

2013

In Memoriam: Paul R. Rice

Wayne Brazil

Eldone E. Fallon

Robert K. Goldman

Claudio Grossman

Geoffrey C. Hazard Jr.

See next page for additional authors

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>

 Part of the [Law Commons](#)

Recommended Citation

Brazil, Wayne , Eldone E. Fallon, Robert K. Goldman, Claudio Grossman, Geoffrey C. Hazard, Jr., and William M. Jannssen. "In Memoriam: Paul R. Rice." *American University Law Review* 63, no.1 (2013): 1-20.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

In Memoriam: Paul R. Rice

Keywords

Rice, Paul R., Law teachers -- United States, American University (Washington, D.C.). Washington College of Law, obituary

Authors

Wayne Brazil, Eldone E. Fallon, Robert K. Goldman, Claudio Grossman, Geoffrey C. Hazard Jr., and William M. Jannssen

IN MEMORIAM: PAUL R. RICE

The editors of the *American University Law Review* respectfully dedicate this issue to Professor Paul R. Rice.



WAYNE BRAZIL*

Paul Rice was my friend. We lived thousands of miles apart. We saw one another only occasionally. We kept up with one another through projects, correspondence, and by phone—but only sporadically. Despite distance, Paul was real to me, more real than so many people I see, face to face, every day.

Paul Rice was real to me because Paul Rice was real. He was tangible. He was enthusiasm and energy. He was openness and courage and passion. He was intellectual and emotional honesty. His voice was direct, explicit, his messages unvarnished. He was optimism and hope and longing. He was belief—in me, in possibilities, in projects, in the capacities of human beings to use intelligence and good will to make things better.

Paul Rice loved. His wife.¹ His children. His wife. His grandchildren. His wife. His friends. His wife. His students. His wife. His co-workers. His wife.

He loved thinking and challenging and pushing. He loved trying. He loved knowing.

Paul Rice loved being.

The person Paul Rice is evidenced eloquently in his scholarship. His scholarship was bold and animated by a transparent conviction

* United States Magistrate Judge (Ret.); Professor from Practice, *Berkeley Law, University of California, Berkeley*; Mediator, Arbitrator and Special Master, JAMS, Inc.

1. Jane Bird Rice.

that we really can do better. He had more confidence in us than we have in ourselves. So he challenged us to believe in our ability to think things through with open minds, to imagine new ways, to experiment with new procedures, to test new ideas, to find paths forward that would make our system more just, more reliable, more deserving of the people's confidence and respect.

He believed that ability and intelligence and creativity are widespread in our people, that no group or person has a corner on the wisdom market, that telling insights and worldly wisdom could come from people without status and without investment in the status quo. He also believed that the world is complex and its realities ever-changing, making it imperative that we muster the courage and have the self-confidence to re-assess even our most fundamental assumptions and to continuously adapt our rules and procedures. He embraced innovation, experimentation, and growth. So he believed in the common law.

The doctrinal arena in which the essence of Paul Rice is most visible is attorney-client privilege. Concluding his most important article in this area, Paul wrote: "Antiquities, time-honored and resistant to change, are the hardest doctrines to reform because the doctrinal assumptions underlying them are so ingrained in our jurisprudence we refuse to even question them. The attorney-client privilege and the need for secrecy in communications constitute one such doctrinal assumption."²

In this article Paul made a spirited argument, supported by an exhaustive exploration of the pertinent case law, that the courts, exercising the authority and responsibility they retain under the common law, should explicitly declare that they would no longer require parties to satisfy the "time-honored" condition of confidentiality (secrecy) in order to invoke the attorney-client privilege to prevent others from using against them an otherwise qualified attorney-client communication. Paul knew that this idea would be perceived in many powerful legal circles as radical and heretical—even though his research showed that its adoption would in fact represent only a modest extension of a clear trend in the case law and even though his reasoning and intuition provided substantial support for the view that making such a change would do no harm to the policies that the privilege was designed to advance.

