PUBLIC HEARING

before

New Jersey's
RULES OF EVIDENCE STUDY COMMISSION,
on
Proposed Rules of the New Jersey Supreme Court,

Held:
January 20, 1967
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMISSION PRESENT:

Senator Frank J. Guarini, Jr., Chairman

William J. Bozzuffi, Esq.

Morris Brown, Esq.

George Clott, Esq.

Alan Kraut, Esq.

* * * *

I N D E X

SENATOR FRANK J. GUARINI, JR. (Chairman): The mee of the Rules of Evidence Study Commission is hereby oper Public notice has been sent out indicating that the hea would be held on the proposed rules of the New Jersey Supreme Court.

The Commission has been constituted pursuant to S(in which the purpose and duty of the said Commission is study and review the proposed rules of evidence as adop by the Supreme Court, publicly announced on September 1 1964, and to recommend such action as the Rules of Evidence Study Commission shall deem appropriate to be by the Legislature pursuant to Article III, Chapter 52 the Laws of 1960.

By legislative enactment, the changes in the rule of evidence are to become effective on January 31, 1967 Pursuant to S 38, the effective date of the enactment o the proposed rules of evidence is September 11, 1967.

Also pursuant to SCR 1, the Committee, which was organized under the last session, has been reconstitute

I would like to state for the record that there i in attendance at this hearing, Alan Kraut, Morris Brown William Bozzuffi, George Clott, Peter Thomas, and mysel Frank J. Guarini.

I would like to call on anyone here present who wishes to testify before this Commission pursuant to th

notice that had been sent out in reference to the rules of evidence which have been proposed by our New Jersey Supreme Court.

F R A N C I S J. B O L D U C: Mr. Chairman and members of the Commission, my name is Francis Bolduc. I am Executive Director of the New Jersey State Bar Association.

My purpose in being here today is not primarily to testify on the rules of evidence but to explain to you, as a Commission, that the delegate of the New Jersey State Bar Association who was to appear here today, Mr. Abraham Harkavy of East Orange, is presently in the middle of a trial and, unfortunately, the Judge did not see fit in excusing Mr. Harkavy.

I would, therefore, on behalf of the New Jersey State Bar Association, respectfully request that this record be kept open until such time as we can produce to you, in writing, the report which Mr. Harkavy was to give to you orally here today.

And that is the sum and substance of my presence here this morning.

SENATOR GUARINI: Could you tell us when we may expect the report as to the views of the New Jersey State Bar Association? We are interested in knowing what their official position is.

MR. BOLDUC: I do know, Senator, that Mr. Harkavy totally prepared and, therefore, I would assume that as so as he was through with this trial he would commence the writing of the report and I would almost think that we cou have them to you within a ten day period.

SENATOR GUARINI: I think that under the circumsta it's a very reasonable request and since it is deemed important that the views of Mr. Harkavy, representing the State Bar Association, be put before this Commission we should give him adequate time. I would like to suggest perhaps even a longer period of possibly three weeks. The Commission would still be in effect and I wouldn't want to rush Mr. Harkavy. I know what the toil and travail is of law practice and I am sure that he wants adequate time to make a full and complete report.

MR. BOLDUC: I think that time would be sufficient

SENATOR GUARINI: The question has been raised as whether or not we should have this report before we meet w the Supreme Court. I don't think that we are that pressed for time. We will be in executive session between now and then and perhaps even on an informal basis we may be in touch with the State Bar Association. However, his repo will be made part of the record when it is submitted, so w will direct that the report be put in the official transcr

Are there any questions that any of you gentlemen

have to ask the representative of the State Bar, Mr. Boldu

(No questions.)

MR. BOLDUC: Well, in conclusion, then I can assum that we have an approximate three-week period in which tim to submit to you the report.

SENATOR GUARINI: I think that's agreeable with me if it's agreeable with you gentlemen.

MR. KRAUT: Could we suggest that if the report is submitted in writing to the Chairman that the State Bar duplicate copies of it and send it immediately to each of the members of the Commission?

MR. BOLDUC: We would be very pleased to.

SENATOR GUARINI: Yes, Mr. Bolduc, if you send it to the legislative offices here at the Senate, Mr. Arthur Applebaum would be able to distribute it to the members of the Commission. It may be easier for you to do it tha way.

MR. BOLDUC: We will be very happy to comply with your request. (See p. 7 for Mr. Harkavy's statement)

SENATOR GUARINI: Right. Thank you very much for appearing.

MR. BOLDUC: And thank you.

SENATOR GUARINI: Is there anyone else who wishes to step forward?

I think the record should note that every effort

was made to choose a date which would be outside the normal trial dates and that the date would be perhaps feasible for the members of the Bar and the various Bar Associations.

Inasmuch as we have agreed to keep the record open for a three-week period, I would like then to make the announcement that each and every member of the Bar, each and every organization representing any specific practice of law within the Bar, and each Bar Association has a simil opportunity to submit in writing to this Commission, withi this three-week period from today, their sentiments and their feelings and their opinions as to the proposed change of rules which the Supreme Court has put before us.

