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## The Federal Rules of Evidence in the States: A Ten-Year Perspective

L. Kinvin Wroth

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1985]

**THE FEDERAL RULES OF EVIDENCE IN THE STATES:  
A TEN-YEAR PERSPECTIVE**

L. KINVIN WROTH†

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## I. INTRODUCTION

JULY 1, 1985, marked the tenth anniversary of the Federal Rules of Evidence.<sup>1</sup> This anniversary seems an appropriate occasion upon which to measure the impact of those rules on the law of evidence in the states and to comment on the form and process of their adoption.

Ironically, the impetus and the sources for the Federal Rules came from efforts originally designed to make uniform the state law of evidence. The American Law Institute's Model Code of Evidence, adopted in 1942,<sup>2</sup> and the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws, adopted in 1953,<sup>3</sup> had been developed primarily to provide model legislation for state adoption.<sup>4</sup> By 1961, when the Judicial Conference of the United States recommended the preliminary study that was to lead in fourteen years to the adoption of the Federal Rules,<sup>5</sup> neither of those two earlier codes had been adopted in any jurisdiction. The Model Code ultimately found no takers, and the 1953 Uniform Rules were adopted only in Kansas, (the home state of the drafting committee's chairman), New Jersey, and Utah.<sup>6</sup>

1. The bill adopting the Federal Rules of Evidence, H.R. 5463, 93d Cong., 1st Sess. (1973), was signed into law by President Gerald Ford on January 2, 1975. Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified at 28 U.S.C. app. 678 (1982)). The Federal Rules became effective on January 1, 1975. *Id.* For a legislative history of the Federal Rules, see generally S. REP. NO. 1277, 93d Cong., 2d Sess. 4-6, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7051-52. See also *infra* note 19.

2. MODEL CODE OF EVIDENCE (1942), reprinted in 1 J. BAILEY & O. TRELLES, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, DOC. 1 (1980).

3. UNIF. R. EVID. (1953), reprinted in 1 J. BAILEY & O. TRELLES, *supra* note 2, DOC. 2.

4. For the antecedents and history of the 1942 Model Code and of the 1953 Uniform Rules, see 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 77-92 (1977).

5. See PROCEEDINGS OF THE 1961 JUDICIAL CONFERENCE OF THE UNITED STATES 31 (1962). For a discussion of the initial stages in the history of the Federal Rules, see 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 92-100.

6. The chairman of the drafting committee was Spencer A. Gard of Iola, Kansas. 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 89. See also Gard, *Kansas Law and the New Uniform Rules of Evidence*, 2 U. KAN. L. REV. 333 (1954). The 1953 Uniform Rules were adopted by Kansas in 1963. Revision of Code of Civil Procedure, ch. 303, 1963 Kan. Sess. Laws 601 (codified at KAN. STAT. ANN. §§ 60-401 to -472 (1984)). New Jersey subsequently adopted the Uniform Rules in 1967. Order, N.J. Supreme Ct. (June 6, 1967) (codified at N.J. STAT. ANN. § 2A:84A, Uniform Rules of Evidence, Rules 1-32 (West 1984)). In Utah, after initial rejection in 1959, the Uniform Rules were adopted by the Utah Supreme Court in 1971. Order, Utah Supreme Ct. (Feb. 17, 1971). See UTAH R. EVID. 1-74, 9B UTAH CODE ANN. (1977). California in 1965 adopted its own evidence

The effort to develop federal rules of evidence, beginning with the 1962 Preliminary Study<sup>7</sup> and the appointment of the Advisory Committee in 1965,<sup>8</sup> created an intense focal point for proponents of evidence codification and reform. The Advisory Committee's Preliminary Draft<sup>9</sup> and Revised Draft<sup>10</sup> were the subject of widespread informal and formal comment from the practicing bar as well as the academic world,<sup>11</sup> where overnight these drafts superseded the Model Code and 1953 Uniform Rules as teaching tools and research objects. In a number of states where successful adaptation of the Federal Rules of Civil and Criminal Procedure made it a natural step, drafting projects to prepare state rules on the federal model were under way even before the Supreme Court's November 1972 promulgation of the Federal Rules of Evidence.<sup>12</sup> Indeed, Nevada's rules were

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code, which was in some respects based on the 1953 Uniform Rules. Evidence Code, ch. 299, 1964-1965 Cal. Stat. 1297 (codified at CAL. EVID. CODE §§ 1-1605 (West 1966 & Supp. 1985)). See UNIF. R. EVID. commissioners' prefatory note (1974), 13 U.L.A. 209, 212-13 (1980) [hereinafter cited as Prefatory Note]. See generally 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 91-92.

7. Committee on Rules of Practice and Procedure, U.S. Judicial Conference, *Rules of Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (1962). See also 1 J. BAILEY & O. TRELLES, *supra* note 2, Doc. 4.

8. The Advisory Committee, appointed in March 1965, was composed of 15 judges, lawyers, and law professors. See 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 98-99.

9. *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161 (1969) [hereinafter cited as *Preliminary Draft*]. See also 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 100-01; 2 J. BAILEY & O. TRELLES, *supra* note 2, Doc. 5.

10. *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315 (1971) [hereinafter cited as *Revised Draft*]. See also 2 J. BAILEY & O. TRELLES, *supra* note 2, Doc. 6. A further revision of the Revised Draft was transmitted to the Judicial Conference and approved by it for transmittal to the Supreme Court in October, 1971. The revision was never published officially. See 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 101-03.

11. See, e.g., Fornoff, *Presumptions—The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401 (1971); McNichols, *Some Random Thoughts on the Proposed Federal Rules of Evidence*, 7 IDAHO L. REV. 187 (1970); Powell & Burns, *Discussion of the New Federal Rules of Evidence*, 8 GONZ. L. REV. 1 (1972); *Proposed Rules of Evidence by the United States District Courts and Magistrates—a Panel*, 37 INS. COUNS. J. 565 (1970); Schwartz, *The Proposed Federal Rules of Evidence: An Introduction and Critique*, 38 U. CIN. L. REV. 449 (1969); *Symposium: Proposed Federal Rules of Evidence, 1969 LAW & SOC. ORD.* 509; Tone, *The Federal Rules of Evidence*, 54 CHI. B. REC. 307 (1973).

12. *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (1972) [hereinafter cited as *Supreme Court Draft*]. See also 2 J. BAILEY & O. TRELLES, *supra* note 2, Doc. 7. On November 20, 1972, the Supreme Court promulgated the Federal Rules of Evidence pursuant to the various enabling acts in the United States Code. See 28 U.S.C. §§ 2072, 2075 (1982). The Federal Rules were to take effect on July 1, 1973. *Supreme Court Draft, supra*, at 184.

adopted in 1971<sup>13</sup> on the basis of the Preliminary Draft.<sup>14</sup> New Mexico<sup>15</sup> and Wisconsin,<sup>16</sup> in 1973 and 1974 respectively, adopted rules based on the Supreme Court's 1972 promulgation,<sup>17</sup> undeterred by the fact that in the spring of 1973 Congress had suspended the effective date of the Supreme Court's rules<sup>18</sup> and was actively engaged in the preparation of a legislative version.<sup>19</sup>

Congressional action brought only a temporary halt to state efforts. In 1974, while Congress was still at work, the National Conference had produced a new set of Uniform Rules<sup>20</sup> based on the federal model.<sup>21</sup> Within three years after the 1975 enactment of the Federal Rules in their final form, eleven more states had

13. Act of April 22, 1971, ch. 402, 1971 Nev. Stat. 775 (codified at NEV. REV. STAT. §§ 47.020-56.020 (1979)).

14. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE T-1 (Supp. 1985) [hereinafter cited as WEINSTEIN'S EVIDENCE].

15. Order, New Mexico Supreme Ct. (April 26, 1973) (codified at N.M. STAT. ANN. §§ 20-4.101 to -4.1102 (1973) (amended 1976)). New Mexico subsequently amended its rules, effective April 1, 1976, to conform to the changes made by Congress. See N.M. R. EVID. 101-1102.

16. Order, Wisconsin Supreme Ct. (April 16, 1973) (codified at WIS. STAT. ANN. §§ 901.01-911.02 (West 1975 & Supp. 1985)).

17. See 1 WEINSTEIN'S EVIDENCE, *supra* note 14, at T-1.

18. On February 5, 1973, Chief Justice Warren Burger, acting pursuant to the Supreme Court order of November 20, 1972, transmitted the proposed rules to Congress. S. REP. NO. 1277, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7052. Congress responded by enacting a law to insure that the legislators would have a "full opportunity" to review the proposed rules. See Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973). The law deferred the effectiveness of the Federal Rules until expressly approved by Congress. *Id.* For a discussion of the circumstances occasioning the delay of enactment, see *infra* note 124 and accompanying text. See also 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 104-07.

19. The legislative embodiment of the proposed rules, H.R. 5463, was reported out by the Subcommittee on Criminal Justice of the House Judiciary Committee in November 1973, accompanied by House Report 93-650, and sent on to the Senate with minor amendments in February 1974. A Senate version of H.R. 5463, with substantial amendments, was reported out in October 1974, accompanied by Senate Report 93-1277, and passed by the Senate in November. The resulting Conference Report, Number 93-1597, was adopted by both houses in December. See 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 107-08. The bill eventually was signed into law. See *supra* note 1. The Judicial Conference noted that H.R. 5463 incorporated "some of the rules of evidence as prescribed by the Supreme Court, together with many changes made by the House of Representatives." PROCEEDINGS OF THE 1974 JUDICIAL CONFERENCE OF THE UNITED STATES 61 (1975) (emphasis added).

20. UNIF. R. EVID. (1974).

21. Prefatory Note, *supra* note 6, 13 U.L.A. at 212-13. The National Conference of Commissioners on Uniform State Laws joined with the American Bar Association in approving the new set of Uniform Rules, which supersede and differ significantly from the 1953 Uniform Rules. 1 WEINSTEIN'S EVIDENCE, *supra* note 14, at T-3.

adopted rules of evidence derived from either the Federal Rules or the 1974 Uniform Rules, bringing the total number of "rules states" to fourteen.<sup>22</sup> In the seven succeeding years, sixteen more states have followed the same lead,<sup>23</sup> with the most recent adherent, New Hampshire, adopting rules of evidence on January 18, 1985, to be effective July 1, 1985.<sup>24</sup> Thus, there are now thirty rules states. In addition, the Federal Rules have been adopted in Puerto Rico<sup>25</sup> and by federal executive order<sup>26</sup> for use in courts martial.<sup>27</sup> Rules legislation or promulgation proposals are pending or under study in a number of other states at this time.<sup>28</sup> Only the high courts of Massachusetts<sup>29</sup> and Illinois<sup>30</sup> have ultimately declined to promulgate rules, although there have been delays

22. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rules 101-1103 (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence (1979 & Supp. 1985); ME. R. EVID. 101-1102; MICH. R. EVID. 101-1102; MINN. R. EVID. 101-1101; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rules 100-1008 (1985); NEB. REV. STAT. §§ 27-101 to -1103 (1979); N.D.R. EVID. 101-1103; OKLA. STAT. ANN. tit. 12, §§ 2101-3103 (West 1980); S.D. CODIFIED LAWS ANN. §§ 19-9-1 to -18-8 (1979); WYO. R. EVID. 101-1104.

23. See ALASKA R. EVID. 101-1101; COLO. R. EVID. 101-1103; DEL. UNIF. R. EVID. 101-1102; FLA. STAT. ANN. §§ 90.101-90.958 (West Supp. 1985); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rules 100-1102 (Special Pamphlet 1980); IDAHO R. EVID. 101-1103; IOWA R. EVID. 101-1103; N.H. R. EVID. 100-1103; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rules 101-1102 (1985); OHIO R. EVID. 101-1103; OR. REV. STAT. §§ 40.010-40.585 (1983); TEX. R. EVID. 101-1008; UTAH R. EVID. 101-1103; VT. R. EVID. 101-1103; WASH. R. EVID. 101-1103; W. VA. R. EVID. 101-1102.

In addition to the states following the Federal Rules or the 1974 Uniform Rules, Kansas and New Jersey currently still follow the 1953 Uniform Rules and California retains its unique evidence code. See *supra* note 6.

24. Order, *New Hampshire Supreme Ct. (effective July 1, 1985)*. See N.H. R. EVID. 101-1103.

25. P.R. LAWS ANN. tit. 32, app. IV Rules of Evidence, Rules 1-84 (1983).

26. Exec. Order No. 12,198, amended by Exec. Order No. 12,233, 45 Fed. Reg. 16,932 (1980).

27. MILITARY R. EVID. 101-1103.

28. New York, for example, is reviewing a Proposed Code of Evidence that follows the present version of the Federal Rules. The Law Revision Commission submitted its finally approved version to the New York legislature in 1982. 1 WEINSTEIN'S EVIDENCE, *supra* note 14, at T-4. Other states, including New Jersey and Rhode Island, have established committees to consider adopting the Federal Rules. *Id.*

29. Massachusetts developed a proposed set of rules but has thus far declined to adopt them. The justices of the Supreme Judicial Court of Massachusetts, in an announcement concerning the proposal, concluded that "promulgation of rules of evidence would tend to restrict the development of common law principles pertaining to the admissibility of evidence." Announcement of Supreme Judicial Court Concerning Proposed Massachusetts Rules of Evidence (Dec. 30, 1982), reprinted in 1982 Fed. R. Evid. Serv. Tables Mass-1 (Callaghan) (state correlation tables).

30. See 21 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5007 n.12.

and problems in other states such as Vermont<sup>31</sup> and Ohio.<sup>32</sup> The Uniform Law Conference of Canada in 1981 adopted a Uniform Evidence Act<sup>33</sup> with many similarities to the Federal Rules, and codification is under study in Australia.<sup>34</sup>

The impact of the Federal Rules has gone beyond the states where they have been adopted. In Vermont, between the 1977 publication of the Tentative Draft Rules of Evidence and the promulgation of the Vermont Rules in 1982, the Federal Rules or the Tentative Draft were cited as authority in nearly thirty cases.<sup>35</sup> The courts of Illinois,<sup>36</sup> Kentucky,<sup>37</sup> and Tennessee<sup>38</sup> are among those which have adopted specific provisions of the Federal Rules as common-law articulations of the law of evidence. And the Supreme Judicial Court of Massachusetts, in its order declining to adopt proposed rules, invited parties to cite them in briefs and memoranda.<sup>39</sup>

A principal purpose ascribed to the adoption of the Federal Rules in the states has been the attainment of uniformity, both between the federal and the state courts and among the states. Part II of this paper assesses the degree of uniformity that has in fact been attained in the past ten years and the value of that uniformity. As the federal experience illustrates, adoption of rules of evidence raises issues of judicial and legislative power that have

31. See *Foreword* to VT. STAT. ANN. Rules of Evidence, at xiii-xvii (1983).

32. For a discussion of the legislative battles fought over the adoption of the Ohio Rules of Evidence, see Blakey, *A Short Introduction to the Ohio Rules of Evidence*, 10 CAP. U.L. REV. 237, 241 (1980).

33. See REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM EVIDENCE (Carswell 1982). The report was the basis for Bill S-33, the proposed Canada Evidence Act, which is currently under consideration by the Canadian Parliament. For a discussion of the Proposed Canada Evidence Act, see Paciocco, *The Proposed Canada Evidence Act and the "Wray Formula": Perpetuating an Inadequate Discretion*, 29 MCGILL L.J. 141 (1983).

34. See, e.g., AUSTRALIAN LAW REFORM COMM'N, ISSUES PAPER NO. 3, REFORM OF EVIDENCE LAW (1980); P. SALLMAN, CRIMINAL JUSTICE IN AUSTRALIA 19 (1984).

35. See, e.g., *State v. Patnaude*, 140 Vt. 361, 370, 438 A.2d 402, 405 (1981) (citing FED. R. EVID. 401); *State v. Roy*, 140 Vt. 219, 226, 436 A.2d 1090, 1093 (1981) (citing FED. R. EVID. 801(d)(1)(B)). See also *Foreword* to VT. STAT. ANN. Rules of Evidence, at xiv (1983).

36. See, e.g., *Wilson v. Clark*, 84 Ill.2d 186, 193-96, 417 N.E.2d 1322, 1326-27 (adopting FED. R. EVID. 703, 705), *cert. denied*, 454 U.S. 836 (1981).

37. See, e.g., *Crawley v. Commonwealth*, 568 S.W.2d 927 (Ky. 1978) (adopting FED. R. EVID. 804(b)(3)), *cert. denied*, 439 U.S. 1119.

38. See, e.g., *State v. Morgan*, 541 S.W.2d 385 (Tenn. 1976) (adopting FED. R. EVID. 609(a)).

39. Announcement of Supreme Judicial Court of Massachusetts Concerning Proposed Massachusetts Rules of Evidence, *supra* note 29. See Comment, *Evidence—Prior Criminal Conviction*, 70 MASS. L. REV. 44, 44, n.11 (1985).



on occasion led to conflict between the two branches of government. Part III of the paper examines the respective merits of judicial and legislative adoption and reviews the issues of constitutional power involved. Part IV offers rulemaking guidelines designed to eliminate conflict in states which have not yet adopted rules of evidence.

## II. UNIFORMITY

Uniformity in federal and state rules of evidence has two main advantages: (1) it allows lawyers who practice in both state and federal court, or who have clients in more than one state, to master only one basic set of rules, and (2) it provides practitioners and scholars alike ready access to a single nationwide body of authority and commentary.<sup>40</sup> To be effective, however, uniformity need not mean a literal and total uniformity of language and format among the states or between the states and the federal courts.

