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BOOK REVIEW

Federal Evidence. David W. Louisell & Christopher B. Mueller. The Lawyers Co-operative Publishing Co., Rochester, N.Y. Five-volume set. Pp. 4066. \$237.50

CHARLES R. COLEMAN*

Of the projected five volumes, only four are in print,¹ due in part to the untimely death of David Louisell in August of 1977² and the comprehensive nature of the treatise itself. At present, the work consists of thirty-two hundred sixty-six pages presenting an inclusive body of evidence law, which supplements the federal evidentiary rules with myriad developmental and interpretive aspects.

The authors' purpose is best articulated in the preface, where reference is made to Justice Holmes' admonition:

[T]heory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. . . . It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject.³

With this philosophy in mind, the authors propose "to go to the bottom of the subject."⁴ Their work transcends the typical monograph, which gestures more with verbal embroidery and legal ornament than with precision and detail. *Federal Evidence* attests to the authors' commitment, and each chapter reflects a painstaking effort to construct sound legal architecture.

Just as the first car off the assembly line will suffer the inevitable disadvantages of being first, the authors observe that the Federal Rules of Evidence are fraught with deficiencies, mistakes, and disappoint-

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1. The respective copyright dates for the existing four volumes are 1977, 1978, 1979, and 1980. Volume five has a tentative release date of February, 1981.

The volumes are updated by annual cumulative pocket supplements, but there is no charge for upkeep materials issued within six months of order shipment. In addition, price is guaranteed at \$47.50 per volume for the complete set.

2. 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* iii (1978).

3. 1 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* iii (1977); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1877).

4. 1 D. LOUISELL & C. MUELLER, *supra* note 3.

ments.⁵ Subjectively, it is arguable that the rules resist interdisciplinary interaction and suffer a cultural lag,⁶ but the authors pave the way to a point of salvation: “[C]ould the [r]ules have been expected to do more than countenance the case by case unfolding of the competencies of science and technology?”⁷ Thus, it is the wager of pro and con, of tradition and innovation that engenders criticism and admiration. Yet, with these realizations foremost in their minds, the authors’ mission “to go to the bottom of the subject” consists of an *objective* task that will not be circumvented.

All *lex scripta*⁸ in common law jurisdictions is subject to change through judicial interpretation. Perforce, the federal rules offer no exception. Mueller and Louisell suggest changes both to the text of the rules and to the interpretations.⁹ However, they do not draw conclusions barren of support and impervious to reason, but clothe each position with the essentials of objectivity.¹⁰ The rules are a sensitive legal ensemble that must be read and understood in relation to existing precedent and policy considerations giving rise to their enactment. An evaluation of this codification cannot be reached solely by reference to a rule number and its textual content. Only after interpretations of the rules have been assembled and evaluated is a valid conclusion accessible.¹¹

The treatise consists of an assembly of technical information and a cadre of references, including frequent reference to scholars and judges, law review articles, case law, federal and state statutory law, and the extensive legislative history of the Federal Rules of Evidence. Interspersed among this impressive accumulation of authority are case synopses, footnoted as the authors deem appropriate.

5. According to the authors, the most egregious are Article III (Presumptions in Civil Cases) and Article V (Privileges). *Id.* at iv.

6. As the authors point out, these alleged deficiencies are “less certain and more subjective. . . . But it can hardly be denied that the [r]ules do little to effect a happy marriage between [e]vidence and the learning of science, philosophy and the liberal arts; indeed do they even arrange a promising courtship?” *Id.*

7. *Id.*

8. *Lex scripta* is defined as: “Written law; law deriving its force not from usage, but from express legislative enactment; statute law.” BLACK’S LAW DICTIONARY 822 (5th ed. 1979).

9. I D. LOISELL & C. MUELLER, *supra* note 3 at iii (preface). “Our point here is simply that we have not let our general and deep admiration for the [r]ules blind us to strong criticism where in our judgment it is necessary, or to suggestions for change which might be helpful.” *Id.* at v.

10. By way of illustration, the probable judicial interpretation that a court might give a particular rule is opined by the authors, but only after having displayed how that opinion was reached. The authors’ positions are substantiated by pre-rule or post-rule construction, by decisional law, and arguably by the influence of the legislative history and surrounding policies giving rise to that interpretation or proposed change. *Id.* at 8-22.

11. The discussion of rule 103 § 11, entitled “Waiver of Objection by Introducing or Relying upon Evidence—Invited Error and the Open Doctrine,” is instructional. *Id.* at 45. Look also at the discussion of the harmless error rule embodied in rule 103. *Id.* at 85-93.

A general description of the treatise will demonstrate the comprehensiveness, complexity, and sophistication with which the authors have treated the subject. Each volume of the existing four-volume set is virtually identical in form. The substantive portion begins with a section entitled "Analysis by Rule and Section" which imparts the basic organization of each volume. Chapter headings follow, denoting the general subject matter of the rules dealt with in each chapter. The rules within these headings are indexed by number and each rule is further divided into sections. The sections introduce the topical analyses the authors have devoted to the particular rule.¹² The arrangement facilitates a structured and organized approach to this broad and intractable area of law. The topical analysis sections are particularly valuable in promoting ease in locating a specific aspect of a rule which otherwise would be impossible without sifting through pages of irrelevant information.