2. Paul R. Rice, *The Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998).

But knowing that his proposal likely would trigger intensely defensive reactions and expose him to biting criticism³ did not deter Paul from publishing this piece. He pressed forward because he knew, both from the volume of reported cases on this issue and from his extensive first-hand experience as a special master in complex civil cases (including the U.S. government's divestiture action against AT&T,⁴ one of the biggest civil actions in U.S. history), that courts and litigants expended untold resources on unproductive and unnecessary disputes about whether, in particular case-specific circumstances, the confidentiality requirement should be deemed satisfied. Paul understood that lawyers' incentives to try to uncover and use their opponents' attorney-client communications were huge and would remain so—but he believed that abandoning the unnecessary confidentiality requirement would reduce litigation's indefensible transaction costs by removing one of the principal doctrinal vehicles lawyers had been using in response to those incentives.

To date, antiquity and resistance to change have proved as formidable as Paul predicted—so his campaign to have the confidentiality requirement abandoned has not resulted in the doctrinal adjustment he championed. But his work in this arena clearly has borne fruit, as it has inspired broader debate and more direct re-examination of fundamentals than ever would have occurred if Paul had remained silent.

The campaign against the confidentiality requirement was a product of Paul's indisputably successful and much more comprehensive scholarship on the attorney-client privilege. That scholarship yielded the legal profession's most thorough, best documented and researched treatises on the attorney-client privilege, treatises that canvassed the pertinent case law from both federal and state courts.⁵ Undeterred by the staggering volume, the radically uneven quality of reasoning, and the inconsistencies within the pertinent case law, Paul succeeded on two extremely important

3. For an example of a response to Paul's proposal, see Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31 (2000). Paul responded to Professor Leslie's views, in characteristically vigorous and direct terms, in Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie's Defense of the Indefensible*, 2001 WIS. L. REV. 187 (2000).

4. See *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978). As reflected in subsequently reported opinions and orders, over time the District Court expanded the duties of the special masters in this case to include managing discovery, generally, and coordinating the procedures the parties used to enter stipulations. See, e.g., *United States v. AT&T Co.*, 498 F. Supp. 353 (D.D.C. 1980).

5. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (2012); PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE: STATE LAW* (2010).

fronts: he brought conceptual order to an almost rag-tag doctrinal universe, and he provided lawyers with access to the full range of relevant judicial opinions, enabling counsel to feel that if there was authority for or an argument against a position that they wanted to take or to challenge, they would find that authority in Paul's volumes.

In other settings, Paul provided lawyers and law students with yet another very useful form of help with this much litigated and often misunderstood subject: he wrote law review articles that, in clear and compact form, identified the essential elements of privilege analysis, separated out the issues that were the most difficult or the most vulnerable to doctrinal confusion, then, for each such issue, systematically summarized and clarified the current state of the common law.⁶

There is an additional set of professional activities that evidence the essential Paul Rice. Eschewing timidity, in the mid-1990's Paul launched an extremely ambitious undertaking that became known as "The Evidence Project." Demonstrating both his commitment to the powers of reason and research and his belief in the democratic distribution of ability and energy, he tapped the services and directed the work of some 40 law students over a period of two years as he and his teams conducted a systematic review of the state of evidence law—with an eye toward identifying areas of doctrine in which inconsistency or uncertainty could compromise the system's promise to do justice. Paul hoped that the product of all this work would be used not only by individual judges as they contributed to the development of the common law, but also, and more immediately and comprehensively, by the Judicial Conference's Advisory Committee on the Federal Rules of Evidence. In this second hope he was to be deeply disappointed. After its completion and publication (in 1997),⁷ Paul and his co-workers presented the results of their massive undertaking to the Rules Committee. It is unclear whether most of the members of this Committee directly examined this submission, even superficially. What is clear is that the Evidence Project's submission failed to move the Committee to take any action, or even to adjust or expand the topics to which it would devote significant attention.

6. See, e.g., Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967 (1999).

7. Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330 (1997).

The Committee's non-response to all this work mystified and angered Paul. Characteristically, he chose to respond to this non-response not by non-responding, not by retreating into his academic corner, but by launching a new inquiry—this time into the history, composition, and operation of the Advisory Committee. Then he published his conclusions, directly challenging the Judicial Conference and the Committee to democratize (to some extent) the Committee's membership and to expand, ambitiously, the Committee's mandate and mode of operation.⁸

This was vintage Paul Rice—some might say quixotic, but no one could say faint hearted or inauthentic. He beseeched the leaders of the profession to have more faith in themselves and in those they were leading; he pressed the members of the Committee to free themselves, at least in some measure, from unnecessarily conservative doctrinal constraints that Paul believed the Chief Justice was imposing; he pushed the Committee to expand its role and vision, to take on more, to work harder, to explore more vigorously the possibility of contributing more and in more ways. Probably without so understanding his plea, he was urging the Committee to be Paul Rice.