Is there anything that any other member of the Commission wants to add to what I have said or what has bee done here today?

MR. BOZZUFFI: Senator, have we received any communications from any of the Bar Associations or any of the private attorneys?

SENATOR GUARINI: The only communication that has been received, pursuant to the notice that has been printed on several occasions in the New Jersey Law Journal and has been published elsewhere, has been from the New Jersey State Bar Association and, unfortunately, the representati that was selected to make the presentation has been unable to attend, and that is Mr. Harkavy. There has been no oth

notice received from anyone else pursuant to our meeting here today.

I might state also that the New Jersey Trial Lawyers Association, through their President, Jerome Yesl stated that they were going to send someone here to test: That representation was made to me orally about one week but I assume, from no one coming forward, that that Association is not represented today.

Now if there are no other presentations to be ma I shall then call these hearings to a conclusion and the Commission will meet in executive session to review the various rules in accordance with the scheduled meeting which had been previously arranged. It would be best, I think, gentlemen, if we met in the Assembly Lounge whic has been set up for our deliberations.

Thank you very much.

(Hearing concluded)

SUBMITTED BY ABRAHAM I. HARKAVY

S U M M A R Y

Many of the Rules concerning which there were criticisms and objections placed on the record at the special meeting of the Judicial Conference of June 20, 1963, both by other delegates and myself, were amended or deleted by the Supreme Court to conform to the objections etc.

The following is a list of the Rules:

Rule 1 (13)

Rule 4

Rule 5

Rule 6

Rule 8 (4)

Rule 8 (5)

Rule 16

Rule 20

Rule 21

Rule 45 (this became the new Rules 4 and 5)

Rule 58

Rule 62 (6)

Rule 63 (1)

Rule 63 (2)

Rule 63 (4)(c)

Rule 63 (5)

Rule 63 (6)

Rule 63 (13)

Rule 63 (15)(c)

Rule 63 (21

Rule 63 (23)

Rule 63 (31)

Rule 63 (34)

The following rules are still in the same form as proposed by the Supreme Court Committee on Evidence and the objections to each are listed herein-

below:

Rule 2(4): It was felt that the effect of this rul to give too much power to the Trial Judge in that his author to relax the rules would remove certainty in their enforceme and destroy the true effect thereof.

Rule 14: The original rule as proposed by the Comm was amended by the Court. However, I feel that even the new does not correct the objection to the original rule. The ob to this rule is predicated upon the same feeling that, "He w asserts shall have the burden of establishing". The effect rule thus is to shift the burden of proof. This should be a of procedure and not substance or evidence. At the conferen the question of whether the rule was unconstitutional was di cussed.

Rule 54: This rule needs clarification because the fails to indicate that proof of insurance should be prohibit litigation other than where the issue of negligence is invol

Rule 63(3): It is felt that this rule is not neede the situations it intends to regulate are controlled by pres existing rules of civil procedure.

Rule 63(12)(c): Opposition was expressed to that p of the rule which permitted causes of symptoms, previous and present, to be included in the testimony of the doctor; this give a doctor the right to go into all factual details conce the happening of the accident in question etc. Presently, u our case law in New Jersey as recently restated in Pinter vs Parsekian, 92 NJSuper 392; 223 A2d 635 (App.Div)1966, the d history is limited to facts necessary for medical treatment none other.

Respectfully submitted,

ABRAHAM I. HARKAVY

February 7, 1967

RALPH NEIBART
COUNSELLOR AT LAW
744 BROAD STREET
NEWARK, N. J. 07102
MARKET 3-3993

February 1, 1967

Senator Frank J. Guarini, Jr.
State House
Trenton, New Jersey

Dear Senator Guarini:

This letter is in response to your request for comments on the Rules of Evidence.

In my opinion the proposed new rules should be promptly adopted. The reports of the prior committees which have studied the rules demonstrate the advantages of the proposed reforms.

My primary concern, however, is with the omission of Rul 21 from the rules recommended for adoption by the Supreme Court. Rule 21 would have limited impeachment by crimes to t involving fraud, lack of veracity or false statement. It wou also have provided that the defendant as a witness in his own criminal prosecution may not be impeached by evidence of prio conviction unless he has first attempted to support his credi bility by putting evidence of his good character. The Rule would have changed New Jersey law as embodied in N.J.S.A. 2A:

Although there was strong support for the change expres: in each of the prior studies, so far as I know no explanatio was given for the omission of Rule 21 from the list of rules

recommended for adoption. As a result, certain trial judges have sought to avoid the prejudicial effect of the statute by construing it as giving the trial court discretion to bar the introduction of an accused's prior record for impeachment purposes. I understand that two of the cases so construing the statute are presently on appeal before our Supreme Court.

If the subject matter of Rule 21 is of concern to your Commission despite its "non-adoption" by the Supreme Court and the pendency of the above appeals, I would be pleased to submit some further comments in favor of Rule 21.