The aspect of the work warranting the greatest amount of credit is the elaborate discussion of each rule. The rule itself is introduced by stating its text, followed by the Advisory Committee note, the House Judiciary Committee report, the Senate Judiciary report, the House Senate Conference Committee report, and in some instances the Supreme Court's view of the rule. There is an elaborate section depicting research references from *American Jurisprudence*, *American Law Reports*, case citations, related treatises, law review articles, and federal and state statutes.¹³ Next, the authors analyze each rule, beginning with the background and purpose of the rule. Here they discuss whether the rule constituted a breakthrough in evidence law, and whether the rule resolved any unanswered questions. If the rule underwent any significant changes during the rulemaking process, they are brought to light, as are earlier versions of the rule, comments on the final draft, views of particular congressmen regarding the rule, and the rule's relationship to the Model Code of Evidence and the Uniform Rules of Evidence. The function, purpose, and use of each rule are explored in depth. The authors cite pre-rule and post-rule authority substantiating what the rule does, what it was intended to do, whether it accomplishes its purposes, how it should be construed (broadly or narrowly), the reasons for that construction, and any unique characteristics the rule possesses. The authors parallel the above format with each and every rule. This approach produces a degree of clarity and a depth of understanding consistent with their purpose of "going to the bottom of the subject."

12. For example, rule 103 § 7 analyzes the "Objections Necessary to Preserve Rights of Appeal." *Id.* at 36. Section 8 discusses the "Sufficiency of Objections—Timeliness and Statement of Grounds." *Id.* at 33.

13. Illustrative is the rule 103 synopsis, which reads: Text of Rule 103, Advisory Committee's Note, House-Senate Conference Committee Report, and Research Reference. *Id.* at 23.

Because the Federal Rules were only recently promulgated,¹⁴ the developing body of law relative to their interpretation creates a difficult task for those who undertake the construction of a reputable source defining the rules' judicial identity. The organization of the federal court system, with each circuit following its own case law, creates difficulty in uniform interpretation and application, and a more difficult task in reporting the recent decisions. This situation necessitates a highly complex structure and the authors have made significant inroads into creating a well-organized source.

The Mueller and Louisell compilation transcends and exposes the summary presentation of the Federal Rules of Evidence by James William Moore in *Moore's Federal Practice*.¹⁵ In all fairness, however, the works of Moore may have had the purpose of presenting the rule for textual references with a brief note on its legislative history. In keeping with their stated purpose, Mueller and Louisell have made a rigorous attempt to present the rules in a textual and contextual framework. Except for the presentation of the text of the rule, a brief comment section, and the Advisory Committee's note, the Moore publication is not comparable. It does have features, however, that induce some appeal—mainly the easier accessibility of certain types of information.¹⁶

For reasons that already should be apparent, *Federal Evidence* can best be used by judges, practitioners,¹⁷ and law school professors. The intricate treatment may cause law students to evade its use. Without a sound familiarity with evidence law, the treatment of one rule's interaction with other rules and statutes could be stifling. The volume of the work would also weigh against its routine use by law students.

A book review without some criticism is arguably no review at all. Although the treatise is exemplary in many ways, I have found problems in its use. Foremost, the treatise is too detailed for everyday use. One would have to read several sections to obtain a clear understanding of a single rule. In addition, there is no parallel reference table,¹⁸ and the rule numbers are often mentioned in the text without

14. The Federal Rules of Evidence are a derivation of legislative enactment. 28 U.S.C. § 2076 (1975).

15. 7 J. MOORE, *MOORE'S FEDERAL PRACTICE* (1976).

16. For example, in Moore's treatise, the exceptions to rule 802, the Hearsay Rule, do not have to be ascertained by laboring through pages of detailed explanation. *Id.* at 47-199.

17. In their preface to the treatise, the authors indicate: "As practitioners, both of us have experienced the exigencies and urgencies of [e]vidence questions in the trial of lawsuits. The craving of trial court and counsel for certain, authoritative and readily ascertainable answers is as reasonable and inevitable as it is instinctual." 1 D. LOUISELL & C. MUELLER, *supra* note 3.

18. For example, because each rule interacts with other rules and existing law, in order to project the consequential effect of a rule, one would need a reference to the other rules that interact with the rule with which you are concerned. The Uniform Commercial Code comment section usually lists code section related to the code section discussed. Of course, further reference to relevant federal law would facilitate an obvious purpose.

any topical reference to the rule itself. Some of the references are to rules in the volume not yet in print. Another concern is the often redundant discussion of the rules, especially the restatements of legislative history in the narrative portion. A final problem is that what is authoritative in one circuit as the judicial construction of a rule is not authoritative in another. These differences in interpretation may also pose problems in updating the treatise with appropriate decisions from the respective circuits. The same problem, however, exists with the case annotations in the *United States Code Annotated*.

In conclusion, a familiarity with this work will yield two distinct benefits: the reduction of non-volitional inaccuracies and, if used as source material, the early identification of problems as they emerge. As revealed by this treatise, a comprehensive understanding of the Federal Rules of Evidence cannot be achieved without “going to the bottom of the subject.”