The process of state adoption in fact has resulted in numerous and wide variations on both levels. A quick survey of the admirable tabular summary of state rules in *Weinstein's Evidence*<sup>41</sup> indicates that in fifty of the seventy-seven rules originally promulgated by the Supreme Court in 1972, one or more of the states has adopted a variation that is more than a minor technical word change. A similar hasty scrutiny of the state correlation tables in Callaghan & Company's *Federal Rules of Evidence Service*<sup>42</sup> reveals that only one of the twenty-eight states tabulated in the current version has fewer than ten substantial variations from the Federal Rules and most have many more.<sup>43</sup>

### A. *Reasons for State-Federal Variations*

There are at least five reasons that have led to variation between the Federal Rules and state adaptations. The opportunity for such variation is of course greatly enhanced and encouraged because state rulemakers have before them in the various Supreme Court and congressional drafts six published versions of

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40. See MCKUSICK, *State Courts' Interest in Federal Rulemaking: A Proposal for Recognition*, 36 ME. L. REV. 253, 254-55 (1984).

41. 1 WEINSTEIN'S EVIDENCE, *supra* note 14, at T-1 to 246.

42. 1984 Fed. R. Evid. Serv. (Callaghan) (state correlation tables).

43. The one state with fewer than ten substantial variations from the Federal Rules is Utah, with five. See UTAH R. EVID. 101-1103. Two states, Idaho and West Virginia, are not yet included in the tables.

the Federal Rules,<sup>44</sup> as well as the 1974 Uniform Rules. Even though most of the state rules purport to be based on the Federal Rules as enacted by Congress in 1975, some avowedly are based on earlier drafts or the Uniform Rules and there are many examples of individual state rules taken from one of the earlier versions.<sup>45</sup> Thus, a drafter might be lured into adopting one of the types of variations discussed below by the availability of alternative models, or the drafter who sought to vary the federal model for local reasons would find appropriate language readily at hand.

### 1. *Minor Technical and Verbal Variations*

Minor variations have a number of causes. Some variation between federal and state tests is inevitable because of institutional differences. Plainly, state rules must refer in appropriate local terminology to the state constitution, laws, and court structure in provisions where the federal equivalents are mentioned.<sup>46</sup> In addition, some state drafters, by preference or under legal compulsion, have varied the federal model in the interest of employing gender-neutral language.<sup>47</sup> Finally, every drafter knows the feeling of wanting to “say it better.” There are numerous variations of language that can only be accounted for as instances of intended stylistic improvement.<sup>48</sup>

### 2. *Traditional State Practice*

Many of the significant variations with the Federal Rules are efforts by a state to preserve what is perceived as a traditional state practice—whether a theoretical concept such as the Morgan theory of presumptions,<sup>49</sup> or a rule of practice, such as the scope of cross-examination.<sup>50</sup>

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44. For citations to the six published versions, see *supra* notes 9, 10, 12 & 19.

45. Nevada’s rules, for example, are based on the Preliminary Draft of the Federal Rules. See NEV. REV. STAT. §§ 47.020-56.020 (1979). Arkansas’ rules are based on the 1974 Uniform Rules. See ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rules 102-1102 (1979 & Supp. 1985). For examples of individual rule variations, see ME. R. EVID. 406; S.D. CODIFIED LAWS ANN. §§ 19-14-21 to -14-23 (1979); VT. R. EVID. 601(a).

46. Compare ME. R. EVID. 402 with FED. R. EVID. 402.

47. Compare OR. REV. STAT. § 40.450 (1985) with FED. R. EVID. 801(d)(1), (2).

48. Compare VT. R. EVID. 406 with FED. R. EVID. 406.

49. Compare, e.g., DEL. UNIF. R. EVID. 301 with FED. R. EVID. 301. For a discussion of the theoretical issues, see *infra* text accompanying notes 67-69.

50. Compare, e.g., N.H. R. EVID. 611(b) with FED. R. EVID. 611(b).

### 3. *Taking Sides*

In some instances, states have declined to follow a controversial provision of the Federal Rules, in effect taking sides in one of the disputes that ran through the whole federal adoption process.<sup>51</sup> Such state positions may be based either on prior state practice or on a fresh look at the issues as illuminated in the federal debates.

### 4. *A Plague on Both Houses*

Some state variants reflect a rejection of all views offered on controversial points in the federal debates in favor of a traditional state rule, an original solution to the problem, or in some cases silence.<sup>52</sup>

### 5. *Breaking New Ground*

Some state rules depart from the Federal Rules in addressing areas the federal drafters did not address, such as judicial notice of law,<sup>53</sup> *res ipsa loquitur*,<sup>54</sup> allocation of burdens,<sup>55</sup> or new rules of privilege.<sup>56</sup>

## B. *A Survey of State Variations*

This section provides a nonexhaustive listing of some of the principal areas of difference between the Federal Rules and those adopted in the states.

### 1. *Rule 201: Judicial Notice of Adjudicative Facts*

Federal rule 201(g)<sup>57</sup> provides that in civil actions the jury is to be instructed to accept judicially noticed facts as conclusive, while in criminal cases the jury is to be instructed "that it may, but is not required to, accept as conclusive any fact judicially noticed."<sup>58</sup> This provision was a major departure from the rule as promulgated by the Supreme Court, under which facts judicially

51. Compare, e.g., ME. R. EVID. 201(g) with FED. R. EVID. 201(g). See also *infra* text accompanying notes 57-60.

52. Compare, e.g., VT. R. EVID. 301; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 302 (Special Pamphlet 1980); and WASH. R. EVID. 301 comment with FED. R. EVID. 301.

53. See *infra* notes 65-66 and accompanying text.

54. See DEL. UNIF. R. EVID. 304.

55. See OR. REV. STAT. § 40.105-40.115 (1985).

56. See *infra* notes 137-48 and accompanying text.

57. FED. R. EVID. 201(g).

58. *Id.*

noticed were to be accepted as conclusive in either type of action.<sup>59</sup> The change was based on a concern that, like the direction of a verdict against the accused, a mandatory instruction on judicial notice would invade the sixth amendment right to a jury trial.<sup>60</sup>

Nineteen of the thirty rules states follow the enacted federal rule on this point,<sup>61</sup> while eight states follow the Supreme Court's version.<sup>62</sup> Two states have not adopted any version of rule 201(g) on the ground that their state constitutions prohibit instructing the jury on matters of fact.<sup>63</sup> The remaining state has adopted a variant version because its evidence code does not apply in criminal actions.<sup>64</sup> A majority of the states has thus followed the federal rule along a path that ignores the traditional purpose and meaning of judicial notice in favor of a policy of deference to the constitutional right to jury trial.

Federal rule 201 contains no provision for judicial notice of law. The Advisory Committee's note indicates that this subject was to be left to the appropriate provisions of the Federal Rules of Civil and Criminal Procedure.<sup>65</sup> Twelve states, either because they lacked such procedural rules or out of a desire to group like things with like, have adopted a separate evidence rule covering

59. *Supreme Court Draft*, *supra* note 12, at 201.

60. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 6-7, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7055, 7080. The House Committee on the Judiciary considered that the rule as promulgated by the Supreme Court, requiring mandatory instruction to the jury in a criminal case to accept as conclusive any fact judicially noticed, was "inappropriate because contrary to the spirit of the sixth amendment right to a jury trial." *Id.*

61. See ALASKA R. EVID. 203(c); COLO. R. EVID. 201(g); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 201(g) (Special Pamphlet 1980); IDAHO R. EVID. 201(g); IOWA R. EVID. 201(g); MICH. R. EVID. 201(f); MINN. R. EVID. 201(g); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 201(g) (1985); NEB. REV. STAT. § 27-201(7) (1979); N.H. R. EVID. 201(g); N.M. R. EVID. 201(g); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rules 201(g) (1980); OHIO R. EVID. 201(g); OKLA. STAT. ANN., tit. 12, § 2202(E) (1980); OR. REV. STAT. § 40.085 (1985); UTAH R. EVID. 201(g); VT. R. EVID. 201(g); W. VA. R. EVID. 201(g); WYO. R. EVID. 201(g).

62. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 201(g) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 201(g) (1979); DEL. UNIF. R. EVID. 201(g); FLA. STAT. ANN. § 90.206 (West Supp. 1985); ME. R. EVID. 201(g); N.D. R. EVID. 201(g); S.D. CODIFIED LAWS ANN. § 19-10-7 (1979); WIS. STAT. ANN. § 902.01(7) (West 1975).

63. See WASH. R. EVID. 201 commentary (citing WASH. CONST. art. IV, § 16; *Hensen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238 (1975)). See also NEV. REV. STAT. § 47.020 legislative subcommittee comment (1979) (citing NEV. CONST. art. 6, § 12).

64. TEX. STAT. ANN. art. 3713 (Vernon Supp. 1985).

65. See FED. R. EVID. 201 advisory committee note on judicial notice of law.

judicial notice of law.<sup>66</sup>

## 2. Rules 301-303: Presumptions

Congress made substantial changes in the presumption provisions of the Supreme Court's 1972 promulgation. Rule 301 as enacted adopted a variant of the so-called Thayer Rule, or "bursting bubble" theory,<sup>67</sup> imposing only the burden of going forward with the evidence upon the party burdened by a presumption. In contrast, the Supreme Court's rule 301 had adopted the Morgan Rule, imposing the burden of persuasion upon the burdened party.<sup>68</sup> The congressional change was based on the view that the Morgan Rule gave too great an effect to most presumptions, which only have the purpose of aiding the trial process by shifting the burden of going forward to the party who has the best access to the facts or the notably less probable side of a common question.<sup>69</sup> The 1974 Uniform Rules followed the Supreme Court in

66. See DEL. UNIF. R. EVID. 202 (1981); FLA. STAT. ANN. § 90.201 (West Supp. 1985); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 202 (Special Pamphlet 1980); MICH. R. EVID. 202; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 202 (1985); Nev. Rev. Stat. § 47.140 (1979); N.H. R. EVID. 201(b); OKLA. STAT. ANN. tit. 12, § 2201 (West 1980); OR. REV. STAT. § 40.085 (1985); WIS. STAT. ANN. §§ 902.02-.03 (West 1979); TEX. R. EVID. 202-203; W. VA. R. EVID. 202.

67. The bursting bubble theory, first propounded by Professor James Bradley Thayer in 1898, postulates that the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If the evidence is produced by the adversary, the presumption is spent and disappears. For a more detailed explanation of the theory, see C. MCCORMICK, MCCORMICK ON EVIDENCE § 344(A) (3d E. Cleary ed. 1984). See also J.B. THAYER, PRELIMINARY TREATISE ON EVIDENCE ch. 8 *passim* (1898).

68. For a more detailed discussion of the Morgan rule, named after Professor Edmund Morgan, one of its leading proponents, see Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937). See also C. MCCORMICK, *supra* note 67, § 344(B).

69. The House Judiciary Committee agreed with the judgment implicit in the Supreme Court's version that the bursting bubble theory gives presumptions too slight an effect. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 7, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7080-81. On the other hand, the committee believed that the rule proposed by the Supreme Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced, "lends too great a force to presumptions." *Id.* Accordingly, the committee amended the rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion. Instead "it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact." *Id.* The Senate Judiciary Committee rejected the "presumption as evidence" approach and left the rule simply as one that followed the Thayer rule in shifting only the burden of production. See S. REP. NO. 1277, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7056. The Senate version was adopted by the Senate-House Conference

adopting the Morgan Rule.

Twelve of the thirty rules states have followed the enacted rule 301 in adopting the Thayer presumption.<sup>70</sup> Eleven states have followed the Supreme Court or uniform rule in incorporating a Morgan presumption in their rule 301.<sup>71</sup> Three have adopted rules in which the effect given to the presumption depends upon the type and purpose of the presumption.<sup>72</sup> Three states adopted no rule concerning the effect of presumptions,<sup>73</sup> and Iowa adopted a presumption rule expressly leaving in effect existing law.<sup>74</sup>

Federal rule 302<sup>75</sup> is a choice-of-law rule providing that in civil actions state law governs the effect of a presumption when state law governs the issue to which the presumed fact is relevant. The 1974 uniform rule 302<sup>76</sup> provides the converse rule for federal claims in state court. Only eight states have adopted the uni-

Committee and enacted. See CONF. REP. NO. 1597, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7099.

70. See ALASKA R. EVID. 301; COLO. R. EVID. 301; IDAHO R. EVID. 301; MICH. R. EVID. 301; MINN. R. EVID. 301; OHIO R. EVID. 301; N.H. R. EVID. 301; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 301 (1985); N.M. R. EVID. 301; S.D. CODIFIED LAWS ANN. § 19-11-1 (1979); VT. R. EVID. 301; W. VA. R. EVID. 301.

71. See ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 301 (1979); DEL. UNIF. R. EVID. 301; ME. R. EVID. 301; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 301 (1985); NEB. REV. STAT. § 27-301 (1979); NEV. REV. STAT. § 47.180 (1979); N.D. R. EVID. 301; OR. REV. STAT. §§ 40.010-40.585 (1985); UTAH R. EVID. 301; WIS. STAT. ANN. § 903.01 (West 1975); WYO. R. EVID. 301. The Montana rule goes a step farther in providing specifically that a presumption is overcome by a preponderance of the evidence. See MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 301 (1985).

72. See FLA. STAT. ANN. § 90.302 (West Supp. 1985); HAWAII REV. STAT. § 626, Rules of Evidence, Rule 302 (Special Pamphlet 1980); OKLA. STAT. ANN. tit. 12, § 2303 (West 1980). The Florida and Hawaii provisions are based upon § 603 and § 605 of the California Evidence Code. See CAL. EVID. CODE §§ 603, 605 (West 1966). The Oklahoma rule is based on rule 14 of the 1953 Uniform Rules, adoption of which Judge Weinstein has criticized as "a draftsman's error." 1 WEINSTEIN'S EVIDENCE, *supra* note 14, at 301-77.

73. See ARIZ. REV. STAT. ANN. Rules of Evidence (Supp. 1985); TEX. R. EVID. 101-1008; WASH. R. EVID. 101-1103.

74. IOWA R. EVID. 301. The Iowa rule provides, "Nothing in these rules shall be deemed to modify or supersede existing law relating to presumptions in civil actions and proceedings." *Id.*

75. FED. R. EVID. 302. The rule was intended to reflect the impact of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), in the area of presumptions. See FED. R. EVID. 302 advisory committee note (citing *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939)). For the view that policy rather than constitutional considerations dictated this choice, see 21 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5132.

76. UNIF. R. EVID. 302 (1974).

form rule.<sup>77</sup> The remaining twenty-two states have no comparable rule.

Two states have added unique provisions concerning specific presumptions. Maine, for example, has added its own rule 302 setting forth the presumption of legitimacy, which imposes a burden of persuasion beyond a reasonable doubt upon the party asserting illegitimacy.<sup>78</sup> Delaware also has added a rule 304, codifying the law of *res ipsa loquitur*.<sup>79</sup> Two other states have incorporated lengthy lists of presumptions in their rules.<sup>80</sup>

Congress did not adopt the Supreme Court's rule 303 covering presumptions in criminal cases. The intention was to leave the subject to resolution in then-pending legislation to revise the federal criminal code.<sup>81</sup> The 1974 uniform rule 303<sup>82</sup> is virtually identical to the rule promulgated by the Supreme Court. Fifteen states have adopted the Supreme Court/uniform rule 303 either verbatim or in effect.<sup>83</sup> Twelve states have adopted no provision

77. See ALASKA R. EVID. 302; ARK. STAT. ANN. § 28-1001, Rule 302 (1979); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 302 (1985); NEB. REV. STAT. § 27-302 (1979); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 302 (1985); N.D. R. EVID. 302; UTAH R. EVID. 302; WYO. R. EVID. 302.

78. ME. R. EVID. 302. The Maine rule provides:

Whenever it is established in an action that a child was born to or conceived by a woman while she was lawfully married, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond a reasonable doubt of such illegitimacy.

*Id.* The Maine advisors' note explains: "Federal Rule 302 deals with the effect of a presumption in a case where state law supplies the rule of decision, typically a diversity of citizenship case. It obviously has no place in a state code of evidence." *Id.* advisors' note.

79. DEL. UNIF. R. EVID. 304 (1981).

80. HAWAII REV. STAT. § 626-1, Rules of Evidence, Rules 303, 304 (Special Pamphlet 1980); OR. REV. STAT. §§ 40.010-40.585 (1985). The Hawaii provisions are based on §§ 630-669 of the California Evidence Code. See CAL. EVID. CODE §§ 630-669 (West 1966). The Oregon provision is similar to the California Code but does not follow it in distinguishing between the Thayer and Morgan presumptions.

81. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 5, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079. Judge Weinstein, in considering the failure of Congress to adopt a revised criminal code, has urged that a rule equivalent to the Supreme Court's rule 303 be promulgated. See 1 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 303[03] (citing *Supreme Court Draft, supra* note 12, at 212 (rule 303)).

82. UNIF. R. EVID. 303 (1974).

83. See ALASKA R. EVID. 303; ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence Rule 303 (1979); ME. R. EVID. 303; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 306 (Special Pamphlet 1980); IDAHO R. EVID. 302; MICH. R. EVID. 302; N.M. R. EVID. 303; NEB. REV. STAT. § 27-303 (1979); NEV. REV. STAT. § 47-230 (1979); OKLA. STAT. ANN. tit. 12, § 2304 (West 1980); OR. REV. STAT.

covering presumptions in criminal cases.<sup>84</sup> Two states have adopted rules incorporating by reference statutory provisions concerning criminal presumptions.<sup>85</sup>

3. *Rule 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*

Federal rule 404<sup>86</sup> was enacted by Congress in substantially the form of the Supreme Court promulgation. The 1974 uniform rule is identical.