8. See Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000); Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817 (2002).

JUDGE ELDON E. FALLON*

On February 16, 2005, the Judicial Panel Multidistrict Litigation designated the Vioxx litigation a multidistrict litigation (MDL) case and consolidated all related cases in the Eastern District of Louisiana.¹ This moved some 50,000 individual cases along with several dozen class actions filed in every state in the Union to Louisiana. My court was designated the transferee court to handle this MDL. Discovery quickly ensued with thousands of depositions being noticed and various discovery motions filed seeking, among other things, the production of some nine million documents. The motions to produce presented procedural challenges for the court because the defendant, the custodian of the documents, claimed attorney-client privilege on some 90,000 of these documents. Pursuant to my usual practice, I ordered the privileged documents to be filed en camera so they could be reviewed to assess the validity of the privilege. When some forty boxes of documents and several discs were delivered to chambers, the scope of the logistical problem became apparent. It became clear to me that both the court and the litigants would profit from the services of a special master appointed to help navigate through this discovery morass. But who to appoint? Who had the knowledge and practical skill to handle this task? I was aware of the scholarly writing on this subject by Professor Paul Rice and called to discuss the matter with him. After a brief discussion, it became clear to me that I had found my special master.

Professor Rice clearly was skilled in both the microscope and telescope in this area: that is to say, while he found detail enticing and engaging he was still able to see and appreciate the big picture. He helped devise a method for creating a sample of these documents that could then be reviewed, and the rulings extended to the whole body of documents. This reduced the task to a manageable one and solved a truly vexing discovery problem. I am saddened to hear of his passing. The Academy and the Courts have lost the contributions of a giant.

* Judge, U.S. District Court for the Eastern District of Louisiana.
1. *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005); see *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565, 571 (E.D. La. 2005.)

2013]

PAUL R. RICE

7

ROBERT K. GOLDMAN*

It is not my purpose today to talk about Paul's professional accomplishments. Other voices—far more eloquent and distinguished than mine—will surely chronicle his achievements in the months and years to come. For now, suffice it to say that he mastered his craft as a teacher, as few others have, and became renowned, both at home and abroad, for his scholarship and many other contributions in the field of evidence.

What I shall try to do today is convey in a few brief words what Paul has meant to me over these many years. Paul and I have been friends since he joined the Washington College of Law faculty some thirty-eight years ago. For the past dozen years or so, we became particularly close, lunching together daily or at least several times a week—unless he and Jane were away at the beach or traveling. I so looked forward to those meals with Paul, which were often the best and most enjoyable part of my day. And, I suspect that Paul enjoyed them too. His passing is a particularly bitter blow that has left a very real void in my life that I know cannot be filled.

For the past several days, I have thought hard about what it was about Paul that drew me ever so closer to him in recent years. I knew it was surely more than his witty conversation, his easy manner, his quick smile and infectious laugh, his empathy for my problems, or our shared interest in art and the present state of Roger Federer's backhand.

My query led me to read and re-read his poetry. And, it is in those poems that I found the answer I was searching for. For those poems are an open window into Paul's soul and the key to understanding who he was, where he came from, and what he most cherished and valued in life.

While often bittersweet or tinged with loss, the poems about his rural childhood are at base an affirmation of his belief in the essential goodness and beauty of life and the timelessness of place that binds one generation to another.

Reading those poems helped me to understand and appreciate how Paul could, while driving home on a gorgeous spring day, weep at the sight of his favorite redbud in full bloom as he listened to that haunting duet from the Pearl Fishers.

* Professor of Law, *American University Washington College of Law*.

Above all else, what I found so irresistible about Paul was the utter simplicity of his humanity and his seemingly infinite capacity to love—all of which abound in *Seasons of Love*¹—his book of poems written for Jane—his partner, wife, muse, and best friend for half a century.

