictions. Congressional entrustment of discretion to the judges in dealing with privilege is far broader in terms than with uncharted hearsay, yet the reported decisions dealing with the latter are far more numerous.<sup>30</sup>

A considerably different pattern is that of a general rule followed by specific applications. Thus the broad principle that the admissibility of relevant evidence is subject to the limitations of "prejudice"<sup>31</sup> is followed by a series of rules consisting of concrete

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26. Dickerson 159.

27. Fed.R.Evid. 402. See *United States v. Grajeda*, 570 F.2d 872 (9th Cir. 1978).

28. Fed.R.Evid. 501. Except for the communications privileges, Wigmore made no effort to distill out any general principles governing the common law of privilege, and none is apparent. Wigmore, *Evidence* § 2285 (McNaughton Rev.). In view of this lack, plus the fact that virtually the entire law of privilege today is statutory, the Rule offers slight guidance. It is worth noting that in *Funk v. United States*, 290 U.S. 371 (1933), where the quoted language of the Rule finds its genesis, State legislation on the marital privileges furnished the stimulus for departing from common law concepts of incompetency.

29. Fed.R.Evid. 803(24), 804(b)(5).

30. Much too numerous to be treated in this discussion.

31. Fed.R.Evid. 401-403.

applications in connection with character,<sup>32</sup> compromise,<sup>33</sup> liability insurance,<sup>34</sup> and so on. That the rules with concrete applications are not intended to be a complete catalog of situations where the general principles apply must be self-evident,<sup>35</sup> otherwise the statement of the general governing principles would be quite needless. Moreover, the relevancy/prejudice relationship finds expression in other rules, e.g., those dealing with character and conduct of witnesses<sup>36</sup> and with impeachment by conviction.<sup>37</sup> The common law experience will, then, suggest additional applications, e.g., contradiction on collateral matters for impeachment purposes, speculative and conjectural evidence, or purportedly scientific evidence in an insufficiently established field.

With regard to the more particularized rules, the question arises as to the proper treatment of parallel situations. Should the Rule be regarded as an exclusive occupancy of the area or as a basis for extension by analogy? The answer lies in the purpose of the Rule. An illustration is found in *United States v. Lewis*,<sup>38</sup> where a witness made an out-of-court identification statement of the accused after viewing his photograph. Was the statement hearsay when offered at the trial? Rule 801(d)(1)(C) removes from the category of hearsay a prior statement made by a witness who is available for cross-examination at the trial if the statement is "one of identification of a person after perceiving him . . . ." The language clearly contemplates seeing the individual in person. Yet the court pointed to the reason for the Rule, namely the unreliability of courtroom identification because of lapse of time and the suggestiveness of the circumstances, and decided that the statement fell within the Rule and was admissible. A further illustration is found in *Kennedy v. Great Atlantic & Pacific Tea Co.*,<sup>39</sup> a slip and fall case. The presiding judge's clerk, known to the jury to be such, testified that he visited the locus after a heavy rain and saw a pool of water there. A reversal resulted. The court relied in part on Rule 605 which renders the judge incompetent to be a witness in the trial over which he is presiding. The court thought the reasons for the Rule applied to the judge's clerk, quoting the Advisory Committee's Note:

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32. Fed.R.Evid. 404.

33. Fed.R.Evid. 408.

34. Fed.R.Evid. 411.

35. See also Advisory Committee's Note, Fed.R.Evid. 401. For convenient sources, see note 25 *supra*.

36. Fed.R.Evid. 608.

37. Fed.R.Evid. 609.

38. 565 F.2d 1248 (2d Cir. 1977).

39. 551 F.2d 593 (5th Cir. 1977).

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? *Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?* The rule of general incompetency has substantial support. (Citations omitted). (Emphasis supplied).<sup>40</sup>

Both of the foregoing cases are completely acceptable extensions by analogy within the purpose of a rule. In contrast is the amendment of a rule by engrafting a further requirement. An example is the Fifth Circuit decision of *United States v. Beechum*.<sup>41</sup> The case involved Rule 404(b), which mandates exclusion of evidence of other crimes as proof of character in order to suggest the inference that the person acted in conformity with that character, but does not require exclusion when the evidence is offered for other purposes, including proof of intent. The court decided to continue the former rule of the circuit which required that other crimes in intent cases be proved by clear and convincing evidence, although no such requirement is found in Rule 404(b). "As a codification founded on its historical antecedents, the Federal Rules of Evidence shall not be taken to repeal the products of our studied deliberation unless that intention is clearly manifest."<sup>42</sup> The result was to frustrate application of the Rule, to destroy uniformity of interpretation, and to violate the accepted principles of statutory construction. Other Fifth Circuit decisions do not, however, bear out the declared purpose of maintaining an evidentiary subculture in that part of the judicial system of the United States.