Because of growing concern for the problems caused by admission of evidence about a rape victim's prior sexual conduct in rape prosecutions,<sup>87</sup> Congress amended the Federal Rules in 1978<sup>88</sup> by adding rule 412,<sup>89</sup> which prohibits reputation or opinion evidence of past sexual behavior and imposes significant procedural and other limitations on the admission of other evidence of such behavior. There is no equivalent to rule 412 in the 1974 Uniform Rules.

Twenty of the thirty rules states have adopted federal rule 404 either verbatim or with only minor modifications.<sup>90</sup> The remaining ten states have adopted the basic plan of the federal rule with a more substantial change,<sup>91</sup> with five of the states having

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§ 40.125 (1985); S.D. CODIFIED LAWS ANN. §§ 19-11-2 to -4 (1979); VT. R. EVID. 303; WIS. STAT. ANN. § 903.03 (West 1975); WYO. R. EVID. 303.

84. See generally ARIZ. REV. STAT. ANN. Rules of Evidence, Rules 101-1103 (Supp. 1985); COLO. R. EVID. 101-1103; FLA. STAT. ANN. §§ 90.101-.958 (West Supp. 1985); MINN. R. EVID. 101-1101; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rules 100-1008 (1985); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rules 101-1102 (1985); N.H. R. EVID. 100-1103; OHIO R. EVID. 101-1103; TEX. R. EVID. 101-1103; UTAH R. EVID. 101-1103; WASH. R. EVID. 101-1103; W. VA. R. EVID. 101-1102.

85. See DEL. UNIF. R. EVID. 303; N.D. R. EVID. 303.

86. FED. R. EVID. 404.

87. The level of concern may be discerned from the debates in Congress preceding the enactment of rule 412. See 124 CONG. REC. H34912-13 (1978) (House debates); 124 CONG. REC. S36256 (1978) (Senate debates).

88. See Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978). The amendment added rule 412 to the Federal Rules of Evidence. See FED. R. EVID. 412.

89. FED. R. EVID. 412.

90. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 404 (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 404 (1979); COLO. R. EVID. 404; DEL. UNIF. R. EVID. 404; FLA. STAT. ANN., § 90.404 (West 1979); IDAHO R. EVID. 404; MICH. R. EVID. 404; MINN. R. EVID. 404; NEB. REV. STAT. § 27-404 (1979); N.H. R. EVID. 404; N.M. R. EVID. 404; N.D. R. EVID. 404; OHIO R. EVID. 404; S. D. CODIFIED LAWS ANN. §§ 19-12-4 to -5 (1979); UTAH R. EVID. 404; VT. R. EVID. 404; WASH. R. EVID. 404; W. VA. R. EVID. 404; WIS. STAT. ANN. § 904.04 (West 1975); WYO. R. EVID. 404.

91. See ALASKA R. EVID. 404 (substitutes "relevant" for "pertinent" in sub-



added language expressly limiting the use of evidence of prior sexual behavior in rape cases.<sup>92</sup> In addition, eight states have adopted a separate rule similar to federal rule 412,<sup>93</sup> and two states have provided an *in limine* procedure as a prerequisite for admission of some or all evidence of prior crimes.<sup>94</sup>

#### 4. Rule 405: Methods of Proving Character

Federal rule 405<sup>95</sup> was enacted in the form promulgated by the Supreme Court in 1972. The original House bill would have eliminated proof of character by opinion testimony from rule 405(a),<sup>96</sup> but the provision was restored before the bill passed the House. The 1974 uniform rule is identical.<sup>97</sup>

Seventeen states have adopted rules identical to the enacted

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sections (a)(1) and (2)); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 404 (Special Pamphlet 1980) (refers to rule on bias, etc., in subsection (a)(3) and includes "modus operandi" in subsection (b)); IOWA R. EVID. 404 (makes subsection (a)(3) applicable in civil cases and in criminal cases where victim is unavailable); ME. R. EVID. 404 (eliminates subsection (a)(2)); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 404 (1985) (makes subsection (a)(2) applicable in assault cases where victim is unavailable and adds subsection (c) covering character in issue); NEV. REV. STAT. § 48.045 (1979) (character as well as trait evidence admissible in equivalents of subsections (a)(1) and (2)); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 404 (1985) (adds "entrapment" in subsection (b)); OKLA. STAT. ANN. tit. 12, § 2404 (1980) (omits "wrongs" in subsection (b)); OR. REV. STAT. § 40.170 (1985) (covers character in issue, broadens use of victim traits, and permits use of aggressor traits in civil action); TEX. R. EVID. 404 (permits evidence of traits relevant to moral turpitude or violence in civil cases).

92. See ALASKA R. EVID. 404; MICH. R. EVID. 404; MINN. R. EVID. 404; OHIO R. EVID. 404; W. VA. R. EVID. 404. It should be noted that, in at least five other states, advisory comments or notes to rule 404 state that the rule should be interpreted to impose a similar limitation. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 404 (Supp. 1985); DEL UNIF. R. EVID. 404; UTAH R. EVID. 404; WASH. R. EVID. 404; WYO. R. EVID. 404.

93. See HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 412 (Special Pamphlet 1980); IDAHO R. EVID., 412; IOWA R. EVID. 412; NEV. REV. STAT. § 48.069 (1979); N.H. R. EVID. 412; N.M. R. EVID. 413; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 412 (1985); OR. REV. STAT. § 40.210 (1985).

94. See ALASKA R. EVID. 404 (court order); FLA. STAT. ANN. § 90.404 (West Supp. 1985) (notice). Vermont has incorporated a procedure similar to that of Florida. See VT. R. CRIM. P. 26(c). Similar action also was recommended in Delaware. See DEL. UNIF. R. EVID. 404 advisory comment. See generally Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985).

95. FED. R. EVID. 405.

96. House Judiciary Committee members feared that wholesale allowance of opinion testimony might tend to turn a trial into "a swearing contest between conflicting character witnesses." See H.R. REP. NO. 650, 93d Cong., 1st Sess. 7, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7081.

97. See UNIF. R. EVID. 405 (1974).

federal rule.<sup>98</sup> Eight states have adopted the rule with a variety of clarifying changes,<sup>99</sup> including (1) the addition of the words, "in any community or group in which the individual habitually associated," after "reputation" in subdivision (a);<sup>100</sup> (2) the addition of the words, "or where the character of the victim relates to the reasonableness of force used by the accused in self-defense," in subdivision (b);<sup>101</sup> and (3) a sentence in subdivision (a) prohibiting expert testimony on character relating to commission of the act charged.<sup>102</sup> Five states have followed their prior law in eliminating proof of character by opinion evidence.<sup>103</sup>

##### 5. *Rule 406: Habit; Routine Practice*

When Congress enacted rule 406,<sup>104</sup> it enacted only subdivision (a) of the Supreme Court's rule 406.<sup>105</sup> In the belief that the method of proof should be left to case-by-case development, Congress deleted subdivision (b), providing for proof of habit or routine practice by opinion testimony or specific instances of conduct.<sup>106</sup> The omitted subdivision was incorporated in the 1974 uniform rule.<sup>107</sup>

Twenty-two states<sup>108</sup> have adopted federal rule 406 either

98. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 405 (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 405 (1979); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 405 (Special Pamphlet 1980); IDAHO R. EVID. 405; IOWA R. EVID. 405; ME. R. EVID. 405; MINN. R. EVID. 405; NEB. REV. STAT. § 27-405 (1979); N.H. R. EVID. 405; N.M. R. EVID. 405; N.D. R. EVID. 405; OHIO R. EVID. 405; S.D. CODIFIED LAWS ANN. §§ 19-12-6 to -7 (1979); TEX. R. EVID. 405; W. VA. R. EVID. 405; WIS. STAT. ANN. § 904.05 (West 1975); UTAH R. EVID. 405.

99. See ALASKA R. EVID. 405; COLO. R. EVID. 405; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 405 (1985); NEV. REV. STAT. § 48.055 (1979); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 405 (1985); OKLA. STAT. ANN. tit. 12, § 2405 (West 1980); OR. REV. STAT. §§ 40.010-40.585 (1985); COLO. R. EVID. 405; WYO. R. EVID. 405.

100. See ALASKA R. EVID. 405.

101. See MONT. CODE ANN. tit. 26, ch. 10, Rules of evidence, Rule 405 (1985).

102. See N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rules 405(a) (1985).

103. See DEL. UNIF. R. EVID. 405; FLA. STAT. ANN. § 90.405 (West Supp. 1985); MICH. R. EVID. 405; VT. R. EVID. 405; WASH. R. EVID. 405.

104. FED. R. EVID. 406.

105. See *Supreme Court Draft*, *supra* note 12, at 223 (rule 406).

106. The deletion was suggested by the House Special Subcommittee on the Judiciary. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079.

107. See UNIF. R. EVID. 406 (1974).

108. See ALASKA R. EVID. 406; ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 406 (Supp. 1985); COLO. R. EVID. 406; DEL. UNIF. R. EVID. 406; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 406 (Special Pamphlet 1980); IDAHO

verbatim or with minor stylistic change. One state has limited the rule to routine practice of organizations.<sup>109</sup> Two of the states<sup>110</sup> have added language defining "habit" and "routine practice." Only seven states<sup>111</sup> have adopted uniform rule 406(b).

#### 6. Rule 407: Subsequent Remedial Measures

Federal rule 407<sup>112</sup> is identical to the rule as promulgated by the Supreme Court<sup>113</sup> and to the 1974 uniform rule 407.<sup>114</sup>

Nineteen states<sup>115</sup> have adopted rule 407 in a form substantially identical to the federal/uniform rule, and five other states<sup>116</sup> have adopted a similar version with only minor variations. One state has expressly included products liability cases in the rule's definition of "negligence or culpable conduct".<sup>117</sup> Four states<sup>118</sup> specifically except "product liability" or "strict liability" cases from the exclusionary effect of the rule by express language or

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R. EVID. 406; IOWA R. EVID. 406; MICH. R. EVID. 406; MINN. R. EVID. 406; N.H. R. EVID. 406; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 406 (1985); N.D. R. EVID. 406; OHIO R. EVID. 406; OKLA. STAT. ANN. tit. 12, § 2406 (West 1980); OR. REV. STAT. §§ 40.010-40.585 (1985); S.D. CODIFIED LAWS ANN. § 19-12-8 (1979); TEX. R. EVID. 406; UTAH R. EVID. 406; VT. R. EVID. 406; WASH. R. EVID. 406; W. VA. R. EVID. 406; WYO. R. EVID. 406.

109. See FLA. STAT. ANN. § 90.406 (West Supp. 1985).

110. See MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 406 (1985); OR. REV. STAT. § 40.180 (1985).

111. See ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 406(b) (1979); ME. R. EVID. 406(b); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 406(c) (1985); NEB. REV. STAT. § 27-406(2) (1979); NEV. REV. STAT. § 48.059(2) (1979); N.M. R. EVID. 406(b); WIS. STAT. ANN. § 904.06(2) (West 1975).

112. FED. R. EVID. 407.

113. See *Supreme Court Draft*, *supra* note 12, at 225 (rule 407).

114. UNIF. R. EVID. 407 (1974).

115. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 407 (1978); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 407 (1979); COLO. R. EVID. 407; DEL. UNIF. R. EVID. 407; IDAHO R. EVID. 407; MICH. R. EVID. 407; MINN. R. EVID. 407; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 407 (1985); N.H. R. EVID. 407; N.M. R. EVID. 407; N.D. R. EVID. 407; OHIO R. EVID. 407; OR. REV. STAT. § 40.185 (1985); S.D. CODIFIED LAWS ANN. § 19-12-9 (1979); UTAH R. EVID. 407; VT. R. EVID. 407; WASH. R. EVID. 407; W. VA. R. EVID. 407; WYO. R. EVID. 407.

116. See FLA. STAT. ANN. § 90.407 (West Supp. 1985); NEV. REV. STAT. § 48.095 (1979); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 407 (1985); OKLA. STAT. ANN. tit. 12, § 2407 (West 1980); WIS. STAT. ANN. § 904.07 (West 1975).

117. See NEB. REV. STAT. § 27-407 (1979).

118. See ALASKA R. EVID. 407; HAWAII REV. STAT. 626-1, Rules of Evidence, Rule 407 (Special Pamphlet 1980); IOWA R. EVID. 407; TEX. R. EVID. 407. It should be noted that in two states the advisory note or comment calls for an interpretation of the rule to except such cases. See COLO. R. EVID. 407 committee comment; WYO. R. EVID. 407 committee note.

interpretation. Maine stands alone in having adopted a version of rule 407 that is exactly opposite in its effect to the federal rule.<sup>119</sup> Subdivision (a) of the Maine rule makes evidence of subsequent remedial measures expressly admissible.<sup>120</sup> The Maine rule also adds a subdivision (b), which expressly makes a manufacturer's written defect notification admissible against the manufacturer on the issue of existence of the defect in a products liability suit.<sup>121</sup>

### 7. Rules 501-513: Privileges

The Supreme Court in its 1972 promulgation included rules 501-513,<sup>122</sup> setting forth nine separate evidentiary privileges for various forms of confidential communication, together with a general rule confining privileges to the Federal Rules and constitutional and federal statutory exemptions, as well as three rules covering procedural aspects of the assertion of privilege. Congress declined to enact these rules, substituting for them a single rule 501<sup>123</sup> providing that evidentiary privileges, except as the Constitution, federal statutes, and other Supreme Court rules might provide, were to "be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>124</sup> The rule also provided that, in civil actions where state substantive law applied, privileges were controlled by state law.<sup>125</sup> The basic purposes of the change were to avoid contravening the common law by evidentiary rule and to respect state policy in areas where state

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119. See ME. R. EVID. 407.

120. See ME. R. EVID. 407(a). The advisors' note to Maine rule 407 recognizes subdivision (a) as adopted to be "directly contrary to Maine law" but calls the assumption that denying admissibility would deter repairs "unpersuasive today." ME. R. EVID. 407(a) advisors' note (citing *Carleton v. Rockland St. Ry.*, 110 Me. 397, 86 A. 334 (1913)). See also Comment, *The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Proving Negligence*, 27 ME. L. REV. 225 (1975).

121. ME. R. EVID. 407(b). See also TEX. R. EVID. 407(b) (including an identical provision).

122. See *Supreme Court Draft*, *supra* note 12, at 230-61 (rules 501-513).

123. FED. R. EVID. 501.

124. According to Judge Weinstein, federal rule 501 as enacted by Congress "differs radically in approach from the view on privileges expressed by the Advisory Committee." 2 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 510[01]. Judge Weinstein suggests that it was the acrimonious debate in Congress over the privileges article submitted by the Court that delayed the enactment of the rules for so long. *Id.* See also 120 CONG. REC. H40891 (1974) (remarks of Rep. Hungate) ("Without doubt, the privilege section of the rules of evidence generated more comment or controversy than any other section.").

125. FED. R. EVID. 501.

law governs.<sup>126</sup> The 1974 Uniform Rules contain rules 501-512<sup>127</sup> covering the same ground as the Supreme Court's rules, with the omission of Supreme Court rule 502, covering required reports privileged by statute.

Eleven states have followed the federal lead,<sup>128</sup> adopting federal rule 501 or some variant and adopting no specific rules of privilege. Montana has adopted only those rules covering the informer's privilege and the procedural provisions.<sup>129</sup> The remaining eighteen states have adopted a variety of privileges based on the Supreme Court and Uniform Rules. Of these eighteen states, seven states<sup>130</sup> follow the Uniform Rules with more or less fidelity; seven states<sup>131</sup> follow the Supreme Court rules with somewhat less fidelity; and the remaining four states<sup>132</sup> present too varied a pattern to summarize. In one area of recent widespread concern, six of the eighteen privilege-rules states followed Supreme Court rule 503(a),<sup>133</sup> omitting a definition of "representative of the client" and leaving to case law the question of which corporate employee communications are privileged. Twelve states<sup>134</sup> have

126. See H.R. REP. NO. 650, 93d Cong., 2d Sess. 8-9 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7082-83. For a critical analysis of the theoretical bases of rule 501, see 23 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5422.

127. UNIF. R. EVID. 501-512 (1974).

128. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 501 (Supp. 1985); COLO. R. EVID. 501; IOWA R. EVID. 501; MICH. R. EVID. 501 (1978); MINN. R. EVID. 501; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 501 (1985); OHIO R. EVID. 501; UTAH R. EVID. 501; WASH. R. EVID. 501; W. VA. R. EVID. 501; WYO. R. EVID. 501.

129. See MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rules 502-505 (1985). The Montana rules are based on rules 509-512 of the 1974 Uniform Rules. See UNIF. R. EVID. 509-512 (1974).

130. See ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rules 501-502 (1979); DEL. UNIF. R. EVID. 501-513; IDAHO R. EVID. 501-520; ME. R. EVID. 501-513; N.D. R. EVID. 501-512; OKLA. STAT. ANN. tit. 12, §§ 2501-2513 (West 1980); S.D. CODIFIED LAWS ANN. §§ 19-13-1 to -30 (1979).

131. See ALASKA R. EVID. 501-512; FLA. STAT. ANN. §§ 90.501-510 (West Supp. 1985); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rules 501-513 (Special Pamphlet 1980); NEB. REV. STAT. §§ 27-501 to -513 (1979); N.M. R. EVID. 501-514; OR. REV. STAT. §§ 40.225-40.295 (1985); WIS. STAT. ANN. §§ 905.01-.13 (West 1975).

