**New Rules of Evidence**

# U.S. Courts Facing Changes

11/24/72

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Profound changes are in store for the nation's federal courts, and for the lawyers and citizens who go to court, as the result of the code of evidence approved this week by the United States Supreme Court.

Unless Congress objects, which is unlikely, the new rules will require new ways of trying cases in the 93 federal district courts of the land. Ultimately the rules will affect the decision-making of government agencies, large and small business enterprises and individual Americans.

The key to the transformation is a new uniformity that will reduce drastically the power of a district court judge to run his trials by local rule, custom or whim, heedless of the rules governing trials elsewhere in the country. Some likely results:

- Business and government decision-makers will be spared the present uncertainties created by differing

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rules of evidence regarding, for example, corporate merger cases.

- State courts, currently 50 enclaves of conflicting evidence laws, may be moved to follow the federal example, helping a mobile citizenry to greater certainty about the law irrespective of geography.

- Ordinary citizens may come to think of the law as somewhat less of a mystery, because the basic thrust of the rules is to cut down on legal "technicalities" and red tape which excludes relevant evidence.

According to Albert E. Jenner Jr., the Chicago lawyer who headed the 15-member drafting committee, a key feature of the new rules is that they specify precisely what kinds of evidence are inadmissible because of a privilege—such as husband-wife or priest-penitent or doctor-patient confidentiality. Anything that isn't specified, he said, is not privileged, so the ancient saying governs—the trial must be a "search for truth."

Jenner's committee, appointed by former Chief Justice Earl Warren, worked for eight years under the auspices of the Judicial Conference of the United

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States, administrative arm of the federal judiciary. The conference, whose members are ranking judges, recently passed the rules along to the Supreme Court for transmittal to Congress

Jenner said no judge agrees with every rule but there is general agreement that the rules as a whole make sense.

The husband-wife privilege, which protects one spouse from the testimony of another, will be honored in criminal cases but not in civil cases. The draftsmen drew the line there to safeguard family relationships where possible without excluding all material evidence in all kinds of cases. Confidences to a clergyman in the course of spiritual counselling would not be divulged.

A doctor-patient confidentiality will be recognized only if the doctor is a psychiatrist or other expert consulted for mental health purposes. This line was drawn after extensive debate and give-and-take with the American Medical Association.

Not surprisingly, since the new rules are the work of judges, legal scholars and practicing lawyers, a broad lawyer-client privilege will remain in effect.

Two other major exceptions were introduced late in the drafting process in concessions to the Justice Department. The code spells out broad privileges against the disclosure of "state secrets"—including national defense, foreign relations and investigative information—and against divulging the identity of government informers.

Even these guarantees of government secrecy have limitations. For instance, if the government sues a citizen but withholds a key item of evidence on national security grounds, a judge could rule against the government for that reason alone if justice appeared to require it.

Until last Monday, when the high court released the final text of the rules over the single dissent of Justice William O. Douglas, few persons outside the legal profession were aware of the rules or the unusual method that is used to enact them into law.

Unlike conventional laws passed by Congress and signed by the President, the rules will be transmitted to Congress in January and will have the force of law after 90 days unless both houses of Congress disapprove them. In this respect the process is similar to Executive Branch reorganization plans, which are submitted by the President subject to a veto by either the House or Senate within 60 days.

Justice Douglas, who thinks jurists should not engage in this kind of legislation-drafting, has objected every time the Supreme Court has triggered the rule-making process over the past three decades. The late Justice Hugo L. Black always joined him in chiding the court's majority for "making law" rather than judging cases, as the justices promulgated federal rules of procedure for criminal and civil cases.

This time Douglas added the objection that the underlying law for adopting federal court rules covers only "practice and procedure" rather than evidence. The difference, which some lawyers deem critical, is between standard methods of filing lawsuits, serving summonses and other formalities and the principles governing the kinds of proof that can be considered by the judge or jury.

A threat to curtail the rule-making power of the courts and their committees was made last year by Sen. John L. McClellan (D-Ark.), powerful member of the Senate Judiciary Committee, but was withdrawn after the draftsmen heeded the senator's objections to a previous version of the evidence code.

McClellan resisted a proposal that would have restricted the right to cross-examine a defendant about prior criminal convictions. Reformers have complained for years that such cross-examination of a defendant, in theory limited to an attack on his credibility, can go a long way toward suggesting that the accused is guilty of the current charges against him.

In its final form the rule forbids such cross-examination only if the conviction is so old that 10 years have elapsed since the expiration of the sentence for that crime and the accused has not been convicted of a subsequent crime.

Jenner says he doesn't know whether the new rules will help prosecutor or accused, plaintiff or defendant, and says the committee

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didn't care. The evidence rules, he noted, do not cover court-made rules like the "Miranda rule," excluding confessions on constitutional grounds when the defendant has not waived his right to silence and legal counsel.

Rules governing cross-examination and the credibility of witnesses will significantly affect strategy planning of lawyers.

In most courts a lawyer can offer his evidence in the order of his choice, confident that the other side's cross-examination is limited to the subjects covered by his witness's direct testimony.

But in the future, cross-examination will be wide open to other relevant subjects. The lawyer must weigh the possibility that his opponent will expose weaknesses in his case at an awkward time in the trial.

For the first time the rules will formally recognize the long-assumed right of a federal judge to comment on the evidence. But he must do so only at the close of the case. "We can't have the judge bouncing around with remarks about everything," Jenner said. "He's got to sit down and think about it."

**ALBERT E. JENNER JR.**
**. . . headed committee**