I know of no man other than Paul who in this jaded age of tweets and twitters could so joyously toil for months on end to produce such a public and poignant love letter to his spouse. Nor have I known another man who after fifty years of marriage was still so passionate about his love for his mate. His marriage to Jane, as Paul has written, was their “brilliant quilt, pieced from the fabric of many journeys. Substantial, varied, washed in the clarity of mountain streams, dried in the freshness of full sunlight.”²

My final words are for you, Paul. Thank you for your steadfast friendship and the affection you always showed me over these many years. And, thank you for the example of your life which taught me that, despite the tragedies that might befall us, life is indeed truly beautiful and should be lived to the fullest.

So, goodbye Dear Friend—Dwell peacefully in the house of the Lord and may you delight his angels—as you have us in this world—with your goodness and your grace.



1. PAUL R. RICE, *SEASONS OF LOVE* (2011).
2. *Id.*

2013]

PAUL R. RICE

9

CLAUDIO GROSSMAN*

We are all here together on a very sad and tragic moment—to honor the memory of our esteemed colleague and friend Paul Rice. As we mourn his passing we are all united by shared feelings and emotions.

We all share a sense of confusion, shock, and disbelief with Paul's abrupt, surprising, unexpected death. It is like when we wake in the morning after a nightmare and we do not yet know if we are still dreaming as we find ourselves in confusion, transitioning from dream to reality. Except in this case the situation is much worse as we discover with horror, when the clouds of confusion dissipate, that the nightmare is the reality of Paul's death and this reality is not a bad dream.

We have suffered the loss of an admirable scholar, professor, colleague, friend, husband, father, and grandfather.

Paul's intellectual contribution is more than impressive. His book *Evidence: Common Law and Federal Rules of Evidence*,¹ his other recently published books *Attorney-Client Privilege in the United States*,² *Attorney-Client Privilege: State Law*,³ and *Electronic Evidence: Law and Practice*⁴ as well as his more than 100 law review, journal, and newspaper articles on various topics of procedure and evidence are compulsory reading and an essential guide for scholars, judges, students and practitioners in the field.

On the rich mosaic of the intellectual creation of our community Paul solidly occupied the doctrinal centerpiece as he sought to explain and decipher norms and principles and their underlying values and policy objectives looking to serve the profession and society at large. Paul had the creativity of a superb artisan working laboriously to capture every detail in the complex field of evidence, with the ambition at the same time of representing the whole. His scholarship—because of his connection with practice and reality—

* Dean, *American University Washington College of Law*.

1. PAUL R. RICE & ROY KATRIEL, *EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE* (2009).

2. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (2012).

3. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE: STATE LAW* (2010).

4. PAUL R. RICE, *ELECTRONIC EVIDENCE: LAW AND PRACTICE* (2005).

has the smell of warm bread and the taste of milk. His attention to detail reminds us of the paintings of Vermeer, where every detail is a work of art by itself—while the totality of the whole—like Vermeer’s painting *Woman with a Pearl Necklace*, is only possible thanks to that exquisite and refined elaboration. Paul’s scholarship was a scholarship of total engagement and commitment. It was incorporated in his life. He talked about it, walked with it, took it on his holidays, to his beloved beach house, and it was certainly omnipresent in the organized chaos of the books spread out in his office.

We lost a scholar, but we lost also a unique professor and teacher.

In thirty-eight years of teaching Paul educated thousands of Washington College of Law students, and nothing captures better his passion and dedication than the testimony of the numerous alumni who, saddened and in shock by his passing, had the need to pay tribute to their professor, sharing their thoughts with us:

- Rishi Bagga, Class of 2006, says Professor Rice’s Evidence class “was the lowest grade I got in law school—but that grade did not matter—I learned more about the law in that Evidence class than [in] any other class I took.”
- Libby Stennes, Class of 1997, called Professor Rice her first legal mentor, saying “he challenged and inspired me to learn more than rules of law. His method of teaching started with intimidation but ultimately nurtured confidence in his students.”
- Zach Zarnow, who just graduated last spring, says Professor Rice “was exacting the way a ruler marks distance—never with malice, never wrong, never without reason An intellectual force and a caring man, he was a scholar and a teacher, revered and somewhat feared, but never unappreciated.”
- Scott Daniel, class of 2009, says “Professor Rice has a well-earned reputation at WCL of being THE toughest professor . . .with the TOUGHEST final exam I am a better litigator because I had Rice for Evidence. With what you taught me, Professor, I CAN do justice. My clients and I give you our greatest thanks”

And we can go on and on as we received an immense outpouring of sorrow by Paul's former students. Their testimonies reverberate with the gratitude we owe to all the great professors who, like Paul, do not restrict themselves to teach only the law but much more: a constant love of learning, passion with discipline while expecting and actually demanding from us to always bring the best of ourselves. As with his scholarship, Paul brought everything to class. He prepared each class as if it were his first one, he brought to each class all his knowledge and intellectual passion and even his family. Jane, as you probably know, you have become a mythical figure for many evidence students—as they have memorized complex rules with examples that carry your name.