132. See NEV. REV. STAT. §§ 49.015-405 (1979); N.H. R. EVID. 501-512; TEX. R. EVID. 501-513; VT. R. EVID. 501-512.

133. *Supreme Court Draft*, *supra* note 12, at 237 (rule 503(a)). See DEL. UNIF. R. EVID. 503(a); FLA. STAT. ANN. § 90.503 (West Supp. 1985); NEB. REV. STAT. § 27-503(a) (1979); N.M. R. EVID. 503(a); VT. R. EVID. 503(a); WIS. STAT. ANN. § 905.03 (West 1975).

134. See ALASKA R. EVID. 503(a)(2); ARK. REV. STAT. ANN. § 289-1001, Uniform Rules of Evidence, Rule 503 (1979); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 503(a)(2) (Special Pamphlet 1980); IDAHO R. EVID. 502(a)(2);

followed uniform rule 502(a)(2) and the 1969 and 1971 drafts of federal rule 503(a)<sup>135</sup> in defining “representative of the client” to incorporate the “control group” test, limiting the privilege to persons having authority to seek and act upon legal advice for the client.<sup>136</sup>

Nine of the rules states<sup>137</sup> have adopted additional rules of privilege not found in either the Uniform or Supreme Court rules. Protected relationships include accountant-client,<sup>138</sup> reporter-source,<sup>139</sup> school employee-pupil,<sup>140</sup> social worker-client,<sup>141</sup> nurse-patient,<sup>142</sup> interpreter-hearing impaired person,<sup>143</sup> stenographer-employee,<sup>144</sup> medical review panel,<sup>145</sup> parent-child<sup>146</sup> and lie detector technician-subject.<sup>147</sup> Hawaii has even

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ME. R. EVID. 503(a)(2); NEV. REV. STAT. § 49.075 (1979); N.H. R. EVID. 503(a)(2); N.D. R. EVID. 503(a)(2); OKLA. STAT. ANN. tit. 12, § 2503(a)(2) (West 1980); O. REV. STAT. § 40.225 (1985); S.D. CODIFIED LAWS ANN. § 19-13-2 (1979); TEX. R. EVID. 503(a)(2). Note that Idaho rule 502(a)(2) goes a step beyond the “control group” test to include also “an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.” IDAHO R. EVID. 502(a)(2).

135. See UNIF. R. EVID. 502(a)(2) (1974); *Preliminary Draft*, *supra* note 9, at 249 (rule 503(a)(2)); *Revised Draft*, *supra* note 10, at 361 (rule 503(a)(2)).

136. The Supreme Court in 1981 rejected the “control group” test, thus leaving the issue to case-by-case development as the Supreme Court’s draft of rule 503(a) would have done. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn* suggests a more functional approach, previously adopted in lower court decisions, which would focus on the relation of the communication to the employee’s duties, rather than on his or her level within the corporate hierarchy. See C. McCORMICK, *supra* note 64, §§ 87, 96. See also Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279 (1984); Salminen, *The Corporate Attorney-Client Privilege: The Control Group Test in Maine Rule 502* (Dec. 1985) (unpublished independent writing project, University of Maine School of Law).

137. See DEL. UNIF. R. EVID. 501-513 (1981); HAWAII REV. STAT. tit. 33, ch. 626, Rules of Evidence, Rules 501-513 (1981); IDAHO R. EVID. 501-520; NEV. REV. STAT. §§ 49.015-405 (1979); N.M. R. EVID. 501-514; OKLA. STAT. ANN. tit. 12 §§ 2501-2513 (1980); OR. REV. STAT. tit. 4, ch. 40 §§ 40.225-40.295 (1983); WIS. STAT. ANN. §§ 905.01-.13 (1975).

138. See NEV. REV. STAT. §§ 49.125-.205 (1979). See also IDAHO R. EVID. 515.

139. See OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); DEL. UNIF. R. EVID. 513; NEV. REV. STAT. § 49.275 (1979).

140. See NEV. REV. STAT. § 49.290 (1979) (counselor-pupil); *id.* § 49.291 (teacher-pupil); IDAHO R. EVID. 516; OR. REV. STAT. § 40.245 (1985).

141. See N.M. R. EVID. 509; IDAHO R. EVID. 518; OR. REV. STAT. § 40.250 (1985).

142. See DEL. UNIF. R. EVID. 503(a)(4); OR. REV. STAT. § 40.240 (1985).

143. See WIS. STAT. ANN. § 905.015 (West Supp. 1985).

144. See OR. REV. STAT. § 40.265 (1985).

145. See NEV. REV. STAT. § 49.265 (1979); IDAHO R. EVID. 519-520.

146. See IDAHO R. EVID. 514.

147. See WIS. STAT. ANN. § 905.065 (West Supp. 1985).

incorporated the privilege against self-incrimination into its rules.<sup>148</sup>

#### 8. Rule 601: General Rule of Competency

Congress enacted the Supreme Court's rule as the first sentence of rule 601,<sup>149</sup> providing that "[e]very person is competent to be a witness except as otherwise provided in these rules."<sup>150</sup> Congress then added a sentence saving state law competency provisions where state substantive law supplies the rule of decision. This provision was adopted in deference to state policy asserted to lie behind such provisions as "dead man's statutes."<sup>151</sup> The 1974 uniform rule 601,<sup>152</sup> following the Supreme Court rule, contains only the first sentence.

Nineteen states<sup>153</sup> have adopted the first sentence of the enacted federal rule verbatim, or in similar language, thus by implication repealing the dead man's statute and any other common-law statutory competency provisions. In addition, Minnesota<sup>154</sup>

148. HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 509 (Special Pamphlet 1980).

149. FED. R. EVID. 601 (incorporating *Supreme Court Draft*, *supra* note 12, at 261, (rule 601)).

150. *Id.*

151. *See* FED. R. EVID. 601 advisory committee note. Dead man's statutes were enacted in many states to prevent an interested party from testifying as to transactions with a person since deceased in a suit prosecuted or defended by the executor or administrator of the decedent. *See* C. MCCORMICK, *supra* note 67, § 68. While acknowledging substantial disagreement over the merit of the dead man's statutes, the House Judiciary Committee nevertheless felt they should not be overturned, in that they reflect state policy concerns. *See* H.R. REP. NO. 650, 93d Cong., 1st Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7083. For a strong criticism of both dead man's statutes and Congress' decision to defer to state law in federal rule 601, *see* Schmertz, *The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion*, 30 VILL. L. REV. 1367, 1376-405 (1985).

152. UNIF. R. EVID. 601 (1974).

153. *See* ALASKA R. EVID. 601; ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 601 (1979); DEL. UNIF. R. EVID. 601; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 601 (Special Pamphlet 1980); IOWA R. EVID. 601; ME. R. EVID. 601; MICH. R. EVID. 601; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 601 (1985); NEB. REV. STAT. § 27-601 (1979); NEV. REV. STAT. § 50.015 (1979); N.M. R. EVID. 601; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 601 (1985); N.D. R. EVID. 601; OHIO R. EVID. 601; OKLA. STAT. ANN. tit. 12, § 2601 (West 1980); OR. REV. STAT. § 40.310 (1985); S.D. CODIFIED LAWS ANN. § 19-14-1 (1979); UTAH R. EVID. 601; WYO. R. EVID. 601. The Utah rule also contains an express repeal of Utah's dead man's statute. *See* UTAH R. EVID. 601(c). However, the Supreme Court of Wyoming has held that the Wyoming rule is ineffective to supersede the statute. *See* Consolidated Constr., Inc. v. Smith, 634 P.2d 902 (Wyo. 1981).

154. *See* MINN. R. EVID. 616.

expressly repealed the dead man's statute, although Minnesota's rule otherwise leaves competency to prior law.<sup>155</sup> Eight states<sup>156</sup> have incorporated the phrase "by statute" or similar language in the first sentence, implicitly preserving the dead man's statute and other competency provisions. Four states<sup>157</sup> have adopted a specific provision containing or expressly saving a dead man's statute. Ten states<sup>158</sup> have incorporated a list of specific disqualifications as exceptions to the general rule of competency of rule 601(a).

### 9. *Rule 608: Evidence of Character and Conduct of Witness*

In enacting rule 608,<sup>159</sup> Congress enacted the rule adopted by the Supreme Court<sup>160</sup> with a change in rule 608(b) intended to increase court discretion in allowing into evidence specific instances of character to attack credibility.<sup>161</sup> The 1974 uniform rule is identical to the enacted federal rule.<sup>162</sup>

Nineteen states<sup>163</sup> have followed the federal rule verbatim or

155. MINN. R. EVID. 601.

156. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 601 (Supp. 1985); COLO. R. EVID. 601; FLA. STAT. ANN. § 90.601 (West Supp. 1985); MINN. R. EVID. 601; N.H. R. EVID. 601; VT. R. EVID. 601; WASH. R. EVID. 601; W. VA. R. EVID. 601. Minnesota, however, expressly repealed the dead man's statute. See *supra* notes 154-55 and accompanying text. New Hampshire had previously repealed the statute. See *infra* note 257.

157. See FLA. STAT. ANN. § 90.602 (West Supp. 1985); IDAHO R. EVID. 601(b); TEX. R. EVID. 601(b); WIS. STAT. ANN. § 906.01 (West 1975).

158. See ALASKA R. EVID. 601; IDAHO R. EVID. 601; ME. R. EVID. 601; MICH. R. EVID. 601; MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 601 (1985); N.H. R. EVID. 601; OHIO R. EVID. 601; OR. REV. STAT. § 40.310 (1985); TEX. R. EVID. 601; VT. R. EVID. 601.

159. FED. R. EVID. 608.

160. See *Supreme Court Draft*, *supra* note 12, at 267-69 (rule 608).

161. Rule 608(b), as submitted by the Supreme Court, permitted specific instances of misconduct by a witness to be addressed on cross-examination for the purpose of attacking the witness' credibility, as long as the questions were probative of the witness' truthfulness or untruthfulness, and the acts were not "remote in time." See H.R. REP. NO. 650, 93d Cong., 1st Sess. 10, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7084. The amended rule emphasized the discretionary power of the court in permitting such testimony, and deleted the reference to remoteness in time as unnecessary and confusing. See *id.*

162. See UNIF. R. EVID. 608 (1974).

163. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 608 (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 608 (1979); COLO. R. EVID. 608; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 608 (Special Pamphlet 1980); IDAHO R. EVID. 608; IOWA R. EVID. 608; ME. R. EVID. 608; MINN. R. EVID. 608; NEB. REV. STAT. § 27-608 (1979); N.M. R. EVID. 608; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 608 (1985); N.D. R. EVID. 608; OHIO R. EVID. 608; OKLA. STAT. ANN. tit. 12, § 2608 (West 1980); N.H. R. EVID. 608; S.D. CODIFIED LAWS ANN. §§ 19-14-9 to -10 (1979); VT. R. EVID. 608; W. VA. R. EVID. 608; WYO. R. EVID. 608.



with minor variations. Four states,<sup>164</sup> each of which eliminated opinion evidence from rule 405(b), have consistently followed that course in rule 608(a). Vermont,<sup>165</sup> however, has eliminated opinion evidence from rule 405(b) but permitted it in rule 608(a), following the pattern of its case law. Three states<sup>166</sup> do not allow specific instances of conduct to attack credibility. Four states<sup>167</sup> have other variations, including adoption of the 1969 Preliminary Draft, adoption of the Supreme Court rule, and addition of a provision covering impeachment by evidence of bias.

#### 10. *Rule 609: Impeachment by Evidence of Conviction for Crime*

When Congress enacted Rule 609,<sup>168</sup> it made numerous amendments to the Supreme Court rule. Principal changes were (1) a provision that convictions must be proved by the admission of the accused or by public record on cross examination;<sup>169</sup> (2) incorporation of an express requirement that the court weigh probative value against prejudice in admitting evidence of either a conviction of a crime not involving dishonesty that is punishable by sentence of one year or more,<sup>170</sup> or a conviction more than ten years old;<sup>171</sup> and (3) a requirement of notice for use of evidence of a conviction which is more than ten years old.<sup>172</sup> The 1974 uniform rule follows the enacted rule, except that the provision for bringing out the conviction on cross examination is omitted from rule 608(a) and the balancing requirement is omitted from rule 608(b).<sup>173</sup>

There is considerable variation in state adoption of rule 609. Seven states<sup>174</sup> have adopted the federal rule, either verbatim or

164. See DEL. UNIF. R. EVID. 608(a); FLA. STAT. ANN. § 90.608 (West Supp. 1985); MICH. R. EVID. 608(a); WASH. R. EVID. 608(a).

165. VT. R. EVID. 608. See also *id.* reporter's note.

166. See ALASKA R. EVID. 608; OR. REV. STAT. § 40.350 (1985); TEX. R. EVID. 608.

167. See MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 609 (1985); NEV. REV. STAT. § 50.085 (1979); UTAH R. EVID. 608; WIS. STAT. ANN. § 906.08 (West 1975).

168. FED. R. EVID. 609.

169. FED. R. EVID. 609(a).

170. FED. R. EVID. 609(a)(1). This provision is an outgrowth of the line of cases implementing the 1965 District of Columbia Circuit decision in *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). For further discussion of the *Luck* discretionary approach, see 3 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 609[03].

171. FED. R. EVID. 609(b).

172. *Id.*

173. See UNIF. R. EVID. 608 (1974).

174. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 609 (Supp. 1985);

with minor variations, and two states<sup>175</sup> have adopted the uniform rule. Three states<sup>176</sup> allow impeachment only for crimes involving dishonesty or false statement. Nevada has eliminated the dishonesty provision,<sup>177</sup> while Vermont<sup>178</sup> retains the common-law moral turpitude test. Nine states<sup>179</sup> have reduced judicial discretion by eliminating the balancing requirement or by other means, and seven states<sup>180</sup> have increased discretion by extending the balancing requirement. Montana<sup>181</sup> forbids impeachment by prior conviction, and Colorado<sup>182</sup> has no comparable rule.

### 11. *Rule 613: Prior Statements of Witnesses*

Congress enacted rule 613<sup>183</sup> substantially as promulgated by the Supreme Court.<sup>184</sup> The uniform rule<sup>185</sup> is identical to the enacted federal rule.

Twenty-four states<sup>186</sup> have adopted rule 613(a) with some

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MINN. R. EVID. 609; N.H. R. EVID. 609; OKLA. STAT. ANN. tit. 12, § 2609 (West 1980); UTAH R. EVID. 609; WASH. R. EVID. 609; WYO. R. EVID. 609.

175. See ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 609 (1979); DEL. UNIF. R. EVID. 609.

176. See ALASKA R. EVID. 609; HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 609 (Special Pamphlet 1980); IOWA R. EVID. 609.

177. NEV. REV. STAT. § 50.095 (1979).

178. VT. R. EVID. 609.

179. See FLA. STAT. ANN. § 90.610 (West Supp. 1985); NEB. REV. STAT. § 27-609 (1979); NEV. REV. STAT. § 50.095 (1979); N.M. R. EVID. 609; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 609 (1985); N.D. R. EVID. 609; OHIO R. EVID. 609; OR. REV. STAT. § 40.355 (1985); W. VA. R. EVID. 609.

180. See IDAHO R. EVID. 609; ME. R. EVID. 609; MICH. R. EVID. 609; S.D. CODIFIED LAWS ANN. §§ 19-14-12 to -16 (1979); TEX. R. EVID. 609; VT. R. EVID. 609; WIS. STAT. ANN. § 906.09 (West 1975).

181. See MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 609 (1985).

182. See 3 WEINSTEIN'S EVIDENCE, *supra* note 14, at 609-114.

183. FED. R. EVID. 613.

184. 56 F.R.D. 183, 278-79 (1973) (rule 613).

185. UNIF. R. EVID. 613 (1974).

186. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 613(a) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 613(a) (1979); DEL. UNIF. R. EVID. 613(a); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 613(a) (Special Pamphlet 1980); IDAHO R. EVID. 613(a); IOWA R. EVID. 613(a); ME. R. EVID. 613; MINN. R. EVID. 613(a); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 613(a) (1985); NEB. REV. STAT. § 27-613(1) (1979); NEV. REV. STAT. § 50.135(1) (1979); N.H. R. EVID. 613(a); N.M. R. EVID. 613(a); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 613 (1985); N.D. R. EVID. 613(a); OHIO R. EVID. 613(a); OR. REV. STAT. § 40.380 (1985); S.D. CODIFIED LAWS ANN. § 19-14-24 (1979); OKLA. STAT. ANN. tit. 12, § 2613(A) (West 1980); UTAH R. EVID. 613(a); VT. R. EVID. 613(a); W. VA. R. EVID. 613(a); WIS. STAT. ANN. § 906.13(1) (West 1975); WYO. R. EVID. 613(a).

variations. Five states<sup>187</sup> retain some vestige of the common-law requirement, which was eliminated in rule 613(a), that the witness must be shown a prior statement. Twenty states<sup>188</sup> have followed rule 613(b) in allowing extrinsic evidence of an impeaching statement without a prior opportunity for the witness to explain or deny, provided that such opportunity is provided at some point. Two states<sup>189</sup> have omitted the requirement of an opportunity to explain; eight states<sup>190</sup> have retained the common-law requirement that the witness be confronted with the statement before extrinsic evidence may be offered.