Familiar doctrine requires that statutes be read as a whole.<sup>43</sup> Similarly as to the Rules, which must not be read separately and in isolation but as a part of an entire system, with due regard to its plan and organization and to the contents of rules other than the particular one under consideration. And so with *United States v. Batts*,<sup>44</sup> a narcotics prosecution in which defendant denied knowing that the hashish in question was hidden in his vehicle. On cross-examination, without objection, he denied knowing the nature of a "coke" spoon that he was wearing on a necklace when

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40. 551 F.2d at 597.

41. 555 F.2d 487 (5th Cir. 1977).

42. 555 F.2d at 509. The principle that statutes in derogation of the common law are to be construed strictly is generally discredited. *Dickerson* 206-208.

43. *Sutherland* § 46.05.

44. 558 F.2d 513 (9th Cir. 1977).

arrested. In rebuttal the government introduced evidence of prior possession and offer for sale of cocaine by defendant, that had been suppressed because of unlawful seizure. On appeal, defendant claimed a violation of Rule 608(b), which states that specific instances of conduct to attack the credibility of a witness are not provable by specific instances, although they may be inquired into on cross-examination concerning the character of the witness for truthfulness. The court might have disposed of this contention by pointing out that Rule 608(b) deals with evidence bearing on *character* for truthfulness, leaving evidence bearing directly on the question whether the witness was telling the truth in this particular case to be governed by general principles of relevancy. Instead, the court invoked Rule 404(b), which allows evidence of other crimes for the purpose of proving knowledge or absence of mistake or accident. In such event, the court pointed out, Rule 608(b) does not act to bar the evidence.

Reading the Rules as a whole would obviate much of the difficulty which traditionally has attended and continues to attend the introduction into evidence of declarations of a coconspirator. In *United States v. Petrozziello*,<sup>45</sup> the Court of Appeals of the First Circuit inquired into the impact of the Rules upon its former rule, which had been to admit if there was enough independent nonhearsay evidence to make a prima facie case. The court concluded that Rule 104(a) committed the preliminary question entirely to the determination of the judge, with the incidental effect of rendering the rules of evidence, except the privilege rule, inapplicable to the preliminary fact determination. The court failed to observe that Rule 801(d)(2)(E) classes coconspirators' declarations with admissions and removes them from the category of hearsay. Hence the preliminary question is not one of administering a technical rule of exclusion, namely the rule against hearsay, but rather one of simply determining the occurrence of certain factual conditions on which relevancy, in the broad sense, depends. The treatment would correspond with that accorded admissions by an agent: Was the agent "authorized?" Did he make the statement? These are questions under Rule 104(b), a conclusion which would incidentally relieve the court of its concerns over the inapplicability of the Rules to the process of determining the preliminary question. The First Circuit should have stayed with its earlier rule, as consistent with the Federal Rules.

On occasion collisions may occur between legislative history and the seemingly unmistakable meaning of a Rule. This has happened in the case of crimes involving "dishonesty or false state-

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45. 548 F.2d 20 (1st Cir. 1977).

ment," under Rule 609(a). Important consequences attach to the determination whether a crime falls within this category. If it does, then a conviction of it may be used to impeach any witness without regard to whether it is of felony grade, and the weighing of probative value against prejudice to a defendant is not required. *United States v. Smith*,<sup>46</sup> reached what is on its face a remarkable result: attempted burglary involves neither dishonesty nor false statement. Lewis Carroll would have been pleased. None would question the result with regard to false statement, but few could be found who would not agree that robbery or any other form of theft is dishonest. Yet considering the legislative history, which the court examined carefully and in detail, the conclusion that the Congress intended to include only crimes of false statement, and that "dishonesty" was devoid of significant meaning, is difficult to avoid. Illustrative of the legislative history is the Conference Committee Report:

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.<sup>47</sup>

One may question whether the same result will be reached in States adopting Rule 609(a), in view of the almost certain attenuation in some degree of the impact of federal legislative history at the State level.

### CONCLUSION

The passage of a number of years and the decision of a variety of cases have been the requisites to the formulation of a satisfying answer to Judge Aldrich's question. That answer is that the accepted rules of statutory interpretation are in general being applied by the courts to the Rules with skill and thought, adapting the Rules where necessary and appropriate in a manner consistent with the purposes sought to be achieved.

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46. 551 F.2d 348 (D.C. Cir. 1976).

47. FEDERAL RULES OF EVIDENCE, H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974) (quoted by the court in 551 F.2d at 362). Accord, *United States v. Seamster*, 568 F.2d 188 (10th Cir. 1978); *United States v. Papia*, 560 F.2d 827, 846 (7th Cir. 1977). Contra, *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976) (very abbreviated treatment).