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Ethics and Evidence, Introduction

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Ethics and Evidence, Introduction

Cover Page Footnote

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SYMPOSIUM
ETHICS AND EVIDENCE
INTRODUCTION

*Daniel J. Capra**

In 2000, the Advisory Committee on Evidence Rules proposed a number of amendments that were designed to prevent perceived abuse by lawyers of some of the Federal Rules of Evidence. For example, an amendment to Rule 701 was designed to prevent lawyers from evading the disclosure and admissibility requirements of expert testimony by presenting the expert as a lay witness; and an amendment to Rule 703 attempts to stop lawyers from evading the hearsay rule by calling an expert who goes out of his way to rely on hearsay as the basis for an opinion, with the goal of disclosing the hearsay to the jury. When the proposals were reviewed by the Judicial Conference Rules Committee, one of the judges on that committee remarked ruefully that the Advisory Committee was “trying to take all the fun out of practicing law.” In his view, there was nothing wrong in clever lawyers finding ways to evade the exclusionary rules of evidence; indeed that was part of the fun of practicing law, and, implicitly, such a practice was an example of ethical lawyering.

The evidence rules are rife with possibilities of loophole lawyering; it would be impossible to close all the loopholes and thereby take *all* the fun out of litigation. For example, the evidence rules generally prohibit evidence of a person’s character trait when offered to show that the person acted in accordance with that trait; but if the proponent can make a credible argument that the evidence is offered for a not-for-character purpose, then the evidence is likely to be admissible for that purpose and the opponent is left with a limiting instruction of dubious effectiveness.¹ And while the hearsay rule prohibits the admission of an out-of-court statement when offered to prove the truth of the matter asserted, that statement will be admissible (again with a dubious limiting instruction) if the proponent can make a credible argument that the statement is probative for some not-for-truth purpose such as “context.”² These arguments can be made even if the

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1. Fed. R. of Evid. 404(b).
2. Fed. R. of Evid. 801 (a)–(c).

unstated intent of the proponent is to have the fact-finder consider the statement for the truth of the matter asserted.

The loopholes in the evidence rules raise the question whether ethics rules can or should step in to prevent any perceived abuse. Assuming that the ethics rules should have an independent role in regulating the presentation of evidence, under what circumstances is this regulation warranted? Is there any legitimate ethical concern in bending, but not breaking, the evidence rules? And are there any other ways in which the evidence rules and the ethics rules can be effectively intertwined? These are some of the issues that led to the proposal to arrange this Symposium on ethics and evidence.

The authors in this Symposium address three important questions about the interrelationship between ethics rules and evidence rules:

- (1) Do ethics rules impose any limitations on the use (and arguable abuse) of evidence rules?
- (2) Do evidence rules enforce ethical principles of lawyering, and if not, why not?
- (3) What specific areas of evidentiary practice are most in need of an infusion of ethical principles?

The authors of this Symposium take a variety of approaches to these basic questions. Two authors focus on specific evidence rules and the ethical questions they present. Dan Blinka addresses the 2000 amendment to Rule 703 and explores how the Advisory Committee's attempt to curb abuse might actually lead to more abuse of the Rule. Gerry Shargel considers whether the protections of a particular evidence rule—Rule 608(b)—impacts witness preparation and possible client perjury.

Two of the contributors focus on the potential of the evidence rules to regulate unethical conduct. Ed Imwinkelried illustrates how the evidentiary principle of curative admissibility deters the unethical use of inadmissible evidence. Fred Zacharias analyzes the interface between evidence rules and ethical proscriptions, and the sometimes uneasy relationship between these two bodies of law.

It is not surprising that several authors in this Symposium chose to focus on the prosecutor's preparation and admission of evidence. The prosecutorial abuses in the Duke lacrosse case raise serious questions about whether the existing rules of ethics and evidence are sufficient to guarantee that a prosecutor will do justice and not abuse the process. Bob Mosteller provides a compelling account of the prosecutor's misdeeds in the Duke lacrosse case. Myrna Raeder shows that greater protections are necessary to prevent the prosecutor from generating questionable evidence from jailhouse informants and experts whose testimony is "too good to be true." Finally Rob Aronson and Jackie McMurtrie propose safeguards to prevent the misuse by prosecutors of high-tech and DNA evidence.

Two articles in this Symposium address the potential for abuse in presenting expert testimony, even after Federal Rule 702 was amended to provide stricter regulations against unreliability. Paul Giannelli and Kevin McMunigal raise concerns about prosecutorial presentation of unreliable scientific testimony, and suggest evidentiary and ethical reforms. Joe Sanders focuses on the ethical challenges faced by expert witnesses themselves, and proposes reforms in the selection and presentation of expert testimony to control for bias and unreliability.

Three of our authors explore the role of ethical principles in regulating what the evidence rules call “prejudicial” evidence. Aviva Orenstein analyzes the use of evidence of the victim’s behavior in rape cases, and concludes that evidence rules on their own are insufficient to control the impermissible inferences that are drawn by jurors influenced by rape myths. Todd Pettys argues that the evidentiary term “prejudice”—and the ethical limitations on the presentation of prejudicial evidence—should be reconsidered in light of social science research on the effect of emotions on decision making. And Joe Colquitt considers the relationship between stipulations and prejudicial evidence, and the related ethical considerations arising from litigating in the “shadow” of the evidence rules.

The ethical issues arising from the presentation of false evidence have been oft-vetted by scholars and courts, but rarely from a perspective of the relationship between ethical rules and evidence rules. Mimi Wesson gives an exciting account of how the presentation of false evidence can have an impact on the very establishment of evidence rules; she shows how the false evidence presented more than 100 years ago in the famous *Hillmon* litigation left us with a questionable rule of evidence that is memorialized in the Federal Rules of Evidence and that is, unfortunately, unlikely to change. And Tim Perrin provides an evidence rules perspective on the conundrum of client perjury.

The lawyer’s duty of confidentiality has both an ethical and an evidentiary component. In his contribution to the Symposium, Paul Rothstein sets forth a proposal for a seminar that will help students master the intricate relationship between the duty of confidentiality and the attorney-client privilege.

Thanks are in order. First I would like to thank the authors for agreeing to explore the complex relationship between ethics and evidence rules and for providing such excellent submissions. I am also grateful for the excellent work of Symposium Editor Nasim Farjad, Editor-in-Chief Katherine Hughes, Managing Editor Patrick Connorton, and the board and staff of the *Fordham Law Review*. And I am grateful to my colleague Bruce Green, who had the idea for this Symposium and who recruited me to help put it together.

Notes & Observations