## 12. Rule 801: Hearsay—Definitions

The enacted federal rule 801,<sup>191</sup> with a later 1975 amendment,<sup>192</sup> is quite similar to that promulgated by the Supreme Court.<sup>193</sup> In fact, the only variation between rule 801 and the Supreme Court's version is Congress' addition to rule 801(d)(1)(A) of the requirement that, to be nonhearsay, prior inconsistent testimony must have been given under oath in a proceeding or deposition.<sup>194</sup> The 1974 uniform rule<sup>195</sup> is identical

187. See COLO. R. EVID. 613; FLA. STAT. ANN. § 90.614 (West Supp. 1985); MICH. R. EVID. 613 (1978); TEX. R. EVID. 612; WASH. R. EVID. 613.

188. See ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 613(b) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 613(b) (1979); IDAHO R. EVID. 613(b); IOWA R. EVID. 613(b); MICH. R. EVID. 613(b); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 613(b) (1985); NEB. REV. STAT. § 27-613(2) (1979); NEV. REV. STAT. § 50.135(2) (1979); N.H. R. EVID. 613(b); N.M. R. EVID. 613(b); N.D. R. EVID. 613(b); OKLA. STAT. ANN. tit. 12, § 2613(B) (West 1980); OR. REV. STAT. § 40.380 (1985); S.D. CODIFIED LAWS ANN. § 19-14-25 (1979); UTAH R. EVID. 613(b); VT. R. EVID. 613(b); WASH. R. EVID. 613(b); WIS. STAT. ANN. § 906.13(2) (West 1975); W. VA. R. EVID. 613(b); WYO. R. EVID. 613(b).

189. See ME. R. EVID. 613; N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 613 (1985).

190. See ALASKA R. EVID. 613(b); COLO. R. EVID. 613(a); DEL. UNIF. R. EVID. 613(b); FLA. STAT. ANN. § 90.614(2) (West Supp. 1985); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 613(b) (Special Pamphlet 1980); MINN. R. EVID. 613(b); OHIO R. EVID. 613(B); TEX. R. EVID. 612(b).

191. For the text of rule 801 as originally enacted, see Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926, 1938 (1975).

192. See Act of Oct. 16, 1975, Pub. L. No. 94-113, 89 Stat. 576 (1976). The amendment restored to the rule subdivision (d)(1)(C), which Congress had deleted in the original enactment.

193. See *Supreme Court Draft*, *supra* note 12, at 293 (rule 801).

194. The House Judiciary Committee reasoned that, in contrast to unsworn statements, there can be no dispute as to whether a prior statement in a formal proceeding or deposition was made. Moreover, the context of the proceedings provides assurances of reliability. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7087. The Conference Committee broadened the rule to include "other" proceedings, specifically the

with enacted rule 801, except that it requires the oath in rule 801(d)(1)(A) only in a criminal proceeding, and it omits rule 801(d)(1)(C), which categorizes statements of identification based on perception as nonhearsay.

Twenty-nine states<sup>196</sup> have adopted federal rule 801(a)-(c), setting forth the definitions of "statement," "declarant," and "hearsay," either verbatim or with minor variations. Texas,<sup>197</sup> in a significant departure from the federal rule, has adopted a unique subdivision (c), defining "matter asserted" to include "any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief as to the matter."<sup>198</sup> The effect of this change is to retain for Texas the common-law rule of *Wright v. Doe d. Tatham*,<sup>199</sup> which held that nonassertive verbal conduct offered to show the actor's belief in a relevant fact is an implied assertion of the truth of that fact and is thus inadmissible as hearsay.<sup>200</sup> Federal rule 801(a) was expressly intended to eliminate this doctrine.<sup>201</sup>

There is more divergence in the adoption of federal rule 801(d). Fourteen states<sup>202</sup> have adopted federal rule

grand jury. See CONF. REP. NO. 1597, 93d Cong. 1st Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7104.

195. UNIF. R. EVID. 801 (1974).

196. See ALASKA R. EVID. 801(a)-(c); ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 801(a)(c) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 801(a)-(c) (1979); COLO. R. EVID. 801(a)-(c) (using "to be communicated" instead of "assertion" in rule 801(a)(2)) DEL. UNIF. R. EVID. 801(a)-(c); FLA. STAT. ANN. § 90.801(1)(a)-(c) (West Supp. 1985); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 801(1)-(3) (Special Pamphlet 1980); IDAHO R. EVID. 801(a)-(c); IOWA R. EVID. 801(a)-(c); ME. R. EVID. 801(a)-(c); MICH. R. EVID. 801(a)-(c); MINN. R. EVID. 801(a)-(c); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 801(a)-(c) (1985); NEB. REV. STAT. § 27-801(1)-(3) (1979); NEV. REV. STAT. §§ 51.015-045 (1979); N.H. R. EVID. 801(a)-(c); N.M. R. EVID. 801(a)-(c); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 801(a)-(c) (1985); N.D. R. EVID. 801(a)-(c); OHIO R. EVID. 801(A)-(C); OKLA. STAT. ANN. tit. 12, § 2801(1)-(3) (West 1980); OR. REV. STAT. § 40.450 (1985); S.D. CODIFIED LAWS ANN. § 19-16-1(1)-(3) (1979); UTAH R. EVID. 801(a)-(c); VT. R. EVID. 801(a)-(c); WASH. R. EVID. 801(a)-(c); W. VA. R. EVID. 801(a)-(c); WIS. STAT. ANN. § 908.01(1)-(3) (West 1975); WYO. R. EVID. 801(a)-(c).

197. See TEX. R. EVID. 801(c).

198. See *id.*

199. 7 Adolph. & E. 313, 112 Eng. Rep. 488 (Ex. Ch. 1837), 5 Cl. & Fin. 670, 7 Eng. Rep. 559 (H.L. 1838).

200. 7 Adolph. & E. at 388-89, 112 Eng. Rep. at 516-17. For a discussion of this leading case—a favorite of law professors—see C. McCORMICK, *supra* note 67, at 737-40.

201. FED. R. EVID. 801(a) advisory committee note. See also 4 WEINSTEIN'S EVIDENCE, *supra* note 14, at 801-56 to -61.

202. See FLA. STAT. ANN. § 90.801(2) (West Supp. 1985); IDAHO R. EVID. 801(d); IOWA R. EVID. 801(d); ME. R. EVID. 801(d); MINN. R. EVID. 801(d); NEB.

801(d)(1)(A) virtually verbatim. Ohio follows the federal rule but adds the further limitation that the prior statement must have been subject to cross-examination by the present opponent.<sup>203</sup> Eleven states<sup>204</sup> omit, or follow the uniform rule regarding the oath requirement of rule 801(d)(1)(A). Wyoming's rule, which otherwise follows the federal rule, is confined to criminal cases.<sup>205</sup> Hawaii<sup>206</sup> treats a witness' prior inconsistent statements as a hearsay exception and includes all written or recorded statements in addition to those made under oath at a proceeding or deposition. Michigan<sup>207</sup> and North Carolina<sup>208</sup> have omitted rule 801(d)(1)(A). Twenty-five states<sup>209</sup> have adopted federal rule 801(d)(1)(B), admitting prior consistent statements as substantive evidence if offered to rebut a charge of recent fabrication or the like. Hawaii<sup>210</sup> treats such statements as a hearsay exception. Oregon<sup>211</sup> extends the rule to include prior consistent statements

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REV. STAT. § 27-801(4) (1979); N.H. R. EVID. 801(d); OKLA. STAT. ANN. tit. 12, § 2801(4) (West 1980); OR. REV. STAT. § 40.450 (1985); S.D. CODIFIED LAWS ANN. § 19-16-2 to -3 (1979); TEX. R. EVID. 801(e); VT. R. EVID. 801(d); WASH. R. EVID. 801(d); W. VA. R. EVID. 801(d).

203. See OHIO R. EVID. 801(d)(1)(A) & staff note. The effect is to eliminate testimony before a grand jury. *Id.*

204. See ALASKA R. EVID. 801(d)(1)(A); ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 801(d)(1)(A) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 801(d)(1)(i) (1979); COLO. R. EVID. 801(d)(1)(A); DEL. UNIF. R. EVID. 801(d)(1)(A); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rules 801(d)(1)(A) (1985); NEV. REV. STAT. § 51.035(2)(a) (1979); N.M. R. EVID. 801(d)(1)(A); N.D. R. EVID. 801(d)(1)(i); UTAH R. EVID. 801(d)(1)(A); WIS. STAT. ANN. § 908.01(4)(a)(i) (West 1975).

205. See WYO. R. EVID. 801(d)(1)(A).

206. See HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 802.1 (Special Pamphlet 1980).

207. See MICH. R. EVID. 801(d).

208. See N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 801(d) (1985).

209. See ALASKA R. EVID. 801(d)(1)(B); ARIZ. REV. STAT. ANN. Rules of Evidence, Rules 801(d)(1)(B) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 801(d)(1)(ii) (1979); COLO. R. EVID. 801(d)(1)(B); DEL. UNIF. R. EVID. 801(d)(1)(B); FLA. STAT. ANN. § 90.801(2)(b) (West Supp. 1985); IDAHO R. EVID. 801(d)(1)(B); IOWA R. EVID. 801(d)(1)(B); MINN. R. EVID. 801(d)(1)(B); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 801(d)(1)(B) (1985); NEB. REV. STAT. ANN. § 27-801(4)(a)(ii) (1979); NEV. REV. STAT. § 51.035(2)(b) (1979); N.H. R. EVID. 801(2)(1)(B); N.M. R. EVID. 801(d)(1)(B); N.D. R. EVID. 801(d)(1)(ii); OHIO R. EVID. 801(D)(1)(b); OKLA. STAT. ANN. tit. 12, § 2801(4)(a)(2) (West 1980); S.D. CODIFIED LAWS ANN. § 19-16-2(2) (1979); TEX. R. EVID. 801(e)(1)(B); UTAH R. EVID. 8901(d)(1)(B); VT. R. EVID. 801(d)(1)(B); WASH. R. EVID. 801(d)(1)(ii); W. VA. R. EVID. 801(d)(1)(B); WIS. STAT. ANN. § 908.01(4)(a)(ii) (West 1975); WYO. R. EVID. 801(d)(1)(B).

210. See HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 802.1(2) (Special Pamphlet 1980).

211. See OR. REV. STAT. § 40.450 (1985).

offered to rebut prior inconsistent statements. Maine<sup>212</sup> allows prior consistent statements only for their rebutting effect and not as substantive evidence. Michigan<sup>213</sup> and North Carolina<sup>214</sup> omit rule 801(d)(1)(B). Twenty-four states<sup>215</sup> have adopted federal rule 801(d)(1)(C), admitting statements of recent identification, and Hawaii<sup>216</sup> again treats such statements as an exception. Minnesota<sup>217</sup> and Ohio<sup>218</sup> add language calling for a finding of circumstantial reliability. Two states<sup>219</sup> follow the uniform rule in omitting this provision, and North Carolina<sup>220</sup> omits federal rule 801(d)(1) entirely.

Twenty states<sup>221</sup> have adopted federal rule 801(d)(2), making admissions of parties admissible as nonhearsay, without substantial change. Three states<sup>222</sup> have included a similar provision as a

212. See ME. R. EVID. 801(d)(1).

213. See MICH. R. EVID. 801(d)(1).

214. See N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 801(d) (1985).

215. See ALASKA R. EVID. 801(d)(1)(C); ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 801(d)(1)(C) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 801(d)(1)(iii) (1979); COLO. R. EVID. 801(d)(1)(C); DEL. UNIF. R. EVID. 801(d)(1)(C); FLA. STAT. ANN. § 90.801(2)(c) (West Supp. 1985); IDAHO R. EVID. 801(d)(1)(C); IOWA R. EVID. 801(d)(1)(C); ME. R. EVID. 801(d)(1)(C); MICH. R. EVID. (d)(1)(B); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 801(d)(1)(C) (1985); NEV. REV. STAT. § 51.035(2)(C) (1979); N.H. R. EVID. 801(d)(1)(C); N.M. R. EVID. 801(d)(1)(c); N.D. R. EVID. 801(d)(1)(iii); OR. REV. STAT. § 40.450 (1985); S.D. CODIFIED LAWS ANN. § 19-16-2(3) (1979); TEX. R. EVID. 801(e)(1)(C); UTAH R. EVID. 801(d)(1)(C) VT. R. EVID. 801(d)(1)(C); WASH. R. EVID. (d)(1)(iii) W. VA. R. EVID. 801(d)(1)(C); WIS. STAT. ANN. § 908.01(4)(a)(iii) (West 1975); WYO. R. EVID. 801(d)(1)(C).

216. See HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 802.1(3) (Special Pamphlet 1980).

217. See MINN. R. EVID. 801(d)(1)(C). Minnesota also included statements of present sense impression by a testifying declarant as nonhearsay. MINN. R. EVID. 801(d)(1)(D).

218. See OHIO R. EVID. 801(d)(1)(C).

219. See NEB. REV. STAT. § 27-801(4)(a) (1979); OKLA. STAT. ANN. tit. 12, § 2801(4)(a) (West 1980).

220. See N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 801(d) (1985).

221. See ALASKA R. EVID. 801(d)(2); ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 801(d)(2) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 801(d)(2) (1979 & Supp. 1985); COLO. R. EVID. 801(d)(2); IDAHO R. EVID. 801(d)(2); IOWA R. EVID. 801(d)(2); MINN. R. EVID. 801(d)(2); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 801(d)(2) (1985); NEB. REV. STAT. § 27-801(4)(b) (1979); NEV. REV. STAT. § 51.035(3) (1979); N.H. R. EVID. 801(d)(2); N.M. R. EVID. 801(d)(2); N.D. R. EVID. 801(d)(2); OR. REV. STAT. § 40.450 (1985); S.D. CODIFIED LAWS ANN. § 19-16-3 (1979); UTAH R. EVID. 801(d)(2); VT. R. EVID. 801(d)(2); W. VA. R. EVID. 801(d)(2); WIS. STAT. ANN. § 908.01(4)(b) (West 1975); WYO. R. EVID. 801(d)(2).

222. See FLA. STAT. ANN. § 90.803(18) (West 1979); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 803(a) (Special Pamphlet 1980); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 801(d) (1985).

hearsay exception. The remaining seven states<sup>223</sup> have made modifications to various provisions of the rule.

13. *Rule 803: Hearsay Exceptions—Availability of Declarant Immaterial*

As enacted, federal rule 803<sup>224</sup> contains the twenty-four hearsay exceptions found in the Supreme Court version, with substantial changes in rules 803(6),<sup>225</sup> 803(8),<sup>226</sup> and 803(24).<sup>227</sup> The 1974 uniform rule<sup>228</sup> is essentially similar to the enacted federal rule with only minor variations in detail.

Every state has adopted the general pattern of rule 803. Spe-

223. See DEL. UNIF. R. EVID. 801(d)(2) (proof of conspiracy); ME. R. EVID. 801(d)(2) (statements of agents of principals or employers excluded from rule 801(d)(2)(C)); MICH. R. EVID. 801(d)(2) (statements in connection with motor vehicle misdemeanor guilty plea excluded from rule 801(d)(2)(A); rule 801(d)(2)(b) qualified by reference to Michigan case law); OHIO R. EVID. 801(d)(2) (proof of conspiracy in rule 801(d)(2)(C)); OKLA. STAT. ANN. tit. 12, § 2801(4)(b) (West 1980) (omits "made during the existence of the relationship" from rule 801(d)(2)(D)); TEX. R. EVID. 801(e)(2) (adds depositions as a further category); WASH. R. EVID. 801(d)(2)(iv) (limits rule 801(d)(2)(iv) to statement which agent had authority to make).

224. FED. R. EVID. 803.

225. Rule 803(6) excepts from the hearsay rule records of regularly conducted business activity. See FED. R. EVID. 803(6). The Supreme Court draft did not confine the exception to "business" activities. See *Supreme Court Draft*, *supra* note 12, at 300-01. The congressional change reflected doubt as to the reliability of non-business records. See H.R. REP. NO. 650, 93d Cong., 2d Sess. reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7087-88. Judge Weinstein has suggested that the effect of the changes by Congress has not been significant. See 4 WEINSTEIN'S EVIDENCE, *supra* note 14, at 803-10 to -11.

226. Rule 803(8) excepts public records and reports. See FED. R. EVID. 803(8). The change suggested by the House Judiciary Committee and adopted in the federal rule excludes from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. The rationale for the additional exclusions is that observations by police officers at the scene of the crime are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in a criminal trial. See S. REP. NO. 1277, 93d Cong., 2d Sess. 18, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7064; CONF. REP. NO. 1597, 93d Cong., 2d Sess. 11, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7104-05.

227. Rule 803(24) is a "catch-all" exception to the hearsay rule. See FED. R. EVID. 803(24). The Supreme Court's version also allowed as an exception any statement having circumstantial guarantees of trustworthiness "comparable" to those of the exceptions in rule 803(1)-(23). See *Supreme Court Draft*, *supra* note 12, at 303 (rule 803(24)). Congress narrowed the exception with requirements that the statement be material and probative and that admission serve the purposes of the rules and the interests of justice. A notice provision also was added. See S. REP. NO. 1277, 93d Cong., 2d Sess. 18 reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7065-66; CONF. REP. NO. 1597, 93d Cong. 2d Sess. 11, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7105.