Respectfully yours,

Ralph Neibart

RN/m

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PLEASE QUOTE OUR

February 9, 1967

Senator Frank J. Juarini, Jr.
Rules of Evidence Study Commission
State House
Trenton, New Jersey

Dear Senator Juarini:

I am writing to urge that Rule 63 (13) BUSINESS ENTRIES as set on page 689 of the edition of the "Rules Governing the New Jers Courts", not be made effective in its present form.

The Rule presently reads as follows: (Emphasis added)

> A writing offered as a memorandum or record of acts, cond tions or events is admissible to prove the facts stated therein if it was made in the regular course of a busines at or about the time of the act, condition or event recor and if the sources of information from which it was made the method and circumstances of its preparation were such to justify its admission.

At present, business entries and records are commonly maintain computers. The present wording of this rule may create a prob for a business maintaining its records on a computer using eit magnetic tape or punched cards. I would note that the use of puter tape system is by far the most common computer system in

The difficulty is that in a computer tape system the master fi represented by one or more reels of tape is entirely rewritten time changes are made to the business records. Consequently, writing offered as a memorandum of record of acts will not hav made at or about the time of the act.

An example may be helpful. A ledger sheet kept by a business traditional ways will consist of a sheet of paper on which are manually or by an accounting machine the date, the amount and voice number of each charge or credit to that customer's accou entries are made on the same sheet of paper and the entries ar in the regular course of business at or about the time the goo charged or payment is received. The same account ledger maint on a computer tape system will originally consist of an area c coded information on one magnetic reel of tape, (namely the Ac Receivable Master File). Each time that charges or credits ar

posted to any customers accounts receivable record, the entire master file as contained on the original reel of magnetic tape be copied by the computer on to another reel of magnetic tape a this process the new charges and credits will be posted to the second reel of magnetic tape. The original reel of tape will be called the "father" and the new reel with the updated accou receivable will be called the "son". Typically, a company wil intact the reels of tape from three postings or updatings and reels will be called the "grandfather", the"father" and the "s This is done as a precaution in case the most recent reel of t either damaged or proves to be incorrectly updated due to a pr cessing error.

To produce a writing from the computer that is a memorandum of acts made at or about the time of the act, it would be necessa a business to start storing every reel of tape that at one tim served as an accounts receivable master file. This is a prohi business practice and naturally, is neither the desirable or t necessary answer.

On the one hand, a business properly operating a computerized records system will carry forward any given record through dai weekly or monthly posted updatings for years. An entry to the made on January 1, 1967, can be carried forward in fact and ac for an indefinite period of time, even though that record is c stantly be transferred from one reel of tape to a new reel of Thus, the objectionable portion of this rule is the requiremen the writing be made at or about the time of the act. A writin a printout from the computer to be offered in evidence may or be made at the time the business entry is made into the comput system. The computer system may produce monthly bills which a mailed out but the reproduction of the ledger record might not made unless it is specifically required, as could be the case event of a suit on the account.

On the other hand, the principal behind the admission of busin entries is that they are made in the ordinary and regular cour business at or about the time of the act and that principal mu preserved to have an active rule of evidence.

Thus, the difficulty is that in a traditional or manual system same writing which constitutes the entry made in the regular c of business is the same physical writing that is subsequently in evidence; But in a computerized system the writing that is offered in evidence was not in existence at the time the origi was made. With a computer system the entry is made in the reg

course of business and in or about the time of the act but th
writing is not necessarily done until later.

I believe this rule should be given further consideration in
to make it applicable to the present time when both manual ar
computer systems of business records are operating. A sugges
modification of the rule as it now reads would be the additic
the following language:

> "In the case, however, of a writing as defined in the se
> sentence of Rule 1 (13) it is not necessary that the wri
> be made at or about the time of the act, condition or ev
> recorded, provided that the original business entry was
> corded at or about the time of the act, condition, or ev

Very truly yours,

Robert W. Goodman
Member of A.B.A. Committee
on Electronic Data Retrieval

rwg/mav

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March 3, 1967

Honorable Frank J. Guarini
Law Revision Office
State House
Trenton, New Jersey

Re: Rules of Evidence

Dear Senator Guarini:

I have recently been appointed Chairman of the Legislative Committee of the Union County Bar Association. I have not been able to call a meeting before the date fixed for filing statements concerning the rules of evidence. I, therefore, offer the following on behalf of myself and the President of the Union County Bar Association, William P. Elliott, whose sentiments I share.

I do not favor a codified or statutory evidence act. Such would seem to be conducive to a greater number of appeals seeking to test new wording and the new law of evidence. Ou present rules of evidence, especially as to the heresay rule are the end result of years of judicial interpretation and social evolution. We feel that the courts have been doing a satisfactory job in adjusting the rules of evidence in order to meet the exigencies created by the demands of society.

I feel that the inability of the Supreme Court Committee to reach any final conclusion concerning the adoption of the proposed rules sufficiently evidences the feeling of the Ber and Bar that the system is best left to interpretation and development by the courts.

We thank you for allowing us to express our opinions.

Very truly yours,

John H. Stamler
Chairman, Legislative Committe
Union County Bar Association

JHS:JR
B-5774

cc: William P. Elliott, President