Paul also brought everything into friendship. A valid metaphor for it is his warm and affectionate embraces. Perhaps the most important division we can make in the world is between those who embrace other people and those who do not. And Paul and Jane's "abrazos," as we say in Spanish, meaning embraces or hugs, are spontaneous, contagious, and full of sincere affection, sharing in each of them the joy of friendship, of being alive, of being together. There was no shortage of hugs from Paul—to congratulate you for a publication, for the birth of a grandchild, for a birthday, for the absence of a birthday. Paul's vision of friendship, like everything he did, was unlimited, unconditional, and loyal. Paul would drop by and say, "come on, we're going for lunch." The rest, the pressures of work, the complexities and struggles of administration disappeared in those luncheons and were substituted by a magical parenthesis filled with the meaning of the things that really matter. In my view the local DeCarlo's restaurant also underwent a magic transformation by Paul's presence because he brought life and renaissance to us all. I will propose to DeCarlo's that to memorialize Paul's work, the restaurant create the Paul Rice menu: rigatoni without forgetting the glass of white wine.

To memorialize his immense contributions and personality we, the Washington College of Law, created the Paul Rice Scholarship in Evidence. This will allow our community to have an annual event in his memory and continue to be inspired by his example.

Dear colleagues and friends, we have lost a scholar, a professor of generations, an invaluable friend, an exemplary husband, father and grandfather. Like beautiful music, however, the end of a performance is only a beginning, as the music continues to resonate within us and becomes part of ourselves—and in the most surprising moments surfaces and puts a smile on our face, incorporates beauty

in our lives, invites us to follow it with a touch of our hand, with a move of our foot. Paul's melody will continue to inspire all of us, his family, friends, our community. As we are saddened, we should be grateful to have been invited to listen and enjoy Paul's melodious, contagious, and vibrant music.

To put it in Paul's own words, with the strength of the poetry rooted in his own life experiences:

*Past occurrences . . . like fine wines, improve with age. As time's experiences provide previously unknown details.*⁵

I will stop here. I will stop because if my dear friend Paul were in the audience today, he would already be raising his hands saying, "Okay, Grossman, call the question. Cut to the chase!"

And I know, as I've known for thirty years, that it is better to follow Paul's advice.



5. PAUL R. RICE, SEASONS OF LOVE (2011).

2013]

PAUL R. RICE

13

GEOFFREY C. HAZARD, JR. *

UNITED STATES V. AT&T

Paul Rice and I met upon being appointed as co-Special Masters to supervise discovery in a major antitrust case, *United States v. AT&T Co.*¹

The suit was a Government civil action seeking an injunction to break up AT&T, contending that the company was restraining telecommunications through its near-monopoly of the telephone business. At the time, AT&T had something over 90% of local telephony and a similar or greater share of long-distance and international telephone communication. (This was before development of email.) AT&T's strong position rested on its competency in business and in technology—it was the parent of Bell Telephone Laboratories, the famous research center—and as well its position as a public utility. AT&T was entrenched in state utility regulation as the primary provider of telecommunications, and was similarly established with the Federal Communications Commission.

Since the Government proceeding was civil, there would be discovery under the provisions of the Federal Rules of Civil Procedure. Given the size and complexity of AT&T, it was obvious that discovery sought by the Government would be correspondingly massive and complicated. At the same time, AT&T had extensive contractual and working relationships with the Federal Government. These included providing state-of-the-art telecommunications for the Department of Defense and (as I recall) the State Department, and cooperation with the FBI, NSA and other federal intelligence agencies. As defendant, AT&T had the right of counter-discovery afforded by the Federal Rules. Given the size and complexity of AT&T's relations with the Government, its defense discovery would be similarly massive and complicated.