228. UNIF. R. EVID. 803 (1974).

cific exceptions where there are substantial state variations are rules 803(1) (six states),<sup>229</sup> 803(4) (seven states),<sup>230</sup> 803(5) (eight states),<sup>231</sup> 803(6) (ten states),<sup>232</sup> 803(8) (eighteen states),<sup>233</sup> 803(18) (twelve states),<sup>234</sup> and 803(22) (fourteen states).<sup>235</sup> Thirteen states<sup>236</sup> have adopted federal rule 803(24), the catch-all exception, verbatim; seven<sup>237</sup> have adopted it with slight changes;

229. See COLO. R. EVID. 803(1) (variations) FLA. STAT. ANN. § 90.803(1) (West 1979) (variations); MINN. R. EVID., 803(1) (exceptions omitted); NEB. REV. STAT. § 27-803 (1979) (exceptions omitted); OHIO R. EVID. 803(1) (variations); OR. REV. STAT. § 40.460 (1985) (exceptions omitted).

230. See FLA. STAT. ANN. § 90.803(4) (West 1979); IDAHO R. EVID. 803(4); MICH. R. EVID. 803(4); MINN. R. EVID. 803(4); N.H. R. EVID. 803(4); OKLA. STAT. ANN. tit. 12, § 2803(4) (West 1980); VT. R. EVID. 803(4).

231. See COLO. R. EVID. 803(5); DEL. UNIF. R. EVID. 803(5); FLA. STAT. ANN. § 90.803(5) (West 1979); N.H. R. EVID. 803(5); OHIO R. EVID. 803(5); OKLA. STAT. ANN. tit. 12, § 2803(5) (West 1980); TEX. R. EVID. 803(5); WIS. STAT. ANN. § 908.03(5) (West 1975).

232. See ALASKA R. EVID. 803(6); ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 803(6) (Supp. 1985); FLA. STAT. ANN. § 90.803(6) (West 1979); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 803(b)(6) (Special Pamphlet 1980); MICH. R. EVID. 803(6); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 803(6) (1985); NEB. REV. STAT. § 27-803(6) (1979); NEV. REV. STAT. § 51.135 (1979); OHIO R. EVID. 803(6); WASH. R. EVID. 803(6) (omitted by statute).

233. See ALASKA R. EVID. 803(8); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 803(8) (Supp. 1985); DEL. UNIF. R. EVID. 803(8); FLA. STAT. ANN. § 90.803(8) (West 1979); IDAHO R. EVID. 803(8); IOWA R. EVID. 803(8); ME. R. EVID. 803(8); MICH. R. EVID. 803(8); MINN. R. EVID. 803(8); MONT. CODE ANN. tit. 26, ch. 10 Rules of Evidence, Rule 803(8) (1985); NEB. REV. STAT. § 27-803(8) (1979); NEV. REV. STAT. § 51.155 (1979); N.D. R. EVID. 803(8); OHIO R. EVID. 803(8); TEX. R. EVID. 803(8); VT. R. EVID. 803(8); WASH. R. EVID. 803(8) (as covered by statute); WIS. STAT. ANN. § 908.03(8) (West 1975).

234. See COLO. R. EVID. 803(18); FLA. STAT. ANN. § 90.803 (West 1979) (omitted); IDAHO R. EVID. 803(18); IOWA R. EVID. 803(18); ME. R. EVID. 803(18); NEB. REV. STAT. § 27-803 (1979) (omitted); N.H. R. EVID. 803(18); NEV. REV. STAT. § 51.255 (1979); OHIO R. EVID. 803 (omitted); OR. REV. STAT. § 40.460 (1985) (omitted); VT. R. EVID. 803(18); WIS. STAT. ANN. § 908.03(18) (West 1975).

235. See ALASKA R. EVID. 803(22) (omitted); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 803(22) (Supp. 1985); COLO. R. EVID. 803(22); DEL. UNIF. R. EVID. 803(22); FLA. STAT. ANN. § 90.803 (West 1979) (omitted); ME. R. EVID. 803(22); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 803(22) (1985); N.H. R. EVID. 803(22) (omitted); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 803(22) (1985) (omitted); N.D. R. EVID. 803(22); OR. REV. STAT. § 40.460 (1983); S.D. CODIFIED LAWS ANN. § 19-16-26 (1979); TEX. R. EVID. 803(22); VT. R. EVID. 803(22).

236. See ALASKA R. EVID. 803(24); ARIZ. REV. STAT. ANN. Rules of Evidence, Rule 803(24) (Supp. 1985); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 803(24) (1979 & Supp. 1985); COLO. R. EVID. 803(24); DEL. UNIF. R. EVID. 803(24); IDAHO R. EVID. 803(24); IOWA R. EVID. 803(24); N.M. R. EVID. 803(24); N.D. R. EVID. 803(24); S.D. CODIFIED LAWS ANN. § 19-16-28 (1979); UTAH R. EVID. 803(24); W. VA. R. EVID. 803(24); WYO. R. EVID. 803(24).

237. See HAWAII REV. STAT. § 626-1, Rules of Evidence, rule 803(24) (Special Pamphlet 1980); MINN. R. EVID. 803(24); NEB. REV. STAT. § 27-803(22); N.H. R. EVID. 803(24); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 803(24)



and two states<sup>238</sup> have adopted the Supreme Court version. Eight states<sup>239</sup> have omitted the catch-all exception. Exceptions in state rules not found in the federal rules include business records in justice courts (Delaware),<sup>240</sup> statements of putative victims who are minors (Vermont),<sup>241</sup> former testimony of declarant in civil action (Florida),<sup>242</sup> deposition testimony of an expert (Michigan),<sup>243</sup> and complaints of sexual misconduct (Oregon).<sup>244</sup> Texas adopted the statement against interest exception (federal rule 804(b)(3)) as Texas rule 803 (24), making the exception applicable regardless of the declarant's availability.<sup>245</sup>

#### 14. Rule 804: Hearsay Exceptions—Declarant Unavailable

Congress enacted rule 804<sup>246</sup> with a number of changes from the Supreme Court version,<sup>247</sup> including the omission of the Supreme Court's rule 804(b)(2), which dealt with statements of recent perception.<sup>248</sup> The 1974 uniform rule<sup>249</sup> follows the Supreme Court rule in retaining the "recent perception" exception and broader versions of the exceptions for dying declarations

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(1985); OKLA. STAT. ANN. tit. 12, § 2803(24) (West 1980); OR. REV. STAT. § 40.460 (1983).

238. See MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 803(24) (1985); WIS. STAT. ANN. § 908.03(24) (West 1975).

239. See generally FLA. STAT. ANN. § 90.803 (West 1979); ME. R. EVID. 803; MICH. R. EVID. 803; NEV. REV. STAT. §§ 51.075-.365 (1979); OHIO R. EVID. 803; TEX. R. EVID. 803; VT. R. EVID. 803; WASH. R. EVID. 803.

240. See DEL. UNIF. R. EVID. 803(25).

241. See VT. R. EVID. 804(a).

242. See FLA. STAT. ANN. § 90.803(22) (West 1979).

243. See MICH. R. EVID. 803(18).

244. See OR. REV. STAT. § 40.460 (1983).

245. See TEX. R. EVID. 803(24).

246. FED. R. EVID. 804.

247. For a substantive discussion of the congressional changes to the Supreme Court's rule 804, see 4 WEINSTEIN'S EVIDENCE, *supra* note 14, at 804-3 to -16.

248. Supreme Court rule 804(b)(2) provided a hearsay exception for any "statement of recent perception," which it described as a statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

*Supreme Court Draft*, *supra* note 14, at 321 (rule 804(b)(2)). The House Judiciary Committee eliminated the exception on the grounds that it was too broad, and that it might allow admission of statements not considered trustworthy. See H.R. REP. No. 650, 93d Cong., 1st Sess. 6, *reprinted in* U.S. CODE CONG. & AD. NEWS 7075, 7079-80.

249. UNIF. R. EVID. 804 (1974).

and statements against interest. The uniform rule varies from the Supreme Court's version, however, in that it adopts the enacted version of federal rule 804(b)(5), the catch-all exception.

The states have adopted most of federal rule 804 with only minor changes. Principal variations are in rules 804(b)(2) (fourteen states)<sup>250</sup> and 804(b)(3) (ten states).<sup>251</sup> Four states<sup>252</sup> have adopted the recent perception exception deleted by Congress. All but eight states<sup>253</sup> have adopted federal rule 804(b)(5), or an equivalent catch-all exception. Delaware has omitted it, despite having adopted rule 803(24).<sup>254</sup> Nevada has adopted the equivalent of rule 804(b)(5) while omitting rule 803(24).<sup>255</sup> Exceptions in state rules not found in the federal rule include an exception in South Dakota<sup>256</sup> and New Hampshire<sup>257</sup> for statements by decedents; an exception in Oregon<sup>258</sup> for statements made in a professional capacity; an exception in Ohio<sup>259</sup> for statements made by deceased, deaf-mute, or incompetent persons; and an exception in Vermont<sup>260</sup> for statements as to boundaries of land.

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250. See ALASKA R. EVID. 804(b)(2); ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 804(b)(2) (1979); DEL. UNIF. R. EVID. 804(b)(2); FLA. STAT. ANN. § 90.804(2)(b) (West 1979); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 804(b)(2) (Special Pamphlet 1980); IOWA R. EVID. 804(b)(2); ME. R. EVID. 804(b)(2); NEB. REV. STAT. § 27-804(2)(b) (1979); NEV. REV. STAT. § 51.335 (1979); N.D. R. EVID. 804(b)(2); OR. REV. STAT. § 40.465 (1985); S.D. CODIFIED LAWS ANN. § 19-16-31 (1979); UTAH R. EVID. 804(b)(2); WIS. STAT. ANN. § 908.045(3) (West 1975).

251. See ARK. STAT. ANN. § 28-1001, Uniform Rules of Evidence, Rule 804(b)(3) (1979); FLA. STAT. ANN. § 90.804(2)(c) (West 1979); MONT. CODE ANN. tit. 26, ch. 10, Rules of Evidence, Rule 804(b)(3) (1985); NEV. REV. STAT. § 51.345 (1979); N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rule 804(b)(3) (1985); N.D. R. EVID. 804(b)(3); OHIO R. EVID. 804(B)(3); TEX. R. EVID. 804(b)(3); VT. R. EVID. 804(b)(3); WIS. STAT. ANN. § 908.045(4) (West 1975).

252. See HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 804(b)(5) (Special Pamphlet 1980); N.M. R. EVID. 804(b)(2); WIS. STAT. ANN. § 908.04(2) (West 1975); WYO. R. EVID. 804(b)(5).

253. See generally DEL. UNIF. R. EVID. 804; FLA. STAT. ANN. § 90.804 (West 1979); ME. R. EVID. 804; MICH. R. EVID. 804; OHIO R. EVID. 804; TEX. R. EVID. 804; VT. R. EVID. 804; WASH. R. EVID. 804.

254. See DEL. UNIF. R. EVID. 803(24).

255. NEV. REV. STAT. § 51.315 (1979).

256. See S.D. CODIFIED LAWS ANN. § 19-16-34 (1979).

257. See N.H. R. EVID. 804(b)(5). See also N.H. REV. STAT. ANN. § 516:25 (1974 & Supp. 1985) (part of New Hampshire's earlier repeal of dead man's statute); C. McCORMICK, *supra* note 67, § 65, at 160 n.7.

258. See OR. REV. STAT. § 40.465 (1985).

259. See OHIO R. EVID. 804(b)(5).

260. See VT. R. EVID. 804(b)(4)(C).

### C. *The Value of Uniformity*

The preceding discussion has emphasized the number and form of the differences between the Federal Rules and state adaptations. None of these differences, however, can obscure the fact that the basic plan and principles of the Federal Rules of Evidence apply in all thirty of the states that have adopted them and have significant influence in other jurisdictions as well. On certain provisions, states have struck out on their own in order to preserve traditional state practice, to follow what has turned out to be the losing path in the development of one of the Federal Rules, or to break new ground. Nevertheless, in nearly all of the rules states, uniformity has come to mean a common format and organizational plan, usually with identical or nearly identical numbering; common provisions in identical or nearly identical language in the great majority of rules; and agreement on the subjects that are to be included and excluded from the body of the rules.

Most important, the Federal Rules have put the law of evidence in a single frame of reference. The structure and content of key rules that have been universally adopted mean that there is now widespread common agreement on the vocabulary and conceptual framework in which the basic principles of judicial notice, presumptions, relevance, privilege, competence, hearsay, authentication, and best evidence are to be understood and discussed. Disagreement with a particular formulation of a rule can only be expressed by reference and reaction to the Federal Rules and the growing body of legal literature that has embraced their scheme.<sup>261</sup>

Uniformity at this level is a significant achievement of great potential for the future development of the law of evidence. If the Federal Rules do not yet realize Wigmore's<sup>262</sup> or Morgan's<sup>263</sup> dream of a rational and efficient code of evidence, they are, nevertheless, a major breakthrough. With a common vocabulary and framework, evidence scholars are able to move away from the

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261. See Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 257-58 (1984). Professor Younger's view of state-federal uniformity is less positive than that suggested here. See Younger, *Introduction, Symposium: The Federal Rules of Evidence*, 12 HOFSTRA L. REV. 251, 254 n.17 (1984) ("The prudence of uniformity of practice between state and federal courts is hardly self-evident. And if the Rules were folly to begin with, their replication among the states would not make them wise.").

262. See, e.g., J. WIGMORE, EVIDENCE xix (Tillers rev. ed. 1983) (preface to first edition) (Wigmore stating that his goal is "to expound the Anglo-American law of Evidence as a system of reasoned principles and rules").

263. See generally Morgan & Maguire, *supra* note 68.

sorting and comparison of variant rules to focus on substance and the real impact of the law of evidence upon the effectiveness of the adversary process as an instrument of justice.

### III. FORM OF ADOPTION: RULE VS. STATUTE

The principal vehicle for state adoption of the Federal Rules of Evidence has been rules promulgated by the courts under statutory or constitutional authority. In light of the continuing legislative interest in evidence law reform since the mid-nineteenth century,<sup>264</sup> however, conflict between the legislative and judicial branches has been an inevitable feature of the effort at both the state and federal levels. This part of the paper takes the position that judicial rulemaking is not only a proper method for the reform and codification of evidence rules, but is the preferable method. Part IV of this paper proposes a model intended to resolve, or at least accommodate, any conflict between the legislative and judicial branches.

By 1940, judicial rulemaking power had become sufficiently accepted as a means of procedural reform<sup>265</sup> that it was a natural medium for the development of uniform and codified evidence rules. Both the 1942 Model Code of Evidence and the 1953 Uniform Rules of Evidence were designed to be adopted either as court rules or legislation.<sup>266</sup> The impetus for adoption of the Federal Rules came in 1961 from the Judicial Conference of the United States.<sup>267</sup> Originally, the Federal Rules were planned, drafted, and promulgated as rules of court under the Supreme Court's general statutory power to make rules governing "practice and procedure" so long as those rules do not invade "any substantive right."<sup>268</sup> Through a mixture of motives, some of which were articulated as concern for the scope of that rulemak-

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264. For a cogent historical summary of the development of the legislative role, see 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 67-77.

265. See A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 91-129 (1949); Kaplan & Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951). See also J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 82-84 (1977); Dooley, *The Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont—Judicial or Legislative Power?*, 8 VT. L. REV. 211, 237-39 (1983).

266. See MODEL CODE OF EVIDENCE Rule 2 comment (1942); UNIF. R. EVID. 2 comment (1953).

267. For a discussion of the work of the Judicial Conference, see *supra* text accompanying notes 5 & 7.

268. 28 U.S.C. § 2072 (1982). For a discussion of the Supreme Court's promulgation of the Federal Rules, see *supra* text accompanying notes 8-12.

ing power, Congress stepped in and took over the process<sup>269</sup> so that the final version of the Federal Rules was statutory.<sup>270</sup> Under the act adopting the Federal Rules, the Supreme Court has been given power to amend the rules subject to congressional review, but Congress has also reserved the power to amend any rule "proposed or in force."<sup>271</sup>

In the states, as might be expected, the experience has been varied. In nine<sup>272</sup> of the thirty states that have adopted the Federal Rules or some variation thereof, adoption has been by legislative enactment. In the remaining twenty-one states, the rules have been promulgated by the state's highest court under the authority of statutory, or inherent or express constitutional rulemaking power. The role of the legislature in these promulgations has ranged from apathy through inquisitiveness to hostility.<sup>273</sup>

#### A. *The Scope of Judicial Rulemaking Power*

Two basic questions concerning the scope of judicial power to promulgate rules of evidence have been debated since 1961, when the Judicial Conference of the United States made its initial

269. For a discussion of congressional maneuvering to take over the rule-making process, see *supra* note 18 and accompanying text.

270. See Rules of Evidence (Evidence Rules Enabling Act), Pub. L. No. 93-595, §§ 2-3, 88 Stat. 1926, 1948 (1975).

271. See *id.* (codified at 28 U.S.C. § 2076 (1982)).

272. See Act of February 10, 1976, Act 1143, 1976 Ark. Acts 2799 (codified at ARK. STAT. ANN. § 28-1001 (1979 & Supp. 1985)); Act of June 23, 1976, ch. 76-237, 1976 Fla. Laws 556 (codified at FLA. STAT. ANN. §§ 90.101-90.958 (West Supp. 1985)); Hawaii Rules of Evidence, Act 164, 1980 Hawaii Sess. Laws 244 (codified at HAWAII REV. STAT. § 626-1, Rules of Evidence, Rules 100-1102 (Special Pamphlet 1980)); Rules of Evidence, ch. 219, 1983 Iowa Acts 713 (codified at IOWA CODE § 684.18-19 (1983)); Act of May 22, 1975, Leg. Bill 279, 1975 Neb. Laws 528 (codified at NEB. REV. STAT. §§ 27-101 to -1103 (1979)). Act of April 22, 1971, ch. 402, 1971 Nev. Laws 775 (codified at NEV. REV. STAT. §§ 47.020-56.020 (1979)); Act of July 7, 1983, ch. 701, 1983 N.C. Sess. Laws 666 (codified at N.C. GEN. STAT. § 8C-1, Rules of Evidence, Rules 101-1102 (1985)); Civil Procedure—Criminal Procedure—Evidence Code, ch. 285, 1978 Okla. Sess. Laws 801 (codified at OKLA. STAT. ANN. tit. 12 §§ 2101-3103 (West 1980)); Act of August 22, 1981, ch. 892, 1981 Or. Laws 1374 (codified at OR. REV. STAT. §§ 40.010-40.585 (1983)).

273. Inquisitiveness: In Vermont, the Legislative Committee on Judicial Rules, established by 1981 amendments to 12 VT. STAT. ANN. §§ 1-4, held extensive hearings on the rules of evidence, but finally interposed no effective obstacle to the promulgation in 1983 of the Vermont Rules of Evidence. See Dooley, *supra* note 265, at 220 n.51. Hostility: In Ohio, the General Assembly in 1977 and 1978 prevented the Ohio Supreme Court's proposed rules of evidence from going into effect, by concurrent resolution. After legislative hearings in 1979 and 1980, the court promulgated a revised draft that was not opposed when it became effective in 1980. See Blakey, *supra* note 32, at 242.

recommendation for a feasibility study of federal evidence rules.<sup>274</sup>

The first question is whether there is judicial power to adopt rules of evidence at all.<sup>275</sup> The underlying issue here is a constitutional one of separation of powers—the extent of the inherent power of the judiciary, acting in its administrative capacity as a separate branch of government, to regulate the practice and procedure of the courts.<sup>276</sup> In the federal system, because Congress has asserted primary power over procedure, this question has boiled down to one of statutory interpretation. Specifically, the issue is whether rules of evidence are rules of “practice and procedure” within the meaning of the Rules Enabling Act.<sup>277</sup> The form of this question in the states varies according to the manner in which the law of each state articulates the rulemaking power and with the extent of the inherent judicial power granted by the state constitution. If judicial rulemaking authority is based on state statutory or constitutional language similar to that in the federal Rules Enabling Act, the problem is a similar one of interpretation. In the absence of such a provision, the issue is one of the scope of inherent judicial power.<sup>278</sup> The general response to this question has been in the affirmative. Today, it is recognized that the judicial branches of both the federal and state governments possess general rulemaking power over evidence that is at least concurrent with that of the legislative branches, if it is not exclusive.<sup>279</sup>

The second, more specific question then arises: Are particular rules of evidence that may implicate matters going beyond the

274. For a discussion of the initial recommendation for a feasibility study, see *supra* note 5 and accompanying text.

275. This and other related questions have been addressed by Congressman William L. Hungate, who chaired the Subcommittee of the Judiciary Committee of the House of Representatives that studied the Federal Rules. See Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225, 228-29 (1973).

276. See generally A. VANDERBILT, *supra* note 265, at 132-34; J. WEINSTEIN, *supra* note 265, at 4-8, 21, 52-55.

277. 28 U.S.C. 2072 (1977). See also *Preliminary Report*, *supra* note 7, at 29, 32, 35; J. WEINSTEIN, *supra* note 265, at 71-73, 89-96; Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W. RES. L. REV. 16, 24-26 (1978).

278. See Ashman, *Measuring the Judicial Rulemaking Power*, 59 J. AM. JUD. SEC. 215 (1975). See also A. VANDERBILT, *supra* note 265, at 132-36; J. WEINSTEIN, *supra* note 265, at 77-84; Dooley, *supra* note 265, at 239; Giannelli, *supra* note 277, at 26-33.

279. See *Preliminary Report*, *supra* note 7, at 29-40. See also J. WEINSTEIN, *supra* note 265, at 71-73, 77-84.

confines of the courtroom within the judicial rulemaking power? The basic rationale for the conclusion that rules of evidence in general are rules of "practice and procedure" within the judicial power has been that rules of evidence are by and large aimed at regulating the trial of facts to produce a fair and efficient judicial process. They are either "traffic-control" rules describing the mechanics of trial and the respective powers and obligations of judge and jury, or they are screening rules designed to keep from the jury evidence that will waste its time or tempt it into error.<sup>280</sup> Such rules, intrinsic to the judicial process, plainly fall within the scope of judicial power to regulate practice in the courts by rule. Some rules, however, though usually denominated "rules of evidence" because they operate to keep particular items of evidence from the trier of fact, have another aspect. These are rules based at least in part on policies that serve interests extrinsic to the judicial process.<sup>281</sup> Thus, the second question may be restated as whether such rules primarily serve one of those extrinsic interests and thus depend upon a policy judgment which should be made only by the legislature or by a court announcing a common-law rule in the adversarial context of litigation. If the answer to this question is "yes," then the rule arguably may be deemed beyond the rulemaking power.

In the federal system, this second question has a dual aspect. The judicial rulemaking power is circumscribed not only by the limits that Congress has historically been permitted to place upon it, but also by limits on all federal power inherent in a federal system in which national powers are only those expressed and implied in the Constitution and in which all other governmental power is reserved to the states or to the people. This limitation has its classic exposition in *Erie Railroad v. Tompkins*,<sup>282</sup> which held that the Constitution requires the application of state law in federal courts except as to matters in which there is a constitutional grant of federal power. The enacted version of the Federal Rules of Evidence reflects both sources of limitation. In certain areas, notably the rules of privilege, the rules adopted by the Supreme Court were eliminated altogether as intruding upon congress-

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280. See Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 361-63 (1969). See also C. WRIGHT, LAW OF FEDERAL COURTS 621-22 (4th ed. 1983).

281. See C. WRIGHT, *supra* note 280, at 624; Weinstein, *supra* note 280, at 363-73. See generally J. WEINSTEIN, *supra* note 265, at 73-74, 80-81 n.270.

282. 304 U.S. 64 (1938). See C. WRIGHT, *supra* note 280, at 352-64.

sional and common-law prerogatives.<sup>283</sup> In this and other areas, the Federal Rules also make express reservations of state power in cases where state law creates the rule of decision.<sup>284</sup> These unique aspects of the judicial rulemaking power in the federal system mean that the federal experience may not offer direct authority for resolving questions of state judicial power.<sup>285</sup>

In the states, the second question is primarily one of separation of powers. While theoretically, as 1974 uniform rule 302<sup>286</sup> suggests, a state rule of evidence could impinge upon an area of express federal power, the broad and general nature of most evidence rules and their focus on either the business of the trial courts or proper state interests makes for very little direct conflict. The supremacy clause of the United States Constitution<sup>287</sup> will prevent a general state rule from infringing on federal power in a particular case. The separation of powers issue has been addressed in a variety of forms in many different jurisdictions.<sup>288</sup> It is inherent in all efforts to regulate practice and procedure by judicial rule, but it comes to a particular head with evidence rules because, as the discussion in Part IV of this paper suggests, so many of them serve both the intrinsic interest of the judiciary in the trial process and an extrinsic interest more properly served by legislation or common-law decision. Determination of the ques-

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283. For a discussion of privileges, see *supra* notes 119-41 and accompanying text. For further insight into Congress' reasons for deleting the Supreme Court rules on privileges, see H.R. REP. NO. 650, 93d Cong., 1st Sess. 8-9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7082-83; 21 C. WRIGHT & K. GRAHAM, *supra* note 4, §§ 5421-5422; J. WEINSTEIN, *supra* note 265, at 73-74.

284. See, e.g., FED. R. EVID. 302, 501, 601. Those reservations were intended to reflect the policies, if not the command, of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See sources cited *supra* notes 75, 126, 151. See also J. WEINSTEIN, *supra* note 265, at 73 n.271.

285. See Giannelli, *supra* note 277, at 26-37.

286. UNIF. R. EVID. 302 (1974). Uniform rule 302 provides:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

*Id.* The rule was intended to be the mirror image of federal rule 302, which provides that state law governs the effect of presumptions in federal courts when the rule of decision is governed by state law. For citations to the eight states that have adopted uniform rule 302, see *supra* note 77.

287. U.S. CONST. art. VI, cl. 2. The supremacy clause states that the Constitution and the laws of the United States "shall be the supreme Law of the Land." *Id.*

288. See, e.g., J. WEINSTEIN, *supra* note 265, at 73-74, 77-84; Giannelli, *supra* note 277, at 21-46; Note, *Rules of Evidence: An Exercise of Constitutional Power by the Michigan Supreme Court*, 1980 DET. C.L. REV. 1063. See generally A. VANDERBILT, *supra* note 265, at 132-36.



tion of authority to promulgate a particular rule of evidence that serves interests not solely intrinsic to the judicial process thus requires an analysis of the rule to determine the precise interests involved and a balancing of those interests.

### B. *Judicial Rulemaking Preferred*

To the extent that the judiciary possesses rulemaking power over rules of evidence, court rules are, on balance, the preferred medium for the adoption of state rules of evidence. There are at least three advantages to the use of judicial rulemaking power in adopting rules of evidence:<sup>289</sup> (1) Judicial rulemaking permits the judges, who ultimately are responsible for the conduct of judicial business and have the technical expertise, to have the major say in the scope and content of the rules. Moreover, judicial rulemaking occurs without the necessity of having to plead before the legislature. (2) Due to the flexibility of timetable and procedure and the opportunity for collegial review and action by the court, judicial rulemaking lends itself to a more systematic and coherent drafting process. (3) The amendment process for court rules is far more flexible and efficient than that of the legislature. The court can provide for a continuous monitoring of the rules in operation and can make amendments as necessary to meet changing demands of practice.

The disadvantages of judicial rulemaking are suggested by the limitations on its scope. First, judicial rulemaking may give rise to a conflict with the legislature if either branch is insensitive to the powers and prerogatives of the other. Second, judicial rulemaking may appear distinctly counter-majoritarian if it is conducted without some form of public notice and participation.<sup>290</sup> These disadvantages are eliminated by a properly delineated and implemented rulemaking process.

## IV. MODEL GUIDELINES FOR STATE EVIDENCE RULEMAKING

To assist states that have not yet adopted rules of evidence, Part IV of this paper reviews in greater detail the concerns about judicial rulemaking noted in Part III and sets forth model guidelines intended to meet those concerns.

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289. See J. WEINSTEIN, *supra* note 265, at 12-21. *But cf. id.* at 102-04 (noting certain disadvantages of exercise of rulemaking power by United States Supreme Court).

290. *Id.* at 4-8, 77-79.

### A. *The Concerns*

Three principal concerns arise when rules of evidence are adopted by court rule. The first is the exact path of the line between judicial and legislative power over the matters traditionally deemed to constitute the law of evidence. The second is the practical dimension of the relationship between the judicial and legislative branches when each seeks to act on the same subject. The third is the nature and openness of the process by which the court adopts the rules.

#### 1. *The Line Between Judicial and Legislative Power*

As noted in Part III, some rules of evidence plainly are within the judicial rulemaking power in that they are housekeeping rules that serve the functions of traffic-control or screening. Such rules primarily serve the intrinsic interests of the judiciary in the fair and efficient conduct of trials. Other rules of evidence, however, are the province of the legislature or the common law because they are based on policy considerations extrinsic to the judicial process. This distinction is not always clear and may require a balancing process. The following review of the Federal Rules of Evidence seeks to illuminate the distinction between rules that serve intrinsic judicial interests and those that are based on extrinsic policy considerations.

##### a. Article I: General Provisions

The rules contained in article I of the Federal Rules<sup>291</sup> are traffic-control rules, covering primarily the mechanics by which evidence is to be received, considered, and admitted. These rules plainly serve intrinsic judicial interests.

##### b. Article II: Judicial Notice

Rule 201,<sup>292</sup> covering judicial notice, is a screening rule designed to withdraw from possible erroneous jury determination factual questions so indisputable that no reasonable issue remains. The rule establishes a judicial power and the mechanics of its exercise that are necessary to the intrinsic judicial interest in fair and efficient trial. The rule serves no extrinsic policies.

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291. See generally FED. R. EVID. 101-106.

292. FED. R. EVID. 201. For a further discussion of rule 201, see *supra* notes 57-66 and accompanying text.

## c. Article III: Presumptions

Rules concerning presumptions fall into two categories: (1) those which describe either the effect of presumptions or the manner in which they are to be applied in litigation, and (2) those which create specific presumptions. Federal rule 301, describing the effect of presumptions in civil actions, and uniform rule 303, describing the manner of instructing the jury as to a criminal presumption and the effect to be given to it, are rules of the first category.<sup>293</sup> These rules are in one respect traffic-control rules, serving only interests intrinsic to the judicial system, since they involve the mechanics of the trial process. They may also affect extrinsic interests, however, because they dictate the weight of the burden to be imposed in the name of any extrinsic policy that a presumption may reflect. Federal rule 302,<sup>294</sup> providing that state law controls the effect of a presumption where that law provides the rule of decision, treats rules of the first category as affecting extrinsic interests for federalism purposes. They may, however, be deemed to be of intrinsic judicial interest for separation of powers purposes.<sup>295</sup>

Rules creating specific presumptions also may be either traffic-control rules or rules affecting extrinsic interests. Traffic-control presumptions are those which shift the burden of production to the party who has better access to the facts or the party who must argue the less probable side of a common issue.<sup>296</sup> Presumptions that serve extrinsic interests do so primarily by imposing burdens on disfavored classes of litigants.<sup>297</sup> Analysis is rendered complex by the fact that many presumptions serve both intrinsic and extrinsic purposes.<sup>298</sup> The only specific presumptions created by the Federal Rules are the self-authentication pro-

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293. See FED. R. EVID. 301; UNIF. R. EVID. 303 (1974). For a discussion of the two rules, see *supra* notes 67-69 (federal rule 301) & 81-82 (uniform rule 303) and accompanying text.

294. FED. R. EVID. 302. For a discussion of rule 302, see *supra* note 75.

295. See *supra* note 75. See also 21 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5132; Giannelli, *supra* note 277, at 50.

296. For an example of a traffic-control presumption, see C. McCORMICK, *supra* note 67, § 343 (discussing presumption that properly mailed letter was duly delivered).

297. For an example of a presumption that serves extrinsic interests, see *id.* at 968 (discussing presumption of ownership from prior possession).

298. For an example of a presumption that serves both intrinsic and extrinsic interests, see *id.* at 972 (discussing presumption that child born during marriage is legitimate, which is based both on probability and social policy of avoiding stigma and societal burdens of illegitimacy).

visions of rule 902,<sup>299</sup> which are primarily of intrinsic effect.

d. Article IV: Relevancy

The rules of relevance<sup>300</sup> are primarily screening rules designed to keep from the jury evidence that may waste time or mislead because of its low probative value or high prejudicial content. Such rules plainly serve intrinsic judicial interests. This is so despite the occasionally troubling fact that the "special" rules of relevance found in federal rules 407-410<sup>301</sup> serve extrinsic interests as well in their exclusionary effect. These rules are instances where not only is the logical inference that the jury is asked to draw a tenuous one, but exclusion serves some extrinsic policy such as the encouragement of repairs of conditions that have caused accidents.<sup>302</sup> The rules, nevertheless, primarily affect intrinsic judicial interests because their screening purposes predominate. Moreover, their incidental extrinsic purposes serve either general interests of the judicial system, such as the encouragement of compromise, or generic social values that the courts should not be barred from furthering in the absence of a contrary legislative policy.

e. Article V: Privileges

Like rules governing presumptions, rules governing privileges can serve either intrinsic judicial interests or extrinsic societal policies. Rules that merely describe the conditions under which privileges are to be asserted are traffic-control rules,<sup>303</sup> while rules that define specific privileges are the plainest examples of rules serving interests entirely extrinsic to the trial process.<sup>304</sup> Only the lawyer-client privilege<sup>305</sup> conceivably serves

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299. FED. R. EVID. 902. *See also infra* note 320. *See generally* 21 C. WRIGHT & K. GRAHAM, *supra* note 4, at 568-69. A few states have created other specific presumptions in their rules. *See supra* notes 78-80. Note that the Hawaii and Oregon rules are both statutory. *See supra* note 80.

300. FED. R. EVID. 401-412.

301. FED. R. EVID. 407-410.

302. *See* FED. R. EVID. 407 (evidence of subsequent remedial efforts inadmissible to prove negligence). *See also* FED. R. EVID. 409 (evidence of offer to pay medical expenses is inadmissible to prove liability). *See generally* C. McCORMICK, *supra* note 67, at 811, 815, 818. For a further discussion of federal rule 407, *see supra* notes 112-21 and accompanying text.

303. For examples of such rules, *see* UNIF. R. EVID. 510-512 (1974) (adopting Supreme Court's draft version of rules 511-513). For the history of the privilege rules, *see supra* notes 122-27 and accompanying text.

304. For examples of such rules, *see* UNIF. R. EVID. 502-509 (1974) (adopting Supreme Court's draft version of rules 503-510).

intrinsic judicial interests. Every other privilege serves extrinsic societal policies. Moreover, such privileges generally serve interests contrary to those of the judiciary, since they inhibit the trial process by preventing full development of the facts.<sup>306</sup>

In the Federal Rules, Congress recognized the extrinsic nature of privileges by providing that state privilege law governs in a civil action where state law supplies the rule of decision.<sup>307</sup>

#### f. Article VI: Witnesses

Most of the rules in article VI<sup>308</sup> clearly are traffic-control or screening rules. In the Federal Rules, Congress elected to defer to "state policy," however, by providing a saving clause for rules of competency on state law issues.<sup>309</sup> Since rules of competency, including the dead man's statutes,<sup>310</sup> are screening rules intended to keep from the jury evidence that is unreliable either because of the lack of capacity of the witness or the inability to rebut, this seems a misguided decision based more on politics than policy.<sup>311</sup>

#### g. Article VII: Opinions and Expert Witnesses

The rules in article VII<sup>312</sup> govern the admissibility of opinion testimony in general and expert testimony specifically. Such rules, which function only as screening and traffic-control rules, are plainly intrinsic in effect.