SPECIAL MASTERS

The magnitude of discovery in the case was of course immediately appreciated by the court and counsel. It was recognized that there would be many difficult issues concerning claims of privilege on both

* Emeritus Professor of Law, *University of Pennsylvania Law School*.

1. 86 F.R.D. 603 (D.D.C. 1979).

sides—attorney-client, work-product, and national security. There also might be Executive Privilege claimed by the Government. It was recognized that if the Court undertook to address these directly, it would require large amounts of the time of the District Judge or a Magistrate Judge, radically reducing the attention that could be given to other cases. (The Federal District Courts, then as now, operated on the individual calendar system, so that other new cases would keep coming to whichever judge had the case.)

An obvious possibility was appointment of a special master under FRCP 53. I understand this possibility was initially advanced by counsel for AT&T and that I was suggested as appointee. I recall that the Department of Justice rejected this possibility but that, after further deliberation, agreed to such an arrangement if there was a co-appointment of someone agreeable to the Government. That turned out to be Paul Rice.

Paul and I had not met, although we had heard of each other. I soon came to appreciate that he was a quick study, that he had a fair-minded view of things, and that he was very diligent. We had some idea of the magnitude of the problem, but soon came to understand its deeper complexities.

The established procedure for claiming privilege under the Federal Rules involved document-by-document consideration. Under that procedure, a claim of privilege required the claimant to identify a specific document; state the privilege being claimed; await an objection by the opposing party, which would have to address the specific document with specific legal argument; tender a responsive legal memo; and prepare to argue the specific case. A moment's reflection revealed that in the AT&T case this established procedure would quickly get bogged down.

RESTATEMENT OF THE LAW OF PRIVILEGE

Aside from the huge number of documents to which privilege claims might apply, the rules that would govern the claims were in many respects unclear. They were laid down mostly in decisional law, not statute or rules such as the FRCP. Notably, Rule 502(g) of the Federal Rules of Evidence, then as now, simply referred outward to “applicable law.” Rule 502(g) provides:

“attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communication; and
“work product protection” means the protection that applicable

law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.²

This formulation gave no suggestion as to the content of “applicable law.” Moreover, the precedents reflected deep ambivalence about the concept of privilege itself. Some decisions emphasized the historic right of privacy embodied in the concept of privilege. Other decisions emphasized that privileges obstructed access to truth. The ambivalence was fundamental: Whatever the interpretation of the “applicable law” of privilege might be, its terms would suppress important evidence. Argument over application of applicable law would be tedious and repetitious. Was there an approach to claims of privilege that would work more expeditiously than the traditional procedure?

I can’t remember how a short-cut was suggested, but it exists in a permanent record: a set of codified rules to which counsel would refer in asserting privilege. These rules are set forth in *Guidelines for Claims of Privilege, United States v. American Telephone & Telegraph Co.*³

The rules were called “guidelines” to indicate that they were strongly admonitory or advisory but not preemptive. In their length and detail they resembled a Restatement similar to the format of the American Law Institute *Restatements*: “Black letter” statements, some Comments, and extensive citations to decisions. They were extensive, running from page 603 to page 653 in Federal Rules Decisions.

This code of rules was worked out chiefly by counsel on both sides, with involvement of Paul and me. Establishing the code is a testament to the professional competence and integrity of the lawyers. Achieving it was made somewhat easier by the circumstance that most of the rules—certainly the attorney-client and work-product rules—would work for and against both sides. They were approved by Judge Harold Greene on June 1, 1979.

The task of determining privileges was conducted in the framework of these rules. The task was completed expeditiously and, as I understand, to the satisfaction of all concerned. I came to appreciate Paul Rice accordingly.

PAUL RICE AS A JETHRO

The term “Jethro” signifies someone acting as an assistant judge, and by extension, to everyone serving in a judicial capacity. The term comes from the Hebrew Bible (Old Testament in Christian

2. FED. R. EVID. 502(g)(1)-(2).

3. 86 F.R.D. 603 (1980).

terminology), and responds to the problem that, while God had laid down the rules—the Ten Commandments and so on—there were persistent problems of interpretation. Accordingly:

Moses sat to judge the people: and the people stood by . . . from the morning unto the evening.