#### h. Article VIII: Hearsay

The rules in article VIII<sup>313</sup> define "hearsay"<sup>314</sup> and govern

305. See UNIF. R. EVID. 502 (1974) (adopting the Supreme Court's draft version of 503).

306. See C. McCORMICK, *supra* note 67, at 170-72. This was one of the major reasons for Congress' decision to delete rules 502-513 of the Supreme Court's version of the Federal Rules. See 2 WEINSTEIN'S EVIDENCE, *supra* note 14, ¶ 501[01], at 501-13.

307. See FED. R. EVID. 501. See also CONF. REP. NO. 1597, 93d Cong., 2d Sess. 7, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7100-01.

308. FED. R. EVID. 601-615.

309. See FED. R. EVID. 601. For a discussion of Congress' decision to defer to state policy, see *supra* note 151 and accompanying text.

310. For a discussion of dead man's statutes, see *supra* note 151 and accompanying text.

311. See generally Schmertz, *supra* note 151, at 1376-405 (arguing that while Congress undoubtedly possessed power to insist that federal courts defer to state law in area of incompetency, the decision to do so was unwise and should be reconsidered by both Congress and Supreme Court).

312. FED. R. EVID. 701-706.

313. FED. R. EVID. 801-806.

when such evidence is admissible through a general exclusionary rule<sup>315</sup> and numerous exceptions thereto.<sup>316</sup> Such rules plainly are screening rules and serve only intrinsic judicial interests. The essence of the hearsay rule is to prevent the jury from hearing evidence of statements that are deemed unreliable because they are not offered under oath and subjected to cross examination in the jury's presence.<sup>317</sup> The exceptions are based on the premises that particular kinds of statements have guarantees of trustworthiness that overcome their potential unreliability and that they may be of more than ordinary value to the course of the litigation.<sup>318</sup> Thus, the hearsay rules serve what is predominantly an intrinsic judicial interest.

i. Article IX: Authentication and Identification

The rules in article IX<sup>319</sup> govern authentication of evidence. Such rules are special rules of relevance designed to assure that real or documentary evidence presented to the jury is what it purports to be. Authentication rules are screening rules that serve only intrinsic judicial interests.<sup>320</sup>

j. Article X: Contents of Writings, Recordings, and Photographs

The rules in article X<sup>321</sup> constitute the best evidence rule. The focus of these special rules of relevance is on assuring reliability of documentary evidence where content is at issue.<sup>322</sup> Such rules clearly are screening rules and serve intrinsic judicial interests.

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314. FED. R. EVID. 801. For a further discussion of federal rule 801, see *supra* notes 191-223 and accompanying text.

315. FED. R. EVID. 802.

316. FED. R. EVID. 803-804. For a further discussion of the hearsay exceptions, see *supra* notes 224-45 (federal rule 803) & 246-60 (federal rule 804) and accompanying text.

317. See C. McCORMICK, *supra* note 67, at 726-28.

318. See *id.* § 253. Cf. FED. R. EVID. 803(24), 804(b)(5).

319. FED. R. EVID. 901-903.

320. *But cf.* FED. R. EVID. 902. While the provisions of rule 902, setting forth instances of documents that may be admitted as self-authenticating without extrinsic evidence, are in effect presumptions, they are of the type which serve solely intrinsic judicial interests. See *supra* text accompanying note 299. See generally C. McCORMICK, *supra* note 67, at 700-01.

321. FED. R. EVID. 1001-1008.

322. See C. McCORMICK, *supra* note 67, at 702-05.

## 2. *Accommodation of Judicial and Legislative Power*

The scope of rulemaking power has a practical dimension. Whatever the theoretical scope of their respective powers, the judiciary and the legislature generally act concurrently. The question thus arises: What happens when rules of court and statutes clash? The answers to this question have varied and will vary from state to state according to the terms of the state constitution's judicial article, the terms of any rules enabling legislation that may exist, and the political relations between the branches. What follows describes the minimum conditions for effective rulemaking.

### a. *Judicial Power to Supersede Evidentiary Statutes*

As the concept of judicial rulemaking began to gather momentum in the first half of this century, the power to supersede inconsistent statutes by rule was a recurrent theme.<sup>323</sup> Language granting such a power has been incorporated in the federal and in many state enabling acts.<sup>324</sup> If the power to supersede is not expressly granted, however, it is necessary to invent it. The courts of some states have done just that, finding inherent power to supersede legislation implicit in the grant of rulemaking power in their respective state constitutions.<sup>325</sup>

The necessity for the power is manifest. In most jurisdictions, there is a large body of pre-existing statutory law on evidence. State codes are laden with hidden presumptions, authentication rules, privileges, hearsay exceptions, and rules of relevance. Even if statutory clean-up legislation accompanies the promulgation of rules, it is impossible to catch everything. If the rules are to work as a coherent whole, the supersession power is

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323. See, e.g., A. VANDERBILT, *supra* note 265, at 136-39; *Report of the Committee on Uniform Judicial Procedure*, 39 A.B.A. REP. 571, 572 (1914); Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 279 (1928); Wheaton, *Courts and the Rule-making Powers*, 1 MO. L. REV. 261, 263-65 (1936).

324. See, e.g., Federal Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)); ALA. CODE § 12-2-2 (1975); DEL. CODE ANN. tit. 10-11, §§ 10:361, 10:561, 11:5122 (1974); MO. ANN. STAT. § 477:010 (Vernon 1952); N.M. STAT. ANN. § 38-1-1 (1978); WIS. STAT. ANN. § 751.12 (West 1981). See also OHIO CONST. art. iv, § 5(B). Cf. TENN. CODE ANN. § 16-3-406 (1980).

325. See *Columbia Lumber & Millwork, Co. v. DeStefano*, 12 N.J. 117, 95 A.2d 914 (1953); *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950). For citations to related cases, see Dooley, *supra* note 265, at 243-44 nn.171-72.

necessary.<sup>326</sup>

But what if the conflict is the result of a legislative act intentionally designed to alter the effect of a previously adopted rule? Although some state courts have asserted that the rulemaking power is exclusive to the judiciary, most recognize a concurrent legislative power to revise rules.<sup>327</sup> Even in such cases, however, the courts should have the power to supersede legislation in the area of evidentiary rules. While such a power presents the risk of a running battle between these two branches of government, it is more likely that the threat of such discord will compel cooperation and the constructive sharing of power. Moreover, when inconsistent provisions do emerge, the judiciary, which has control of the whole body of rules, is in the best position to reconcile the conflict by promulgating a new rule that harmonizes the situation.<sup>328</sup>

#### b. Legislative Power to Initiate Evidentiary Statutes; Savings Clauses

Some courts have found that inherent or express judicial rulemaking power, if it is not exclusive to the judiciary, at least confines the power of the legislature to the revision of previously promulgated court rules.<sup>329</sup> In fact, a legislative power to initiate procedural enactments is necessary. There are areas where the judicially adopted rules do not apply or where legislation can be complementary. When the legislature acts in an area already covered by judicial rules, however, it should be understood as changing the effect of a rule only if an intention to supersede the judicial rule is made express. The best hope for effective comity and cooperation is a situation in which legislative power is recog-

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326. See generally 1 R. FIELD, V. MCKUSICK & L.K. WROTH, MAINE CIVIL PRACTICE § 1.3 (2d ed. 1970); Dooley, *supra* note 265, at 244-45. In a series of six clean-up bills drafted for enactment in Vermont by Mr. Dooley and Peter Bluhm of the State Legislative Council, with the assistance of the present author, 155 statutory provisions concerning presumptions, hearsay exceptions, authentication, expert witnesses, and other evidentiary matters were proposed to be repealed or amended for consistency with the Vermont Rules of Evidence. The comprehensive statutory review also revealed many evidentiary provisions requiring no change. See H. 328 (Vt. 1983) (basic conformity); H. 563 (Vt. 1983) (experts); H. 564 (Vt. 1984) (hearsay); H. 565 (Vt. 1984) (presumptions); H. 566 (Vt. 1984) (privileges); H. 567 (Vt. 1984) (miscellaneous). At present writing, none of these bills has been enacted.

327. See J. WEINSTEIN, *supra* note 265, at 77-84.

328. See Dooley, *supra* note 265, at 245-47.

329. See *Market v. Johnston*, 367 So. 2d 1003 (Fla. 1978).



nized, but is carefully used to avoid conflict.<sup>330</sup>

The Federal Rules and state rules based on them do not cover the entire law of evidence. Thus, many statutory provisions dealing with specific points or omitted provisions must remain in effect. The Federal Rules and various state rules recognize this practical reality by including saving clauses in particular rules where statutes remain in force<sup>331</sup> and by specifically providing in some cases for interplay of statutory provisions with the rules.<sup>332</sup>

### 3. *Rulemaking and Legislative Procedure*

The courts have devised a variety of methods for developing and promulgating rules.<sup>333</sup> Increasingly, as exercises of the rulemaking power have come to impinge on areas previously within the legislative domain, concern has been expressed about lack of visibility and public access and participation in judicial rulemaking.<sup>334</sup> If the courts are to maintain credibility in the exercise of the rulemaking power, their rulemaking procedures must be formalized and open. At the same time, if the legislature wishes to have a formal and effective role in the process, it should

330. See 1 R. FIELD, V. MCKUSICK & L.K. WROTH, *supra* note 326, § 1.3; J. WEINSTEIN, *supra* note 265, at 17-20, 77-84; Dooley, *supra* note 265, at 247-49.

331. See, e.g., FED. R. EVID. 301, 402, 501, 802, 1002; N.H. R. EVID. 601; ME. R. EVID. 303, 903.

332. See, e.g., FED. R. EVID. 901(10), 902(10). See also VT. R. EVID. 501(b) (added effective March 7, 1985). The rule provides:

(b) Statutory Privileges. This subdivision applies to information which is protected by a statutory privilege and which: (1) was collected or recorded under a statute, rule or order requiring a report, disclosure or communication to a public agency, officer or employee; (2) was collected or recorded by a public agency, officer or employee in order to provide treatment or services to the privilege holder or to determine whether to charge the privilege holder with a crime or delinquent act; or (3) was communicated to a mediator, factfinder or arbitrator during a labor dispute or negotiation. The public agency, officer or employee or the mediator, factfinder or arbitrator who holds the information is presumed to have the authority to claim the privilege on behalf of the person privileged. Unless the statute provides to the contrary, the privilege does not extend to original information, documents or records when sought from original sources. No privilege exists in actions involving perjury, false statements, fraud in a return or report, or other failure to comply with the statute, rule or order in question. Rules 510 through 512 shall apply to privileges covered by this subdivision.

*Id.*

333. See generally J. WEINSTEIN, *supra* note 265, at 18-19, 84-87; Dooley, *supra* note 258, at 249-50 (arguing that rulemaking procedure, up to the point of promulgation of the rules, is not subject to legislative control as a matter of inherent judicial power); Parness & Korbakes, A Study of the Procedural Rulemaking Power in the United States (Am. Jud. Soc'y mimeo 1973).

334. See J. WEINSTEIN, *supra* note 265, at 8-11, 89-104.

develop a review procedure that works promptly and with appropriate regard for judicial prerogatives.<sup>335</sup>

### B. *Model Guidelines for Evidentiary Rulemaking*

With the preceding concerns in mind, we now articulate model guidelines for evidentiary rulemaking that set forth the proper scope of the rulemaking power over evidence and the appropriate means for its exercise.

#### 1. *Scope of the Rulemaking Power*

The judiciary may freely adopt and amend rules of evidence that serve interests intrinsic to the judicial process. Conversely, the judiciary should not adopt or amend rules of evidence that break new ground in areas that predominantly serve interests, and are based on policies, extrinsic to the judicial process. In the interests of uniformity and comprehensiveness, however, the judiciary may adopt rules of evidence that codify the existing statutory and common-law doctrine in extrinsic policy areas. Where a rule of evidence equally serves intrinsic judicial interests and extrinsic social policies, the judiciary may freely adopt it or amend it in the absence of any clear legislative provision or common-law rule expressly furthering the extrinsic policy.

These principles have the following particular applications in areas that have caused difficulty in the past:

##### a. Presumptions

The judiciary may adopt rules that create presumptions which have the predominant purpose of allocating burdens in ways that aid the conduct of litigation. The judiciary may not adopt rules that create presumptions which have the predominant purpose of furthering extrinsic social policies. Such rules should be left to the legislature or the common law. The judiciary may adopt general rules describing the effect of presumptions, but it should make clear that those rules are subject to any statutory provision or common-law rule that may assign a different effect to a particular presumption in order to serve an extrinsic policy.

##### b. Relevance Rules

The judiciary may adopt or amend special rules of relevance

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335. See *id.* at 105-17, 147-53; Dooley, *supra* note 265, at 250-52; Parness & Manthey, *Public Process and State Judicial Rulemaking*, 1 PACE L. REV. 121 (1980).

reflecting concern for the probative value or prejudicial effect of particular types of evidence, even if such rules also further an extrinsic policy. If the extrinsic policy is a generic social one, however, the judiciary should not adopt a rule that is contrary to an express statutory provision or common-law rule.

c. Privileges

The judiciary may codify existing statutory or common-law rules of privilege in the form and conceptual framework of rules of evidence, provided none of the codified rules is inconsistent with the current interpretation of an express statutory provision or common-law rule. The judiciary may not adopt new privileges by rule, but may codify newly developed legislative privileges and may develop new privileges at common law in the light of reason and experience, and may codify them in the rules. The judiciary also may provide by rule a procedural framework for the application of existing and newly created statutory or common-law privileges.

d. Competency Rules

The judiciary may freely adopt or amend rules of competency that are necessary to serve the intrinsic judicial interest in giving the jury maximum access to evidence that is probative and not misleading or prejudicial.

2. *Accommodation of Judicial and Legislative Power*

In adopting rules of evidence, the judiciary and the legislature should work together to achieve the maximum degree of cooperation and comity through the devices set forth below.

a. Statutory Supersession and Clean-up

In areas that are properly within the judicial rulemaking power as set out above in guideline 1 (Scope of the Rulemaking Power), the judiciary and legislature should agree that duly adopted rules supersede inconsistent statutes. Thus, a general rule of competence will supersede a dead man's statute. To avoid confusion and unnecessary conflict about the superseding effect of any judicial promulgation or amendment of the rules of evidence, the judiciary should prepare, and the legislature should enact, a statutory clean-up measure, repealing or modifying as necessary all inconsistent statutory provisions. If such a measure is enacted, the supersession power need only be used to correct

inadvertent oversights in the clean-up process and as a reserved judicial power in the unfortunate and unlikely event of an unresolvable conflict between a court rule and a subsequent legislative enactment.

#### b. Legislative Recognition of Rulemaking Power

The legislature can assist the judiciary in fashioning and maintaining a coherent body of rules by refraining from tinkering with the rules as promulgated, and by expressing its initiatives on evidentiary matters clearly but in general terms, expressly leaving questions of implementation and effect to judicial rulemaking. An example of such legislation might be: “Communications between law professors and law review editors are privileged from disclosure in all proceedings to which the Rules of Evidence apply, on such terms and conditions as the Supreme Court may by rule provide.”

#### c. Saving Clauses in Rules

The judiciary may find it necessary or desirable to defer to the legislature, as in the case of presumptions and privileges. In such a case, to make clear that relevant statutes are not superseded, the appropriate rules should contain saving clauses providing that the rules govern “except as otherwise provided by statute.” Such saving clauses may be accompanied where appropriate by provisions intended to describe the procedural implementation or evidentiary effect of statutory rules.

### 3. *Rulemaking and Legislative Procedure*

The preceding accommodative measures can work most effectively in an atmosphere of mutual cooperation. The judiciary and legislature should work together to establish a rulemaking process open to all interested parties. The judiciary’s procedures should provide not only public notice and opportunity for comment, but an express invitation to members or staff of the legislature to comment and participate at the drafting stage. The legislature should formalize its review process, providing that the rules take effect in the absence of legislative objection within a stated time period, and that the form of any legislative objection should be a resubmission to the court with a statement detailing the reasons for the objection.

Similarly, the judiciary should participate in any legislative initiative regarding evidence rules. An individual or a committee

should be designated by the court to monitor such legislative activity, maintain liaison with appropriate legislative committees and staff, and participate both formally and informally in the legislative drafting and hearing process.

#### V. CONCLUSION

Uniformity between federal and state rules of evidence and among state rules is in fact a blend of uniformity in form and concept with variation in detail reflective of local practice or conditions. The advantages of uniformity to both practitioners and scholars are manifest, and its continued development should be encouraged.

Rules of evidence preferably should be developed by the promulgation of court rules under the judicial rulemaking power. This method provides the maximum of expertise, coherence, and flexibility in the adoption and amendment of the rules.

While judicial rulemaking power over matters intrinsic to the trial process is inherent, the judiciary and legislature must recognize their concurrent roles in the codification and development of the law of evidence. Through use of various accommodative devices, conflict may be avoided and a body of rules of evidence may be cooperatively developed to serve both the interests of the judiciary in fair and efficient conduct of the judicial process, and the interests of the legislature in furthering the manifold interests of its constituents.