[Jethro,] Moses' father in law said, What is this thing that thou doest to the people? . . . [A]ll the people stand by

Thou wilt surely wear away

[Jethro then said,] [P]rovide out of all the people able men, such as fear God, men of truth, hating covetousness

And let them judge the people⁴

This classic statement of judicial integrity applies to Paul Rice: a man of truth, hating covetousness, and as far as I know, God-fearing. Paul fully qualified as a Jethro in the estimate of the litigants in *United States v. AT&T*. He demonstrated it in his subsequent performances as special master in other complicated cases and as arbitrator in the years since. He had an unsurpassed reputation as a straight-shooter among his colleagues at American University. His intellectual integrity is reflected in his treatises: *The Attorney-Client Privilege in the United States*;⁵ *Electronic Evidence Law and Practice*,⁶ and *Evidence: Common Law and Federal Rules of Evidence*.⁷

We miss him.



4. *Exodus* 18:13–22

5. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (2012).

6. Paul R. Rice, *ELECTRONIC EVIDENCE: LAW AND PRACTICE* (2005).

7. PAUL R. RICE & ROY KATRIEL, *EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE* (2009).

2013]

PAUL R. RICE

17

WILLIAM M. JANSSEN*

I remember my father's curious surprise upon discovering, one day, that he had reached the age of passing—when family, friends, and colleagues who have formed such an irreplaceable part of the fabric of your life begin to leave you with the regularity of a metronome. Bespeckled with a pair of easily lost (but easily replaced) Wal-Mart reading glasses, sitting in his “Dad”-only padded chair in our den, his early-evening tour of the daily newspaper would include a run through the Obituaries, as if dreading the inevitable appearance of some new and unexpected name on his own personal list of loved-and-left. My sense then, as a youngster, was the oddness of the resignation with which my father seemed to accept this time in his life, and my own instinctual unwillingness to dwell on the whole business any longer than his comments would hold me there. No matter what else was happening in our den at the moment—football play, M*A*S*H episode, or Atari match—I would reflexively find the need to head off to the kitchen for a snack (and a reprieve).

As I grow older, my father's sense of resignation now seems less a surrender and more an epiphany. Poems and sonnets and short stories and novels and bumper-stickers and Hallmark cards and cave paintings have, throughout recorded time, urged upon all humankind a common message: that departing this life is no idle threat but a burning reminder. You don't have long. There is an end. And it is closer to you today than it was yesterday. Rush. Act. Time is running out. Squander nothing, least of all, time.

Life is a gift that we are given on loan, with the non-negotiable condition that it be surrendered back upon demand. Those who live life well, it seems to me, see life as just that: a temporary, returnable gift to be treasured and enjoyed and exhausted with passion and joy, as with all other special gifts. It is the path of Paul Rice's life.

I knew Professor Rice as a law student in his evidence class in the fall of 1984. He had, even then, a reputation as a demanding classroom presence, where a Socratic “pass” could get a guy killed, where Rules were expected to be at the ready for instant recitation on command, and where the class period would roar by with your

* Professor of Law, *Charleston School of Law*.

dominant hand (in the pre-laptop era) aching from speedwriting. Good days were when someone else got grilled, though you sweated even those because you could have been next. Class was edgy. We were all nervous. The teacher knew evidence like a great preacher knew the Bible, ready to incant a stanza (or a FRE subpart or case decision) with the ferocity of a true believer. It was an unnerving experience, and we were all motivated. And prepared. To learn. And we did.

As a classroom educator, Professor Rice's wisdom-imparting secret was, in part, the unsettled nature of the classroom dynamic he cultivated. With the basest of incentives (fear), he motivated his students to put in the time and focus necessary to learn the byzantine tangle of evidence principles that would feature so prominently in many of our careers to come. Because evidence doesn't quite have the flair of constitutional law or torts (but a bit more the drone of the U.C.C. and intestacy rules), Professor Rice devised his Socratic back-and-forth to create the very animation the content often lacked. Early on, the semester would be intimidating.

Within a month or so, though, now acclimatized as we had become to the vigor of the course pace, Professor Rice's classroom approach shifted a bit. Cases, rules, and incanted principles got questioned, or challenged, or downright ridiculed. The blind stability of precedent was rejected, even mocked, as Professor Rice urged on his classroom to appreciate the "better" view, the "sounder" approach. In the wreckage of a legal holding he would have utterly disemboweled before us in an impassioned (but astonishingly fluent and coherent) rant, Professor Rice's classroom became a laboratory. His students were challenged, early and often, to reject the "because-they-said-so" deference to the current state of the law, and to appreciate that we budding lawyers had a higher calling. Conceiving a Rule of Evidence as not just "wrong" but "stupid," "idiotic," and "crap" was liberating and empowering to us students, especially when we were armed with his inexorable logic. There might be a role for even us to play in fixing the law.

By the time the final exam approached, most of us were back to just plain "fear" again, as Professor Rice would have found an opportunity or two to remind us that failing the course might actually be an even-money bet. But as the pre-exam outline started to come together, the sense of discovery of what we had learned seemed a bit more profound than in our other classes. We had learned the black letter law to be sure, but we also seemed to have oddly and unexpectedly acquired a very sophisticated understanding of

2013]

PAUL R. RICE

19

animating principles, deeper policy objectives, and applied uses for that black letter law. The learning that Professor Rice had facilitated—or, perhaps, commandeered—was stronger because of how it was learned.

Years later, I came to appreciate how little anything that happened in Professor Rice's classroom was accidental. He had developed and honed, through great time and immense effort, an approach that worked to promote the learning his students needed to succeed in their careers. The paths, the detours, the challenges to precedent, even the rants were crafted carefully, and warmly so—with his students' best interests in mind. There was very little randomness in his plan. What the classroom represented to Professor Rice was a canvas, with each discussion a brushstroke to be evaluated and considered. There was a lot of work put into each class. He had a plan for everything.

As an independent study student with Professor Rice a bit later, I came to see another side of him, one we only glimpsed in larger classes. His intellect was just as intense and probing, his expectations were colossal, and his tolerance for imprecise work (or thinking) was low. But his kindness and generosity were very nearly boundless. For a man who seemed to chart carefully each moment of his planned day, Professor Rice would generously donate an unexpected forty-five minutes to a student who dropped in for a heart-to-heart conversation about professional options, career, or just life. I recall few conversations with Professor Rice that didn't end with a warm smile and an encouraging word. He would open his home, his dining room table, and his family to his students with a remarkable gentleness. In truth, there seemed to be very little that he would refuse to do for a student.²⁴ Save one. He never let you fully relax. There was a constant urgency to his encounters with you, as though we were all in a rush.

Of course, we all were. The future came quickly. Before long, we were lawyers, and the expectations of practice excellence fell instantly upon us. We didn't need outlines then, or casebooks, or class

24. Buried deep in a box of law school stuff I rediscovered during a recent move, I found a letter Professor Rice had sent to let me know he had finished writing and mailing letters of recommendation for a special judicial clerkship I was seeking. His letter to me was quintessential Professor Rice:

Dear Bill: Mine are out. I laid it on thick in them. In fact, the truth became so thin I had to go to confession after they were written. Some day you're going to have to get a real job. In the interim, I wish you the best of luck in your most recent efforts to avoid the inevitable. I wish I had the opportunity that you may be getting.

notes. We needed to know the Rules and how to find them. We needed to know how to argue them in a courtroom, with a barking opponent and an angry judge. We needed to be ready. We needed to have learned.

Professor Rice was always in a hurry. I have no memory of him ever ambling down a hallway at WCL. He would stop and have a relaxed conversation with any student or colleague, but then he'd be off and at pace. He set for himself a rigorous tennis regime, and a numbingly formidable scholarly agenda. I have since learned he skied with passion, but only after checking for new attorney-client privilege cases while munching on his breakfast. He seems to have been incredibly generous with new faculty arrivals to his law school, but also had time to become a renown special master on boundary-pressing evidence disputes. He was transparently devoted to his wife and children, and wore that fact with a badge of special honor in front of his students (also a lesson). Few students whom I knew failed to grasp that Professor Rice was always, thoroughly, and enthusiastically on our side. He was rooting for us all, and that, too, was empowering.

In the astonishingly prolific scholarship he produced, in the intensity of the classroom experience he crafted, in the recognition he earned from judges and lawyers, in the depth of his devotion to all his students, in the passionate affection he showed to his family and his friends, and in the sprawling legacy he leaves behind, Professor Rice was proven right. There wasn't time to waste or to dally. There's life to live, and every moment to cherish. It is his final lesson. I pray I can remember it.